Nuckchadee K. v Assagur L.

2021 IND 12

Cause Number 1650/10

IN THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

Khemraj Nuckchadee

Plaintiff

v.

Leckraj Assagur

Defendant

Judgment

In this plaint, it is common ground that on or about the end of November 2007, Plaintiff agreed to construct for Defendant a residential building of a total area of 2007.25 square feet at the rate of Rs. 140 per square feet comprising of a ground floor and a first floor at Triolet. The agreed price included the costs and labour of all concrete works, placing of metal and painting. Furthermore, it was agreed that should there be any variation of the works, Plaintiff should negotiate for a fresh price and the construction works were to be completed within a delay of three months and payments were to be made on every Saturday.

Plaintiff avers that Defendant requested him not to construct according to the approved plans, but as per the modification which he brought to it, with the result that the surface area of the building was increased to 2225 square feet.

Plaintiff alleges that the costs of the construction including the increase in the surface area of the building to 2225 square feet amounted to Rs. 311,500/- and Defendant has up to 12 April 2008 paid the sum of Rs. 165,000/- leaving a balance of Rs. 146,500 as per the said agreement.

Plaintiff avers that further modification brought by Defendant consisted of the following additional works (as per paragraph 6 of his plaint which are reproduced *verbatim* below): -

"

(i) a concrete fencing wall of about 20 feet;

(ii) a room was constructed and the slab laid on the top of the first floor to cover the stairs,

(iii) a concrete fencing wall of about 3 feet in height and of about 50 feet was constructed on the top of the first floor;

(iv) construction of about 10 'corniche' over the windows;

(v) 4 flower boxes were also constructed and

(vi) installation + the supply of electrical material."

Following a verbal negotiation, Defendant allegedly agreed to pay an additional sum of Rs. 73,000/- for the electrical materials and Rs.32,700 as labour, for the additional works and on which he has only paid Rs. 25,000, thus leaving a balance of Rs. 80,700.

Plaintiff avers that Defendant is now indebted to him in the following sums - (i) Rs. 146,500 representing the balance due on the initial agreement of Rs. 311,500 and (ii) Rs. 80,700 for the additional works as averred above and which said sum Defendant has up to now failed and neglected to pay although often times amicably requested to do so.

As a result of Defendant's alleged illegal acts and doings, Plaintiff has suffered damage and prejudice in the sum of Rs.100,000 for which Defendant is liable.

Plaintiff is, therefore, praying for a judgment condemning and ordering Defendant to pay to him the remaining balance of Rs.146,500 + Rs. 80,700 = Rs. 227,200/- due as alleged above and (ii) the sum of Rs. 100,000 as alleged damages for the reasons set out above.

Defendant in his plea has averred that the minor modifications in relation to the increased surface area were carried out with his consent and there was no issue of paying additional remuneration. His reply to the averments of the plaint at paragraph 6 is reproduced *verbatim* below:

"

(i) the wall mentioned at (i) already existed since the year 2006.

(ii) there is no room as averred at (ii)

(iii) the concrete wall on the first floor mentioned at (iii) and the flower boxes at (v) has already been paid for.

(iv) the corniches at (iv) are mentioned in the approved plan and form part of the concrete work agreed by parties.

(v) as regards item (vi) Defendant avers that Plaintiff proposed to Defendant to have the electric works installed by his electrician which proposal was accepted. Defendant further avers that Plaintiff caused electric material to be delivered on the site in his absence and later showed him an alleged invoice for same which Defendant found suspicious. However, Defendant, to avoid further delay and more hassles, paid for same and for the labour costs directly to the electrician."

Defendant's further averments as per his plea are the following. He has already paid all the money due under the contract given that he took a house loan from the State Bank of Mauritius Ltd (SBM Ltd) for the regular payment of all expenses which were further paid to Defendant's subcontractor/ *préposé*, one Nizam Amerally, who was the one deployed for the construction works. He had to hire the services of one Naden to do the paint work in the sum of Rs. 30,000 and which was not done by the Plaintiff and the concrete work was completed only in May 2008. The electrical works were effected in November 2008. All works carried out by Plaintiff or his *préposé* have been paid for. Defendant has, therefore, moved that Plaintiff's action which is frivolous, vexatious and devoid of merits be dismissed with costs.

Only one witness deponed on behalf of Plaintiff being the Plaintiff himself and likewise only one witness deponed on behalf of Defendant being the Defendant himself.

Plaintiff gave evidence in Court. He produced a contract of work as per the undisputed facts above wherein he signed as contractor and Defendant signed as proprietor in relation to the construction of his house as per Doc. A. While he was deponing in *chief* and starting to establish that he did not do the construction work as contracted as per the plan viz. Doc. C(C1-C8) produced but as per modifications made by starting with the slab, learned Counsel for the Defendant objected to that line of examination in chief as its purpose was to claim remuneration and this could not be allowed given that the contract was a *contrat à forfait* pursuant to Article 1793 of the Civil Code.

Arguments were heard and there was a lingering possibility that this contract could have been brought out of the four corners of that Article 1793 of the Civil Code. This is because it was agreed that should there be any variation of the works, Plaintiff should have negotiated for a fresh price. Moreover, Defendant admitted that he consented to modifications brought to the original contract and which he considered to be minor ones and which he had already paid for in the sense that there was no issue for extra remuneration. The objection was not upheld at that early stage by the Court.

It is significant to note that at that stage, when the ruling was given by the Court, the question was not put yet as to whether Plaintiff had negotiated for a fresh price with the Defendant for the modifications brought to the original contract and what was the fresh price if any. Furthermore, the question was not put yet as to whether for such modifications, the new price accepted by the proprietor or owner meaning the Defendant was reduced in writing.

Now it is imperative to note that neither the Plaintiff nor the Defendant deponed in Court to the effect that there was a fresh price agreed upon by both parties for the modifications brought to the contract of construction being not in accordance with the plan. At no point, Plaintiff stated in Court that he had negotiated for a new price with the Defendant in relation to the modifications entailing an increase in the surface area outside the scope of the plan and that the Defendant had agreed to that new price which was reduced in writing. Equally, Plaintiff did not say in Court that he had negotiated for a new price for the installation and the supply of electrical material and that the Defendant had agreed on a total amount which was also reduced in writing. *A contrario*, Plaintiff admitted that he did not complete the paintwork of the building as per the contract. This lends support to the testimony of Defendant that he was only asked for Rs.25,000 for the electrical material which he

paid for and that there was no agreement as to the price, but to avoid problems, he paid the required sum directly to the electrician one Mr. Mamé and that the paintwork was not completed by Plaintiff and that he had to retain the services of one Mr. Naden to complete same.

I have duly considered all the evidence put forward before me and the submissions of both learned Counsel. At this stage, I find it appropriate to reproduce the provisions of Article 1793 of the Civil Code as follows:

*"Lorsqu'un architecte ou un entrepreneur s'est chargé de la construction à forfait d'un bâtiment, d'après un plan arrêté et convenu avec le propriétaire du sol, il ne peut demander aucune augmentation de prix, ni sous le prétexte d'augmentation de la main-d'oeuvre ou des matériaux, ni sous celui de changements ou d'augmentations faits sur ce plan, si ces changements ou augmentations, n'ont pas été autorisés par écrit, et le prix convenu avec le propriétaire."(**emphasis added**)*

I take the view that the nature of the contract between the parties is a *"contrat à forfait"* so that Article 1793 of the Civil Code is applicable although it was not apparent initially when the objection was taken for the reasons given below:

Firstly, in the present case, the contract provides that should there be any variation to the works, the Plaintiff should negotiate for a fresh price. This provision of the contract has not derogated from the provisions of Article 1793 but has been qualified by the latter bearing in mind that no evidence was adduced on behalf of the Plaintiff as regards the fresh price negotiated by him and agreed upon by the proprietor meaning the owner who is the Defendant in relation to agreed modifications brought outside the scope of the plan viz. Doc. C(C1-C8).

Secondly, had the Defendant agreed that he gave his consent and was prepared to pay a fair price for the work done, then his admission would have amounted to *"a renunciation of his right under article 1793 and have for effect to free the builder from its fetters."* (see- **Perette v Boolaky[1971 MR 36])** given that the restrictions laid down by Article 1793 are not *"d'ordre public"*.

This not being the case, no remuneration over and above the contractual price can be claimed by the Plaintiff for modifications brought to the original plan in the absence of a written authorization emanating from the Defendant which would obviously have included the new price and it cannot be substituted by any other

mode of proof, for example, oral evidence, examination on personal answers included(see- **Perette(supra))** so that it stands to reason that a receipt produced viz. Doc. B or photographs produced viz. Doc. D(D1-D7) cannot be used as beginning of proofs in writing in order to open the door to oral testimony. As highlighted in **Perette (supra)**, that Article does not lay down that the contractor will be debarred from proving, *"otherwise than by the written consent of the owner, that the execution of works additional to those provided in the plan was to be paid for, but simply denies to the contractor the right to claim any extra remuneration for those works unless he can produce a writing from the owner. It follows that the existence of the writing is insisted upon more as a condition precedent to the validity of the builder's claim than as a means of proof, and that the general exceptions to the rules governing the burden of proof should find no application here. (…)*

… Comme disent Aubry et Rau, les dommages-intérêts ainsi réclamés "ne sont autre chose qu'un supplément de prix", dont la réclamation est précisément arrêtée par L'article 1793." (**emphasis added**)

Indeed, in **Nilcant Awotar Associates Ltd v Bhumi Fund Ltd [2015 SCJ 116]**, the Supreme Court had this to say in relation to that Article which reads as follows:

*"There is no doubt that the above article has been couched in the most peremptory terms and in the strings of authorities quoted by the defence counsel with regard to the application of this article, it can be seen that our Courts have systematically applied with much rigor the provisions of this article. In **I.Suhootoorah v R.Murugan** [2009 SCJ 259] , the Appellate Court quoted with approval the remarks made by the Court in **Perette v Boolaky** [1971 MR 36] to the effect that "Article 1793 C.Nap. is visibly couched in most peremptory terms. Even a cursory glance at French case-law and doctrine on the subject is enough for one to conceive with what unrelenting strictness the Courts have applied the provisions of that article and how widely their decisions seem to have been approved by text-book writers".*

(…) that an admission made in his pleadings by the respondent concerning the modifications to the building plan could not, in default of the writing required by article 1793 C. Nap.be received as proof of the consent to those modifications;

(…)

Applying the above reasoning to the case at hand, there is no dispute as to the fact that the plaintiff will not be allowed to claim additional payment on account of extra works in the absence of any writing to that effect from the defendant. The rigor of article 1793 is such that even if the defendant has orally conceded to pay the additional remuneration, in the absence of any writing, evidence of same cannot be received as proof of this fact."

I find it opportune to quote an extract from the Supreme Court case of **Descroizilles v Renel** [1951 MR 150] which is reproduced below:

"The following notes in Dalloz Nouveau Code Civil, under art. 1793, bear on this question: -

58. L'autorisation par écrit ne peut être suppléé par aucun autre genre de prevue, ni par la délation du serment, ni par l'interrogatoire sur faits et articles, ni à plus forte raison, par la prevue testimoniale . . .

*59. Ainsi, lorsque les changements faits au plan convenus pour la construction à forfait d'un bâtiment n'ont point été autorisés par écrit, il y a une présomption légale, exclusive de toute prevue contraire, que ces changements, en supposant qu'ils aient été convenus entre les parties, ne devaient occasioner aucune augmentation de prix."(**emphasis added**)*

It is worthy of note that in **B. Ramkhelawon v A.S.S. Wong Chin** [1987 SCJ 322], the Supreme Court even went to the extent of saying that *"it is now settled that even an "aveu judiciaire" cannot be of any help to a building contractor in default of the writing required by Article 1793 C.Nap. See Perrette v. Bolaky[1971 MR 36].*

(…)

A "contrat à forfait" or "marché à prix fait" is, according to Delvaux, Traité Juridique des Bâtisseurs, Tome1, 1968 Ed., at page 71, "celui par lequel le constructeur s'engage à livrer l'ouvrage executé conformément à un plan arrêté et convenue, pour un prix global et invariable fixé d'avance.

The learned author points out that there are two kinds of "contrat à forfait", the "forfait absolu" in the case where "le maître est, avant de traiter, definitivement fixé sur la chose à construire, non seulement dans ses éléments essentiels, mais encore dans ses details. Il soumet les plans et le devis descriptif à l'entrepreneur qui calcule et fixe son prix global de manière definitive" and "le forfait relatif à prix global" which

is "le marché dans lequel le prix est fixé globalement pour toute l'entreprise – comme dans les marchés à forfait absolu – mais avec prévision d'un décompte de travaux en plus ou en moins en cas de modifications ou changements ordonnés par la maître".".

It was held that: *"The claim of the contractor being one for the increase in the cost of labour as a result of the alleged modifications to be original plan, the Learned Magistrates were therefore right to rule that it was subject to the provisions of Article 1793 C. Nap. even if the contract was not strictly speaking a "contrat à forfait absolu ou relatif."*

Finally, in the same vein, in **Transinvest Construction Ltd v Dr. Jhuboo S [2016 SCJ 428]**, the Supreme Court made the following pronouncements as regards the meaning to be attributed to the term *"la construction d'un bâtiment"* referred to in Article 1793 of the Civil Code as follows:

"The following have been considered to fall within the ambit of Article 1793:

<<…des travaux importants d'installation électrique dans des immeubles en construction…>>

<<…des travaux nécessitant l'adaptation et la modification du gros oeuvre et ne représentant nullement de simples travaux d'aménagement peuvent être assimilés à une construction au sens de l'article 1793 >> (V. Cass. 3e civ., 15 déc. 1982, no.81-11.459…>>

<<…les travaux de rénovation immobilière…>>

<<…des travaux relatifs à l'installation électrique dans un hôtel en construction…>>

(…)

It is clear that the works undertaken cannot be considered as the construction of a "bâtiment" within the literal meaning of the word i.e. "l'ouvrage qui sert d'abri à l'homme".

*The next step is therefore to consider whether the works fall within the wider construction of the word "bâtiment" attributed under French jurisprudence namely as not being confined to "**l'édification**" of the "**bâtiment**" but extending to the "**travaux***

sur existants *si ce sont des travaux de construction" if such works constitute "une veritable transformation des lieux et nécessitent des modifications du gros oeuvre.""".*

Thus, I take the view that all the items enumerated in the plaint as regards the modifications to the building which are concrete works and the installation and the supply of electrical material entailing an increase in its surface area fall within the ambit of a building namely to the *"**travaux sur existants**"* as they were *"des travaux de construction"* and that such works constitute *"une veritable transformation des lieux et nécessitent des modifications du gros oeuvre* (see **Transinvest Construction Ltd(supra)**).

Thus, all the 3 conditions spelled out in **Perette (supra)** have co-existed in the present case for the Plaintiff to be debarred from claiming any amount in excess of the contractual price namely:

1. the contract must be *"à forfait"*.
2. There must have been a plan agreed upon by the parties.
3. The land on which the building has been constructed must have been provided by the owner.

The Defendant, for his part, has in no manner whatsoever waived the protection and advantage afforded to him by Article 1793 of the Civil Code.

For all the reasons given above, the rigor of Article 1793 of the Civil Code prevails and in the absence of a writing from Plaintiff that there has been consent from Defendant to pay additional remuneration for the extra works in the form of a new price agreed upon between them, the case for the Plaintiff should fail. The plaint is accordingly dismissed with costs.

S.D. Bonomally (Mrs.) *(Vice President, Industrial Court)*
31.12.21