(2012) 04 P&H CK 0082

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1660 of 1989 (O and M) and Regular Second Appeal No. 534 of 1990 (O and M)

State of Haryana	APPELLANT
Vs	
Sh. Chaman Lal Mukhija Sh. Chaman Lal Mukhija Vs State of Haryana	RESPONDENT

Date of Decision: April 4, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27
- Constitution of India, 1950 - Article 14, 299
- Government of India Act, 1935 - Section 175

Citation: AIR 2012 P&H 104

Hon'ble Judges: Tejinder Singh Dhindsa, J

Bench: Single Bench

Advocate: Pawan Malik in R.S.A. No. 534 of 1990 and Mr. K.C. Bhatia,A.A.G., Haryana in R.S.A. No. 1660 of 1989, for the Appellant; Pawan Malik, Advocate in R.S.A. No. 1660 of 1989 and Mr. K.C. Bhatia, Addl. A.G., Haryana in R.S.A. No. 534 of 1990, for the Respondent

Final Decision: Allowed

Judgement

Tejinder Singh Dhindsa, J.

The present judgement shall decide R.S.A. No. 1660 of 1989 titled as State of Haryana through Executive Engineer, Haryana, P.W.D. Public Health Division, Kurukshetra Vs. Sh. Chaman Lal Mukhija and R.S.A. No. 534 of 1990 titled as Sh. Chaman Lal Mukhija Vs. State of Haryana through Executive Engineer, Haryana, P.W.D. Public Health Division, Kurukshetra as both the second appeals emanate from the common judgement dated 27.2.1989 passed by the Additional District Judge, Kurukshetra. The State of Haryana through Executive Engineer, P.W.D. Public Health Division, Kurukshetra, plaintiff instituted a suit against Sh. Chaman Lal Mukhija, defendant for recovery of Rs. 2,13,912.89 ps. It was RSA No. 1660 of 1989

(O&M) -2-pleaded that the State of Haryana through the Executive Engineer invited tenders for execution of a sewerage scheme for Thanesar Town at an estimated cost of Rs. 4 lacs. The defendant had submitted his tender, the same was accepted and such acceptance was conveyed through letter dated 20.11.1973. As per plaintiff a valid contract thus came into existence. For executing the work the bricks were to be supplied by the department at the control rate prevailing in January, 1973 and the date of commencement of work was fixed as 11.2.1974 and the same was to be completed within one year of its commencement. It was pleaded that the defendant did not start the work and rather insisted that the permit of bricks as per control rate be supplied to him as for a certain period i.e in the months of February/March, 1974 bricks could not be made available at the control rate, accordingly, the defendant had been informed that he could arrange for the same from the open market and the department would make the extra payment i.e to make good the difference in market price and the control rate. Still, the defendant did not commence the work. Thereafter, the department having arranged bricks at the control rate informed the defendant vide letter dated 1.5.1974 but still the defendant avoided the performance of his part of the contract. It was pleaded that the Executive Engineer had been authorized to levy compensation up to 10% of the estimated cost of the work in the event of the contractor failing to carry on the work in time and as such vide order dated 25.6.1974 the Executive Engineer fastened a liability of Rs. 40,000/- towards compensation on the defendant for intentionally not commencing the work which was equivalent to 10% of the estimated cost of work. Ultimately, on 23.8.1974 a decision was taken and conveyed to the defendant that the work in question was being withdrawn from him so as to be got executed from some other contractor or agency. Accordingly, fresh tenders were invited and the work was allotted to one Gian Chand, who executed the work at a cost of Rs. 3,95,864.30 ps. It was pleaded that the cost of work at the rates that had been offered by the defendant would have been Rs. 2,99,164.41 ps. and as such the plaintiff State had incurred extra expenses of Rs. 96,699.89 ps and for which the defendant was liable to pay such amount. The defendant had deposited Rs. 8,000/- towards earnest money/security at the time of submission of tender and such amount had been adjusted against the compensation of Rs. 40,000/- that had been levied by the Executive Engineer. Resultantly, a sum of Rs. 32,000/- as balance amount of compensation and Rs. 96,699.89 ps. by way of damages i.e a total sum of Rs. 1,28,699.89 ps. was due and recoverable from the defendant. The plaintiff-State further prayed that it was entitled to interest @ 12% per annum on the compensation amount of Rs. 32,000/- w.e.f. 25.6.1974 and on the damages amount of Rs. 96,699.89 ps from the date the final bill had been submitted by Gian Chand i.e. 13.12.1976 till the filing of the suit. The interest as per State was quantified to be Rs. 85,213/- and resultantly the suit for recovery of a total sum of Rs. 2,13,912.89 ps had been instituted.

2. The defendant contested the suit raising the plea that in fact no agreement had been executed between the parties as per requirement of Article 299 of the Constitution of India and as such there was no valid contract entered into between the plaintiff and the defendant. It was stated that there had been no failure on the part of the defendant to perform his part of the contract and in fact it was the plaintiff, who had failed to supply bricks at the control rate within a reasonable time and as such the contract itself stood frustrated. The order dated 25.6.1974, wherein a penalty RSA No. 1660 of 1989 (O&M) -4-towards compensation of Rs. 40,000/- imposed by the Executive Engineer was stated to be illegal, against the principles of natural justice and having no legal consequences. In a nut shell, it was stated by the defendant that he is not liable to pay any amount to the plaintiff and on the other hand it is the defendant, who was liable to refund his earnest money/security of Rs. 8,000/- .

3. Upon the pleadings of the parties, the Trial Court struck the following issues:-

1. Whether the defendant entered into a valid contract/agreement with the plaintiff through the Executive Engineer PWD, Public Health Division, Kurukshetra?OPP.

2. Whether the defendant failed to perform the agreement and thereby committed breach thereof?OPP.

3. Whether the plaintiff carried out the terms of the contract and performed its obligation in time?OPP.

4. Whether the plaintiff suffered any damages, if so, how much and of what value?OPP.

5. Whether the suit has been filed by a duly authorized person on behalf of the plaintiff?OPP.

6. Whether the plaintiff did not provide the material agreed to be supplied in time, if so, what its effect?OPD.

7. Whether the contract/agreement stood expressly and impliedly rescinded, if so, when and with what effect?OPD.

8. Whether the order dated 26.5.1974 imposing a penalty of Rs. 40,000/- was illegal and void and against the principles of natural justice, if so, with what effect?OPD.

9. Whether the suit is within time?OPP

10. Whether the plaintiff has no locus standi to file the suit for the reasons given in para no. 16 of the additional pleas in the written statement?OPD

11. Relief.

4. Issues no. 1 to 4 and 6 to 8 were taken up together by the Trial Court holding the same to be interconnected. The Trial Court decreed the suit in favour of the plaintiff

for recovery of an amount of Rs. 2,13,912.89 ps. along with the pendente lite and future interest @ 12% on the principle amount of Rs. 1,28,699.89 ps. from the date of institution of the suit i.e. 19.11.1981 till the realization of the decretal amount. The Trial Court returned findings holding that the parties had entered into a valid contract and the defendant having failed to perform his part of the contract had committed breach thereof. The Trial Court also held that the plaintiff had been ready and willing to perform its part of the contract and as such the order dated 26.5.1974 imposing a penalty of Rs. 40,000/- towards compensation was a valid order and that the plaintiff was also held entitled to the damages as prayed for.

5. The defendant feeling aggrieved of the judgement and decree dated 11.11.1986 passed by the Trial Court preferred a civil appeal and the same was partly accepted in terms of the impugned judgement dated 27.2.1989 passed by the Additional District Judge, Kurukshetra. Even though, the findings of the Trial Court were affirmed by the Lower Appellate Court but the amount of penalty towards compensation i.e. Rs. 40,000/- was reduced by 50%. Even the amount of damages was reduced from Rs. 96,700/- to Rs. 60,000/- . Still further on the award of interest, the Lower Appellate Court held that no interest could be awarded till the filing of the suit and interest during the pendency of the suit and future interest @ 6% was awarded.

6. Resultantly, the two second appeals bearing nos. 1660 of 1989 and 534 of 1990 have been filed in this Court, one by the defendant contractor namely Sh. Chaman Lal Mukhija and the other by the State of Haryana.

7. I have heard Mr. Pawan Malik, Advocate as also Mr.K.C. Bhatia, Addl. A.G., Haryana at length. With their able assistance I have even examined the records of the case.

8. The following substantial questions of law arise for consideration in the present two second appeals:

1. As to whether there was a binding contract between the parties as envisaged by Article 299 of the Constitution of India?

2. Assuming there was a valid contract, as to whether the findings of the courts below are perverse and based on misreading and mis-appreciation of evidence so as to hold the defendant Chaman Lal Mukhija to be in breach of the contract?

9. Respective counsel for the parties are agreed on the aforementioned two substantial questions of law having arisen and have raised their submissions and arguments in relation thereto.

Question No. 1

10. Learned counsel appearing for the appellant-defendant vehemently argued that the communication dated 20.11.1973 vide which an acceptance had been conveyed

as regards the tender submitted by the contractor could not be construed as a binding agreement between the parties. It was argued that all contracts that are made in the exercise of the executive power of the Union or of a State are to be executed in the manner stipulated under clause 1 of Article 299 of the Constitution of India. Learned counsel would submit that in facts of the present case, no agreement at all had been signed by the appellant-contractor and the findings recorded by the courts below to infer a contract from the correspondence inter se exchange between the parties are wholly erroneous.

11. Per contra, learned counsel appearing on behalf of the State would argue that the defendant-appellant had submitted a tender and upon the same having been accepted, due acceptance had been conveyed vide letter dated 20.9.1973. Such tender submitted by the contractor was in the nature of a proposal and such proposal having been specifically accepted by the State, a valid promise for consideration came into play under the provisions of the Contract Act as the defendant was to execute the work and for which the plaintiff-State was to make the payment. As such the acceptance of the tender vide communication dated 20.11.1973 would be construed as a valid contract enforceable in law.

12. Clause 1 of Article 299 of the Constitution of India provides as follows:

299. Contracts-(1)-All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

13. Hon''ble Supreme Court while examining the scope of Section 175 Clause (iii) of the Government of India Act i.e a provision on the same lines as Article 299 in the case of Seth Bikhraj Jaipuria Vs. Union of India (UOI), had clearly held that contracts on behalf of the Govt. of India are to be executed in the form prescribed. It was held that it was in the interest of the public that the question as to whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation and accordingly where a statute prescribes a particular manner or form set out for entering into a contractual obligation, the same had to be strictly adhered to. Such position in law was reiterated by the Hon''ble Apex Court in Mulamchand Vs. State of Madhya Pradesh, wherein it had been held that the provisions of Section 175 sub clause (iii) of the Govt. of India Act, 1935 and the corresponding provision of Article 299 sub clause (1) of the Constitution of India are mandatory in character and the contravention of those provisions nullifies the contracts and makes them void.

14. Reverting to the facts of the present case, undoubtedly, vide memo dated 20.11.1973 (Ex. PW-2/5) an acceptance regarding the tender submitted by the

appellant-contractor had been conveyed by the Executive Engineer, Public Health Division, Kurukshetra but a bare perusal thereof would also reveal that this very communication required the parties to sign an agreement pertaining to the work in question. Duly proved on record is yet another communication dated 25.1.1974 (Ex. PW-2/6) addressed by the Executive Engineer, Public Health Division, Kurukshetra to Chaman Lal Mukhija, appellant with regard to signing of the agreement in relation to the providing of sewerage work in Thanesar Town. Even the testimony of PW-8 Sh. J.C. Yadav, Superintending Engineer (Planning), Office of Engineer-in-Chief, Public Health Branch, Haryana, Chandigarh would be crucial. In his cross-examination the aforementioned J.C. Yadav stated in the following terms:-

Agreement regarding the execution of the work was drawn but it was not signed by Chaman Lal, defendant. The said agreement was signed by the department and the witnesses but Chaman Lal did not sign the same. From our side the contract was complete but so far as the side of Chaman Lal was concerned, it was not complete i.e. so far the signing of the contract is concerned. It is fact that after the acceptance of the tender a valid agreement has to be executed between the parties, which should be signed by both the parties. It is correct that according to B&R Manual Rule & Order a formal agreement has to be executed.

15. The admitted position of fact between the parties is that apart from the communication dated 20.11.1973, there was no other agreement that had been entered into between the State and the appellant-contractor and in any case none was adduced on record to be reflective of the fact that the constitutional requirement enjoined in clause (1) of Article 299 of the Constitution of India had been discharged. On the contrary, the communications dated 20.11.1973 and 25.1.1974 (Ex. PW-2/5 & PW-2/6) issued by the State make it apparent that the agreement between the parties had yet to be entered into.

16. The Hon''ble Supreme Court in case of Bishandayal and Sons Vs. State of Orissa and others reported as 2001 (1) SCC 555 had held that the question as to whether a contract complies with Article 299 of the Constitution of India would be a mixed question of law and fact and had further held that any agreement that may have been entered into but not in compliance with the constitutional requirement under Article 299 of the Constitution of India would be unenforceable in law. It had been held by the Hon''ble Supreme Court in the following terms:-

14. There can be no dispute with the preposition of law. The question whether a contract complies with Article 299 of the Constitution of India or not is a mixed question of law and fact. Undoubtedly in this case the plea has not been taken in the written statement and not been urged before the trial court. However, it was squarely urged before the Appellate Court. At the stage i.e. when it was urged before the Appellate Court, a contention could have been taken that such a plea cannot be raised. Instead the Appellants took out an application under Order 41, Rule 27, Code of Civil Procedure, for a direction to the Respondents to produce the

original minutes in Court. That application was allowed by the Appellate Court and the Respondents were directed to produce the original minutes in Court. Thus the Appellate Court made sure that no prejudice was being caused to the Appellants. The Appellate Court made sure that Appellants were not deprived of an opportunity to lay all facts before the Court. The minutes were then produced in Court. It was found that the original minutes did not contain the signatures of either of the parties. The original minutes were shown to the counsel for the Appellants and they were satisfied that the minutes had not been signed by the parties. Thus the Appellants themselves, on such a plea being raised, called for the additional evidence and the Appellate Court permitted it. The original minutes clearly indicated that the provisions of Article 299 had not been complied with. Further the witness of the Appellant had, during his cross examination, admitted that apart from the minutes there was no other written agreement between the parties. It is not the case of the Appellants that the agreement arrived at in the meeting of 29th December, 1978 had thereafter been approved or sanctioned either by the President or the Governor. It is, therefore, clear that even though there may have been some agreement the same was not in compliance with the constitutional requirement under Article 299 of the Constitution of India and is therefore unenforceable in law. In a case such as this there is no alternate plea that could be taken. None has been taken. For this reason the Appellants would not be entitled to specific performance of such an agreement. It must be seen where such a plea was not allowed to raised, for the first time in this Court or in the Appeal Court on the ground that the concerned party did not have an opportunity to meet such a case. In this case the Appellants, on their application, were permitted to have brought in Court the original minutes. Unfortunately this did not assist them. Now they can not be permitted to argue that such a plea could not be raised.

17. Accordingly, I hold that there was no valid and binding contract between the parties i.e. State and the appellant and the communication dated 20.11.1973 cannot be construed to have complied with the requirements of Article 299 of the Constitution of India. The findings of the courts below to have inferred a contract between the parties based on correspondence inter se are held to be erroneous. The question of law, accordingly, is answered in favour of the appellant-contractor.

Question No. 2

18. I will now proceed to examine the matter even from the point of view assuming that the communication dated 20.11.1973 itself formed a valid and binding contract.

19. The concurrent findings recorded by the courts below are to the effect that there has been a clear breach of contract at the hands of the appellant in as much as without any justifiable basis the work in question had not been commenced by him inspite of repeated reminders. Accordingly, the courts below held that the State having been constrained to award the work to another contractor namely Gian Chand at a higher rate, the defendant-contractor was liable for payment of damages

as well as penalty towards compensation as had been imposed by the Executive Engineer concerned.

20. There is no dispute as regards the fact that while accepting the tender submitted by the defendant-appellant, the State had taken upon itself to supply the bricks at the control rate. The Trial Court on the basis of evidence adduced concluded that the bricks at the control rate were not available with the State from 25.2.1974 to 1.5.1974 i.e for a period of about two months and three days. However, a finding has been recorded that prior to 25.2.1974 and after 1.5.1974 the bricks were available and the defendant-contractor had been duly intimated in such respect vide letter dated 25.2.1974 (Ex. DA), wherein the contractor had been called upon to arrange the bricks from the open market and for which the State was willing to pay the difference between market price and control rate and as such even the factum of not-availability of bricks from 25.2.1974 to 1.5.1974 has been held to be of no consequence as regards the non-commencement of work at the hands of the contractor is concerned. Various other letters in the form of directions issued by the State to the contractor and placed on record were taken cognizance of by the Trial Court to hold that the defendant-contractor was in breach of the contract.

21. The State Govt. by its own stand conceded that for a period i.e. 25.2.1974 to 1.5.1974 the bricks at the control rate had not been available. The stand taken is that non-availability of bricks at control rate for such period would be immaterial as it had been made clear to the defendant-contractor that he could procure the bricks from the open market. I find that in such context there has been a clear mis-appreciation of evidence. A reference in this regard is again made to the testimony of PW-8 Sh. J.C. Yadav, Superintending Engineer (Planning) for two counts. Firstly, in his statement, Sh. J.C. Yadav even though, testified that bricks were available with the department for supply to the defendant in May, 1974 and intimation of such effect had been sent vide letter (Ex. PW-2/1) and had further stated that bricks were not available to the department during the RSA No. 1660 of 1989 (O&M) -13-period 25.2.1974 to 1.5.1974, in the same breath further testified that he did not have any record to show the availability of bricks with the department as on 1.5.1974 as well as during the month of June, July and August, 1974. No evidence had been adduced on record by the State towards corroboration of their stand that the bricks at the control rate had been made available post 1.5.1974 to the contractor. This in itself would raise a serious question as regards the conduct of the State itself towards performance of its obligation in relation to the contract, assuming there was a valid contract. Still further, PW-8 Sh. J.C. Yadav admitted in his testimony that Chaman Lal, defendant had been corresponding with the department vide various letters including letter dated 30.3.1974 (Ex. D-1/9) and further stated that each and every letter written by Chaman Lal, defendant had been responded to. It would be useful to advert to the letter Ex. D1/9 dated 30.3.1974 and a perusal thereof would clearly show that the contractor had in no uncertain terms called upon the State to commit in writing as regards the extra payment that would

be admissible in the eventuality of his procuring the bricks from the open market. Even though, it is the stand of the State as reflected in the testimony of PW-8 Sh. J.C. Yadav that the communication dated 30.3.1974 (Ex. D-1/9) had been received from the contractor/defendant and the same had been responded to but such alleged response was not adduced on record.

22. Fairness in State action on the touchstone of Article 14 of the Constitution of India would also be applicable in contractual obligations entered into between the State and the individual. The documentary evidence adduced on record as also the oral testimony of their own witness do not inspire much confidence as regards fairness of action viewed in the backdrop of the facts of the instant case. The contractor had clearly submitted a tender and had quoted rates therein in response to a vital condition, wherein the State had undertaken upon itself to supply the bricks at the control rates for the work in question to be undertaken. The courts below have returned findings towards breach of contract against defendant-appellant contractor and in regard thereto have clearly misread and mis-appreciated the evidence adduced on record in particularly with regard to document Ex. D-1/9 and the testimony of PW-8. There is yet another aspect of the matter. While quantifying damages, the plea of the State Govt. has been accepted while taking the difference of rates submitted by Gian Chand, the subsequent contractor and the rates offered by the present appellant-defendant. The courts below have proceeded in total oblivion of the fact that the condition of supply of bricks at the control rates was applicable only to the appellant-defendant, whereas, admittedly, there was no such stipulation while awarding the work to Gian Chand. As such, the very basis for calculating and quantifying the damages was erroneous. Accordingly, even in relation to question no. 2, I hold that there was no breach of contract at the hands of the defendant-appellant, contractor, even if, there was a binding agreement between the parties.

23. For the reasons recorded above, I even reject the contention raised by the learned State counsel, wherein it had been contended that the Lower Appellate Court had erred in modifying the judgement and decree of the Trial Court thereby reducing the penalty, damages as also quantum of interest. I take this view as I have already held that there was no valid contract in the first instance between the parties and even assuming the letter dated 20.11.1973 to be a binding agreement, still, there was no breach in relation to such a contract, if, at all at the hands of the defendant-appellant, Contractor.

24. For the reasons recorded above, I accept the appeal filed by the defendant-appellant i.e. R.S.A No. 534 of 1990 titled as Chaman Lal Mukhija Vs. State of Haryana and set aside the judgement and decrees dated 11.11.1986 and 27.2.1989 passed by the Trial Court and the Lower Appellate Court. Accordingly, the civil suit no. 432 of 1981 instituted by the State of Haryana for recovery against the defendant-appellant Chaman Lal stands dismissed.

25. For the same very reasons R.S.A. No. 1660 of 1989 filed by the State of Haryana fails.

26. Ordered accordingly. A copy of this order be placed on the connected case file.