

State of H.P. and Another Vs H.K. Sareen

Court: High Court of Himachal Pradesh

Date of Decision: Dec. 8, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 80
Constitution of India, 1950 â€” Article 299

Hon'ble Judges: R.B. Misra, Acting C.J.; Dev Darshan Sud, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Dev Darshan Sud, J.

The State has appealed against the judgment and decree of the learned Single Judge allowing the suit of the plaintiff-respondent for granting damages as pleaded.

2. The plaintiff-respondent instituted the suit out of which the present appeal arises claiming a decree for damages to the extent of Rs. 6,60,000/-

on the pleading that he was awarded work by the defendants after the acceptance of the tender submitted by him but was not provided the site for

execution of the work and despite repeated reminders, the defendants did not heed to his requests. He claimed losses as pleaded in paragraph-12

viz:

12. That the defendants are liable to pay to the plaintiff a sum of Rs. 6,60,000/-as per details given below:

a. Amount of earnest money deposited. Rs. 20,000.00

b. Cost of work done at contract prices. Rs. 75,000.00

c. Cost of raising infrastructure at site. Rs. 50,000.00

d. Loss of rent of machinery, tool and plant for the period Sep.1988 to Sept.1989 and watch and ward expenses. Rs. 50,000.00

e. Loss of anticipated profit Rs. 4,50,000.00

f. Interest on earnest money at 18% p.a. Rs. 8,000.00

g. Interest on amount of work @ 18% p.a. Rs. 6,780.00

h. Costs of notice u/s 80 C.P.C. Rs. 220.00

3. The suit was resisted by the defendants on a number of grounds; the primary being that there was no valid contract subsisting between the

parties as envisaged under Article 299 of the Constitution of India and in these circumstances the State could not be held liable. It was pleaded

that the plaintiff had voluntarily executed work up to the extent of Rs. 24,376/- and in the absence of a valid contract, as mandated by the

Constitution of India, no compensation/damages could be granted.

4. The learned Single Judge settled seven issues on the pleadings of the parties. Issue No. 1 was the bone of contention between the parties. The

question to be determined was; as to whether there was a valid contract between the plaintiff and defendants in terms of Article 299 of the

Constitution of India. On the basis of Ex.PW-1/A, letter dated 12.9.1988 addressed by the defendants to the plaintiff awarding the work, the

learned Single Judge concluded that it was signed by the concerned Executive Engineer who, under the rules governing the business of Public

Works Department, is competent and duly authorized to accept the tender and execute contract(s) on behalf of the Governor of the State.

5. The learned Judge, relied upon the decision of the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, holding that the term

executed"" according to Section 175(3) of the Government of India Act, 1935, (which is in pari materia with the provisions of Article 299 of the

Constitution of India), did not contemplate execution of a formal contract by the contracting parties. The learned Judge holds:

...A tender submitted in pursuance of an invitation issued by or on behalf of the Governor General of India and accepted in writing which has been

expressed to have been made in the name of the Governor General and executed on his behalf by a person authorized in that behalf would

conform to the requirements of Section 175(3) of the Government of India Act, 1935.

6. The learned Judge also took note of the decision of the Supreme Court in State of Punjab and Others Vs. Om Parkash Baldev Krishan, which

was urged by the State in defence that unless and until there was a signed contract expressed in the name of the Governor, the State could not be

held liable for the acts of its officers. Considering the totality of the facts and circumstances and the correspondence exchanged between the

parties, the learned Single Judge decreed the suit of the plaintiff.

7. The second issue related to the fact as to whether the plaintiff was prevented by the acts of omission and commission on the part of defendants

which prevented him from performing his part of contract, the learned Judge, on the pleadings of the defendants themselves in paragraph-4 of the

written statement and from Ex.PW-1/B to Ex.PW-1/F, which are letters addressed by the plaintiff to defendant No. 2 during the period 2.11.1988

to 14.9.1989, holds that it was the duty of the defendants to take permission for felling the trees which admittedly was not given and therefore, the

plaintiff could not be faulted with for non performance. The contract had become impossible of performance on account of the wrongful acts of the

defendants. On the question of quantification under issue No. 5, the learned Judge awarded Rs. 24,376/- on the admission of the defendants

themselves. A further sum of Rs. 20,000/- which was earnest money deposited by the plaintiff, was also directed to be refunded.

8. While determining the compensation payable under issue No. 3, the Hon"ble Single Judge awarded 10% of the entire value of the contract

holding that according to the defendants' own evidence the profit of the contract was 10% and as such compensation was quantified at Rs.

2,71,520/-. In all, a sum of Rs. 3,15,896/- qua three items i.e. Rs. 24,376/- for the work performed by the plaintiff, Rs. 20,000/- earnest money

and Rs. 2,71,520/-, as compensation being unearned profit was awarded to the plaintiff. In addition, he was held entitled to interest at the rate of

10% per annum from the date of suit till its realization.

9. The State now appeals and challenges the findings of the Hon"ble Single Judge. The primary point urged for consideration is that when under

Article 299 of the Constitution of India there being no valid and binding contract between the parties, the State can be made liable to compensate

the plaintiff for any alleged breach of contract as there was a breach of the mandatory requirements of Article 299 of the Constitution of India.

10. To appreciate the rival contention of the parties, Ex.DA which has been proved on record by PW-3, Shri B.D. Gupta, Assistant Engineer, HP

PWD, Division Medical College, Shimla requires to be considered. One of the clauses in this document reads:

Item Rate Tender for Works

I/We hereby tender for the execution for the Governor of Himachal Pradesh of the work specified in the under written memorandum within the

time specified in such memorandum at the rates specified therein*....In accordance in all respects with the specifications, designs, drawings and

instructions in writing referred to in the Rule 1 hereof and clause II of the conditions of contract and with such materials as are provided for, by and

in all other respects in accordance with such conditions so far as applicable....

Should this tender be accepted, in whole or in part, I/We hereby agree-

(i) to abide by and fulfill all the terms and provisions of the said conditions annexed hereto and all the terms and provisions contained in notice

inviting tenders so far as applicable and or in default thereof to forfeit and pay to the Governor of H.P. or his successors in office, the sum of

money mentioned in the said conditions. A sum of Rs. 20,000=00 is hereby forwarded in the shape of National Saving Certificate/Time Deposit

Account/Post Office Saving Bank account as Earnest Money duly pledged in favour of Engineer-in-charge. If I/We fail to commence the work

specified in the above Memorandum, I/We agree that the said Governor or his successors in office shall, without prejudice to any other right or

remedy, be at liberty to forfeit the said Earnest Money absolutely, otherwise the said Earnest Money shall be retained by him towards Security

Deposit mentioned against Clause (d) of the above mentioned Memorandum;

(ii) to execute all the works referred to in the tender documents upon the terms and conditions contained or referred to therein and to carry out

such deviations as may be ordered upto a maximum of 20% per cent at the rates quoted in the tender documents and those in excess of that limit

at the rates to be determined in accordance with the provisions contained in Clause 12-A of the tender form.

Dated the 12th day of September, 1988.

Witness....

Address....

Occupation....

The above tender for the sum of Rs. 30,41,273 (Rs. Thirty Lacs, Forty One Thousand and Two Hundred and Seventy Three Only) is hereby

accepted by me Executive Engineer, Medical College, Division HPPWD, on behalf of the Governor of H.P.

11. A bare reading of this document, which is also accepted by the defendants as the basis of the contractual relationship between the parties,

shows that it has been accepted for or on behalf of the Governor of Himachal Pradesh by the Executive Engineer, Medical College Division,

HPPWD, Shimla, thereby putting all doubts at rest as to whether the officer(s) of the respondent was authorized to act for or on behalf of the

Governor.

12. PW-3 Shri B.D. Gupta was the Assistant Engineer, HP PWD, Medical College Division, Shimla. He states that the profit of the contractor is

calculated at the rate of 10%. In cross-examination he says that:

I have brought the record pertaining to the agreement in respect of the award of the work to the plaintiff. Ext.DA is the correct copy of the said

agreement. There is nothing on the record whereby the plaintiff was directed to start the work. The award letter is a part of the agreement copy of

which is Ext.DA....

13. When read with Ex.PW-1/A, there is no doubt that there exists a valid and binding contract between the parties expressed and accepted for

and on behalf of the Governor of Himachal Pradesh. How and under what circumstances the State is now resiling from the award of the work is

not clear. Adverting to the case of Union of India (UOI) Vs. A.L. Rallia Ram, their Lordships while deciding on the question as to whether it was

mandatory for a written contract to be executed, held in paragraph-12:

12. ...The correspondence between the parties ultimately resulting in the acceptance note, in our judgment, amounts to a contract expressed to be

made by the Government and therefore by the Governor-General, because it was the Governor-General who had invited the tender through the

Director of Purchases, and it was the Governor-General who through the Chief Director of Purchases accepted the tender of the respondent

subject to the conditions prescribed therein. The authority of the Chief Director, of Purchases to contract for sale of ""War-disposal"" goods and

sign the contract is not denied. The Chief Director of Purchases has subscribed his signature in his official designation and he has not stated in the

description that the contract was executed on behalf of the Governor-General, but on a fair reading of the contents of the letter, in the light of the

obligations undertaken thereunder, it would be reasonable to hold that the contract was executed on behalf of the Governor-General. No rules

made by the Governor-General have been placed before the Court showing that in executing a contract for the sale of ""War-disposal"" goods, the

officer authorized in that behalf must describe himself as signing on behalf of the Governor-General of India.

14. When Ex.PW-1/A is read Ex.DA, there is no doubt in our mind that the work was offered and accepted for or on behalf of the Governor of

Himachal Pradesh. There is no dispute that the provisions of Article 299 of the Constitution of India are mandatory and require the contract to be

executed on behalf of the President/Governor, as the case may be, by such person and in such manner as he may direct or authorise, but it is not

pleaded by the appellants that the execution of the work was a unilateral act on the part of its officers. Rather it was only after Ex.DA, accepting

the offer of the plaintiff was executed, that Ex.PW-1/A was issued to the plaintiff. Merely because Ex.PW-1/A does not express that it has been

issued for or on behalf of the Governor of Himachal Pradesh does not render the contract void. The acceptance had already been made vide

Ex.DA and what follows subsequent thereto is correspondence with respect to some minor adjustments.

15. Adverting to the decision in State of Punjab and Others Vs. Om Parkash Baldev Krishan, we find that it is distinguishable on facts as has been

rightly held by the Hon"ble Single Judge. It was a different thing altogether if Ex.DA had not been executed and accepted for or on behalf of the

Governor of Himachal Pradesh. Ex.DA has remained unchallenged. It is not the case of the State that the work was to be executed gratis or as an

act of charity or that it was the individual responsibility of the officer(s) of the State. We hold that there is no force in the submission made by the

learned Additional Advocate General. There was a valid and binding contract between the parties.

16. On the issue of damages, we find that the Hon"ble Single Judge has only allowed the amount as admitted by the defendants which includes the

earnest money.

17. On the quantum of loss suffered by the plaintiff the Hon"ble Single Judge has relied upon the decision of the Supreme Court in A.T. Brij Paul

Singh and Others Vs. State of Gujarat, , holding that the expected profit on the contract would be the proper measure of damages. The learned

Single Judge also relied upon the decision of Calcutta High Court in Deo Kumar Saraf v. Union of India 988 CLJ 325 , on this point. We see no

reason to differ. We may add that in Dwaraka Das Vs. State of Madhya Pradesh and Another, the decision in Brij Paul Singh"s case has been

followed, holding:

9. ...Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is

held to be unjustified, and the plaintiff- contractor had executed a part of the works contract, the contractor would be entitled to damages by way

of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the

same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

18. To the same effect is the judgment in Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh,

19. After approving the grant of damages in case of breach of contract, the Court further held that the appellate Court was not justified to interfere

with finding of fact given by the trial Court regarding quantification of the damages even if it was based upon guess work. In both the cases referred

to hereinabove. 15% of the contract price was granted as damages to the contractor. In the instant case however the trial Court had granted only

10% of the contract price, which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the

trial Court regarding breach of contract by specifically holding that ""we therefore see no reason to interfere with the finding recorded by the trial

Court that the defendants by rescinding the agreement committed breach of contract."" It follows therefore as and when the breach of contract is

held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the

agreement....

20. We do not, therefore, find any reason to interfere with the findings of the Hon"ble Single Judge holding that there was a valid and binding

contract between the parties and the assessment of damages.

21. No other point has been urged before us. There is, thus, no force in this appeal which is dismissed. There shall be no order as to costs.