Madan Gopal Sharma Vs Himachal Pradesh Housing Board

Court: High Court of Himachal Pradesh

Date of Decision: Sept. 5, 2016

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 37, Section 100

Citation: (2016) sup HimLR 2683

Hon'ble Judges: Mr. Rajiv Sharma, J.

Bench: Single Bench

Advocate: Mr. C.N. Singh, Advocate, for the Respondents; Mr. J.S. Bhogal, Senior Advocate, with Mr. Suneet Goel, Advocate, for the Appellant

Final Decision: Disposed Off

Judgement

Per Rajiv Sharma, J. - This regular second appeal is instituted against the impugned judgment and decree dated 25.4.2007 rendered by learned

Additional District Judge, Shimla, in Civil Appeal No. 105-S/13 of 2005.

2. The key facts necessary for the adjudication of the appeal are that the respondents/plaintiffs (hereinafter referred to as the ""plaintiffs"" for

convenience sake) filed a suit for recovery of Rs.1,64,124/- @ 18% per annum on the averments that plaintiff No.2, i.e. Executive Engineer, H.P.

Housing Board invited the tenders for construction of approach road, retaining walls and cutting work on 8.11.1996 for Social Housing Colony,

Shoghi. The appellant/defendant (hereinafter referred to as the ""defendant"" for convenience sake) participated in the tendering process. The

defendantÃ¯Â¿Â½s tender was accepted and he was issued award letter dated 11.12.1996. He was asked to start the work at once. The date of

commencement of the work was to be reckoned from 15th day after the issuance of award letter or actual date of commencement, whichever was

earlier. The date of commencement of work was latest by 11.12.1996 and date of completion of the work was fixed on 10.6.1997. The plaintiffs

and defendant entered into an agreement within fifteen days of issuance of award letter. The defendant acknowledged and accepted all the terms

and conditions of the agreement. The site was handed over to the defendant on 11.12.1996. As per clause 2 of the agreement, the defendant was

to execute â…›th of the entire work before completion of Ã¯Â¿Â½th of the time fixed, but the defendant only executed the work valuing Rs.1,94,942.40

paise before completion of Ã¯Â¿Â½th of the time fixed against the total value of work Rs.19,84,885.55 paise, whereas he was required to execute the

work valuing Rs.2,48,110/- within Ã¯Â¿Â½th of time fixed. The defendant was time and again requested by plaintiff No.2 to accelerate the work, but

he failed to do so. The notice was issued to the defendant by plaintiff No.2 on 10.2.1997 to accelerate the work. The defendant was again issued

notice on 11.6.1997 vide which he was asked to restart the work at the site. He was again issued a letter dated 26.6.1997. The defendant did not

care and miserably failed to restart the work at the site. He was again asked to accelerate the progress of work and ensure its entire completion

before 31.7.1997, but he failed to do so. Thereafter, the plaintiffs were constrained to rescind the agreement. The plaintiffs imposed the

compensation of Rs.1,98,488.55 paise upon the defendant and after final billing, a sum of Rs.1,64,124/- was still recoverable from the defendant.

3. The suit was contested by the defendant. He admitted that the agreement was entered into between the parties and the stipulated time to

complete the work was six months. It was denied that the site was handed over to him by the plaintiffs on 11.12.1996. According to him, the

plaintiffs failed to make regular monthly payments. Therefore, he was prevented from executing the work by the acts, conduct, omission and

commission of the plaintiffs.

4. The replication was filed by the plaintiffs. The learned trial court framed the issues on 4.4.2001 and decreed the suit of the plaintiffs vide

judgment and decree dated 16.11.2004. The defendant feeling aggrieved with the judgment and decree dated 16.11.2004 preferred an appeal

before the learned first Appellate Court, who dismissed the same vide impugned judgment and decree dated 25.4.2007. Hence, this regular

second appeal, which was admitted on following substantial questions of law on 17.12.2007:-

1. Whether the impugned decree can be sustained on the basis of Exhibit PW3/K when the said decision of the Superintending Engineer did not

fall within the definition of considered decision in terms of the judgment of the HonÃ¯Â¿Â½ble Supreme Court of India in AIR 1989 SC 952?

2. Whether the impugned decree as passed by the ld. Courts below be sustained especially in the peculiar facts and circumstances of the case

when the respondents/plaintiffs have become judge of their own cause and determined the compensation?

5. Mr. J.S. Bhogal, learned Senior Advocate appearing for the defendant, on the basis of the substantial questions of law framed, has vehemently

argued that judgments and decrees passed by the learned courts below are against the ratio laid down by HonÃ¯Â¿Â½ble Supreme Court in AIR 1989

SC 952. He has also contended that the plaintiffs had become judge of their own cause while determining the compensation and his client

(defendant) could not be made liable to pay compensation under clause 2 of the agreement.

6. Mr. C.N. Singh, learned Advocate appearing for the plaintiffs, has supported the judgments and decrees passed by both the learned courts

below.

7. I have heard learned counsel for the parties and have also gone through the record carefully.

8. Since both the substantial questions of law are interlinked and interconnected, the same are taken up together for determination to avoid

repetition of discussion of evidence.

9. PW1, H.S. Negi testified that site was handed over to the defendant in time. He admitted that the cement was not supplied to the defendant

because he had not dug up the foundation. PW2, S.K. Sharma and PW3, S.C. Sood proved the documents on record. PW4, Vipin Kaul also

stated that the site was handed over to the plaintiff on 11.12.1996, however, the defendant did not complete the work. The plaintiffs have also

proved first notice dated 10.2.1997, Ext.PW3/C, second notice dated 11.6.1997 Ext.PW3/D, third notice dated 10.7.1997 Ext.PW3/E, letter

Ext. PW3/F vide which hearing under clause 2 of the agreement was afforded, letter Ext.PW3/G vide which another opportunity of hearing was

given to the defendant under clause 2 of the agreement, letter Ext.PW3/J vide which the defendant was afforded final opportunity of being heard

and also approval of the Superintending Engineer under clause 2 of the agreement, Ext.PW3/L. The defendant while appearing in the witness box

as DW1 though has denied the receipt of notices and letters, but has admitted that the agreement was entered into between the parties and the

stipulated time to complete the work was six months. Clause 2 of the agreement reads as under:-

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the

essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the order to commence

the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the

contractor shall pay as compensation an amount equal to one percent of such smaller amount as the Superintending Engineer (whose decision in

writing shall be final) may decide on the amount of the tendered cost of the whole work as shown in the tender for every day that the work remains

uncommenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be

bound in all cases in which the time allowed for any work exceeds one month save for special jobs to complete one-eighth of the whole of the

work before one-fourth of the whole time allowed under the contract has elapsed, three-eighth of the work of the work, before one-half of such

time has elapsed and three-fourth of the work, before three-fourth of such time as elapsed.

However, for special jobs if a time-schedule has been submitted by the contractor and the same has been accepted by Engineer-in-charge, the

contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as

compensation an amount equal to one percent of such smaller amount as the Superintending Engineer (whose decision in writing shall be final), may

decide on the said tendered cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the

entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent, on the tendered cost of the work as

shown in the tender.

10. According to clause 2 of the agreement, the defendant was required to ensure good progress during the execution of the work and he was

bound in all cases in which the time allowed for any work exceeded one month save for special jobs to complete one-eighth of the whole of the

work before one-fourth of the whole time allowed under the contract elapsed, three-eighth of the work, before one-half of such time elapsed and

three-fourth of the work, before three-fourth of such time elapsed. He was handed over the site on 11.12.1996 and he was required to complete

the work latest by 10.6.1997, but he failed to do so. It is in these circumstances, the agreement was rescinded.

11. The Executive Engineer had sent the communication to the Superintending Engineer on 28.7.1997, Ext. PW3/F seeking permission to accord

necessary approval to levy compensation for the delay under clause 2 of the agreement, so that compensation could be levied upon the defendant

if he did not complete the work by 31.7.1997. The Superintending Engineer vide communication dated 31.7.1997, Ext.PW3/G informed the

Executive Engineer that hearing under clause 2 of the agreement in respect of the award work was fixed for 7.8.1997 at 11.00 A.M. A copy of

this communication was also sent to the defendant. The Executive Engineer vide communication dated 4.8.1997, Ext.PW3/H requested the

defendant to make himself available on 7.8.1997 at 11.00 A.M. for hearing under clause 2 of the agreement.

The defendant did not attend the hearing on 7.8.1997. The Superintending Engineer again sent a communication dated 19.8.1997, Ext.PW3/J

giving defendant a final opportunity to attend the hearing on 22.8.1997 at 3.00 P.M. The defendant again chose not to appear before the

Superintending Engineer. The Executive Engineer vide communication dated 23.10.1997, Ext.PW3/L informed the defendant that since he had

failed to execute the work as per the agreement, he was liable to pay compensation under clause 2 of the agreement amounting to Rs.1,98,488.55

paise only on the tendered amount of Rs.19,84,885.55 paise. The defendant was liable to pay compensation for non-completion of the work as

agreed and it cannot be said that the plaintiffs have become judge of their own cause. The ratio laid down by HonÃ¯Â¿Â½ble Supreme Court in AIR

1987 SC 1359, State of Karnataka v. Rameshwara Rice Mills is not applicable in the present case.

12. Their Lordships of HonÃ¯Â¿Â½ble Supreme Court in Vishwanath Sood v. Union of India, AIR 1989 SC 952 have held that the compensation

clause contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on

the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending

Engineer, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be

pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. Their Lordships have held as under:-

[8] We have gone through the judgment of the Division Bench of the High Court and we have also considered the arguments advanced on both

sides. With great respect, we find ourselves unable to agree with the interpretation placed by the Division Bench on the terms of the contract.

Clause 2 of the contract makes the time specified for the performance of the contract a matter of essence and emphasises the need on the part of

the contractor to scrupulously adhere to the time schedule approved by the Engineer-in-charge. With a view to compel the contractor to adhere to

this time schedule, this clause provides a kind of penalty in the form of a compensation to the Department for default in adhering to the time

schedule. The clause envisages an amount of compensation calculated as a percentage of the estimated cost of the whole work on the basis of the

number of days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates. We do not agree with the

counsel for the respondent that this is in the nature of an automatic levy to be made by the Engineer in-charge based on the number of days of

delay and the estimated amount of work. Firstly the reference in the clause to the requirement that the work shall throughout the stipulated period

of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid ""in the event

of the contractor failing to comply with"" the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or

negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1per cent for every day of default it takes

care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to

reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the

Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could

be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go

into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the

part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on

the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer

will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the

contractor by the Superintending Engineer. But it will be appreciated that in practise the amount of compensation will be initially levied by the

Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the

contractor appeals for redress. As we see, it, clause 2 contains a complete machinery for determination of the compensation which can be claimed

by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the

parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after

considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all

under this clause. In our opinion the question regarding the amount of compensation leviable under clause, 2 has to be decided only by the

Superintending Engineer and no one else.

13. As discussed above, the plaintiffs had called upon the defendant by issuing various letters to appear before the Superintending Engineer before

determination of compensation; however, he had chosen not to appear before him. The defendant was rightly made liable to pay the compensation

for non-completion of the work, as per schedule provided for in the agreement. Both the substantial questions of law are answered accordingly.

14. Consequently, in view of analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

15. Pending application(s), if any also stands disposed of. No order as to costs.