(1945) 09 AHC CK 0016

Allahabad High Court

Case No: None

Agra Electric Supply Co. Ltd.		APPELLANT
	Vs	
Firm Bansidhar Prem Sukh Das, Oil Mill		RESPONDENT

Date of Decision: Sept. 4, 1945

Citation: AIR 1946 All 406 : (1946) 16 AWR 186

Hon'ble Judges: Bennett, J; Bennet, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Bennett, J.

This is a second appeal by the Agra Electric Supply Company Ltd. They were defendants in a suit brought by a firm known as the firm of Banshidhar Prem Sukh Das, Oil Mill, Maithan, Agra, for a declaration and injunction in respect of an agreement arrived at between the parties in March 1938, for the supply of electrical energy to the firm by the Electric Supply Company. The agreement provided not only for the supply of electrical energy for driving the mill machinery, but also for lights and fans. The dispute between the parties is confined to the charges made by the company for electrical energy for lights and fans. Supply commenced in September 1988, and the firm disputed the September and October bills. Their cheque for the amount admitted by them as due was returned by the supply company, which threatened to disconnect the premises of the firm. The latter instituted the suit on 5th December 1938, and obtained a temporary injunction restraining the company from disconnecting the premises. The suit was decreed by the Munsif on 28th September 1940, and the first appeal was dismissed by the Civil Judge on 30th April 1941. An agreement in a printed form bearing the date of 9th March 1938, (Ex. A) was signed by the parties. One of the principal questions for consideration in the case is whether this formal agreement embodies the contract accepted by the parties in respect of the charges for energy for lights and fans.

Clause 14 of this agreement is the clause which has primarily to be considered. It reads thus:

The consumer shall not, exoept as is in this clause specially provided, utilise or permit to be utilised the electrical energy supplied under this agreement for purposes other than industrial motive power, but the consumer shall be entitled to use the said electrical energy so supplied up to one per cent. (1%) of the total monthly quantity a& registered by the main meter, for the purpose of providing lighting and ventilation upon those premises in which the said electrical energy is used for industrial motive power. Such quantity shall, however, be registered by a separately installed meter and if the quantity so registered shall be; in excess of one per cent. (1%)of the total monthly quantity as registered by the main meter, such excess shall be charged for at the rates for "lighting and fans" set out in the company''s scale of charges for the time being in force.

2. The company submitted bills in accordance with the provisions of this clause,, charging for electrical energy supplied in excess of one per cent, at the ordinary rate, for lighting and fans, this being a very, much higher rate than the rate for industrial motive power. The contention of the plaintiff firm was that the clause must be read with certain letters which passed between the parties on 2nd and 3rd March, together with oral evidence which elucidates them. The company contended that in view of the terms of Sections 91 and 92, Evidence Act, such evidence was inadmissible. Most of the arguments addressed to us have revolved round the question of admissibility. The Courts below held that the evidence was admissible and it is not disputed that on this finding and on the findings of fact arising out of this evidence the suit was rightly decreed. The correspondence referred to is very brief and in some respects obscure. Its meaning could not be fully ascertained without the help of oral evidence. The correspondence shows that the printed agreement form was sent by the company to the firm with a letter dated 26th February. The firm replied in a letter dated 2nd March (Ex. 8), asking the company to note that two clauses of the agreement would not be applicable in their case, these being Clauses, 4 and 14. With Clause 4 we are not directly concerned. They took exception to the latter part of Clause 14 which provided that the excess over one per cent, of the total monthly quantity should be charged for at the ordinary rates for lighting and fans. And they added: "This will be charged for in accordance with our special arrangement with you." They concluded by asking that arrangements for the new connexion might be put in hand immediately "and on this particular assurance from you we have signed the agreement." The deed shows that it was signed on behalf of the firm on this date, namely 2nd March.

3. In reply the company sent the letter Ex. 1 of 3rd March in which they confirmed that Clause 4 would not be applicable, About Clause 14 they expressed themselves as follows:

With regard to Clause 14 we confirm your conversation with the undersigned on this subject, but the clause must remain in the agreement in case of abuse.

4. The letter was written for the company by Mr. Poster, Resident Engineer, and he signed the agreement for the company on 9th March. The correspondence was with Mr. Durga Datt, proprietor of the firm. Both these gentlemen gave evidence about these letters. The Courts below did not accept the statement of Mr. Foster that no assurance was given by him with regard to Clause 14 and believed the explanation of Mr. Durga Datt that an assurance was given to him that the firm Would be charged for excess over one per cent, at the ordinary rates only in case of persistently extravagant and wasteful use of energy for electric light. That would appear to be the construction which should be placed on the sentence "it was meant that the plaintiff would not do lighting every day as it is done on Diwali," though the implication that there is an extravagant use of energy for electric lighting on the occasion of Diwali by everyone interested in the festival may not be warranted. The Courts below also found that although the firm had largely exceeded the limit of one per cent, the company had not proved that this amounted to ''abuse''.

5. We have, therefore, to consider firstly, whether on the assumption that all the terms of the contract were reduced to the form of the document Ex. A, which was signed by the parties and took effect from 9th March the evidence of these letters should or should not be admitted for the purpose of showing that the printed agreement was modified in this respect; and secondly, if on that assumption the letters are not admissible, whether the assumption is warranted, and whether'' the real agreement between the parties is not to be found in the letters and instrument read together. For the company Sir Tej Bahadur Sapru argued mainly on the former aspect of the case, while Dr. Katju for the respondent stressed the latter. These questions are not discussed in the Munsif''s judgment, which contains no reference to Sections 91 or 92, Evidence Act. There was first of all a general issue bearing on the extent of the plaintiff''s liability (and that in not very clear terms), and then issues on the adequacy of the court-fee, the jurisdiction of the Court, and alleged bars under Sections 42 and 56, Specific Relief Act. The issues on courts fee and jurisdiction were not eventually pressed. The Munsif held that the agreement was signed by the plaintiff subject to the condition that Clause 14 would not apply to him; the plaintiff did not leave it to the option of the defendant to make it applicable or not as the latter pleased.

6. The appellant raised in the lower appellate Court the question of the admissibility of the evidence referred to. The Civil Judge took the same view as the Munsif in regard to the agreement, and held that oral evidence was admissible to explain the letters under provisos 2 and 6 of Section 92. He said that in his opinion it was necessary in order to ascertain the terms agreed upon to read the letters and the formal instrument. And he cited certain cases in justification of this view. It has not been disputed before us that if the letters are admissible the oral evidence which

explains them is also admissible. One of the cases cited by the Civil Judge was AIR 1938 198 (Privy Council) . The Civil Judge observed that in this case their Lordships of the Privy Council not only read the promissory note in suit, but also other documents relating to it, to find out what terms were agreed to between the parties. We agree with Sir Tej Bahadur Sapru that this case does not support the view that the letters are admissible under one of the provisos to Section 92, for their Lord, ships drew a distinction between a collateral agreement which alters the legal effect of the instrument and an agreement that the instrument shall not be an effective instrument until some condition is fulfilled. An oral agreement constituting a condition precedent to the attaching of the obligation is within the terms of Proviso 3. As we understand the judgment of the Court below, however, the decision of the Civil Judge was primarily founded on the view that the condition contained in the appellant''s letter altered the legal effect of Clause 14 of the deed; the terms of the contract are not to be found wholly in the deed and therefore Sections 91 and 92 have no application and it is quite unnecessary to justify the admission of the letters under any proviso of Section 92. The other Privy Council case cited by the Civil Judge is, we think, more in point, for in that case, Mt. Jain Mati v. Nanu Ram (''34) 21 AIR 1934 Lah. 314, a person executed on the same date a ruqqa and another document regulating the mode of payment of the amount due on it and it was held by a Bench of the Lahore High Court that both documents must be read together as forming one whole.

7. Sir Tej Bahadur Sapru argued that for other documents to be accepted as forming part of the agreement they must be contemporaneous with the principal document and he referred to some decisions on this and other points which we have carefully considered. The ruling of a learned Judge of this Court in Lachman Das and Another Vs. Ram Prasad and Others, was referred to as showing that the dictum in Woodroffe and Ameer Ali''s commentary on the Evidence Act - "Though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible" requires the qualifications expressed in the first three provisos to Section 92. But we find in another case cited by the learned Counsel that their Lordships of the Privy Council have expressed quite a different view. In AIR 1936 70 (Privy Council) they held that there is nothing in either section (that is 91 or 92) to exclude oral evidence that there was no agreement between the parties and therefore no contract. Their Lordships referred in that case to their decision in Pratap Chunder Ghose v. Mohendra Nath Purkait (''90) 17 Cal. 291, a suit in which a zemindar sued to eject tenants under a kabuliyat which they had executed. They observed in that case that

if there was any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff oannot sue upon it.

8. That appears to be very similar to the position in the present case. A principle laid down, or rather approved, in another Privy Council case cited, Tsang Chuen v. Li Po Kwai (''32) 19 AIR 1932 P.C. 255 might be applicable if we held that the whole contract was to be found in Ex. A. It is that

Where words of any written instrument are free from ambiguity and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such: oases evidence de hors the document for the purpose of explaining it according to the surmised or alleged intention of the parties is utterly inadmissible.

9. If we could hold that the whole contract is to be found in the formal deed executed by the parties we should find it difficult to maintain the decree of the Courts below, for we have not been able to discover that any of the provisos to Section 92 is applicable. Learned Counsel also referred to a recent case of this Court, to which one of us was a party, Firm Chunni Lal Mansa Ram Vs. Firm Sheo Prasad Banarsi Das, . The passage from the judgment of Yorke J., which, we understand, is relied on, reads:

It appears to us to be quite clear that proof of any such contemporaneous contract varying the terms of the original contract was barred by the provisions of Section 92, Evidence Act.

10. With regard to this we may say firstly that the learned Counsel himself ''Argued that to form part of the agreement the variation found in other evidence than 4he formal document must be contemporaneous and he contended that it was not contemporaneous in the present case, the formal document being executed about a week after the letters. Secondly, if we read the passage quoted with the rest of the judgment in Firm Chunni Lal Mansa Ram Vs. Firm Sheo Prasad Banarsi Das, , we find that the question under consideration was whether the contemporaneous contract fell within the terms of the fourth proviso and this was negatived because this proviso relates only to a subsequent agreement. Thirdly, the case based on the alleged contemporaneous agreement was rejected because there was no satisfactory evidence to establish it. We are satisfied in the present case that the agreement disclosed in the letters and deed constituted a single contract arrived at approximately at the same time. Mr. Durga Datt signed for the plaintiff firm on the same date as the letter sent by the firm to the Company. He signed it subject to what was said in that letter and the Company could not without the firm''s concurrence bind the firm to conditions not accepted by them. That this is the correct legal position is also, we think, indicated by what was accepted about the other clause, Clause 4. The firm asked the Company to note that this clause would not be applicable. In their reply the Company agreed, yet the clause remained in the printed form of agreement. No one has suggested that because it is still included in

that printed form and has not been cut out it could be enforced, if occasion arose for enforcement, notwithstanding the agreement of the parties in the correspondence that it does not apply. For these reasons we are satisfied that the Courts below took the correct view of the agreement between the parties.

11. The learned Counsel for the appellant referred to some other grounds raised in the appeal. The Company objected at a late stage in the case that the dispute should have been referred to arbitration in accordance with the printed form of agreement. This objection was not pressed in the trial Court and the Civil Judge was of opinion that it could not be raised in appeal. Learned Counsel has intimated in this Court that while he does not withdraw the objection he does not press the ground of appeal relating to it. The other grounds arose out of Section 23, Electricity Act. We do not consider it necessary to say more than that we agree with the Civil Judge that there is no such contravention of the terms of this section as was contended for. No argument of any substance was indeed advanced to support the contention. Finding no valid ground for disturbing the decree passed in the respondents'' favour we dismiss the appeal with costs.