

(1991) 07 GAU CK 0004**Gauhati High Court****Case No:** Civil Rule No. 737 of 1990

Ganeshmal Maheswari

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: July 19, 1991**Acts Referred:**

- Constitution of India, 1950 - Article 226, 226

Citation: (1991) 2 GLJ 152**Hon'ble Judges:** S.N.Phukan, J and J.M.Srivastava, J**Bench:** Division Bench**Advocate:** P.K.Bhattacharjee, B.Banerjee, Advocates appearing for Parties

Judgement

J.M. Srivastava, J.

By this petition under Article 226 of the Constitution of India, the petitioner seeks direction to the respondents to settle the matter relating to payment for supply of railway wooden sleepers in accordance with the terms of agreement between the parties.

2. The petitioner is proprietor of a small scale Saw Mill in the name and style of M/s Sri Ganesh Saw Mill at Maligaon, Gauhati. The petitioner entered an agreement with the respondent No. 3, the Forest Utilisation Officer, Government of Assam on behalf of the respondent No. 1, the State of Assam for supply of Railway wooden BG and MC sleepers for the year 198788 and an agreement (Annexure A) was executed on 20th August, 1988. The rates at which the sleepers were to be supplied had been prescribed for the year 198788 by the Government as in certificate dated 21.3.88, Annexure A (1). The petitioner supplied BG and MG sleepers at the specified rates of Rs. 325/ and Rs. 143/ per piece respectively. However, after long delay the petitioner was paid only in the first week of April, 1988 at the rate of Rs. 306/ and Rs. 135/ for the BG and MG sleepers respectively. The respondents also deducted twenty percent commission which was not agreed between the parties, and also huge

amount on account of rejection of sleepers which was also unjustified because the sleepers had been inspected and before the same were dispatched for destination. The petitioner under protest accepted the payment after the aforesaid unjustified deduction and has come to this Court for the aforesaid relief.

3. The respondents, in spite of repeated opportunities given, did not file counter affidavit and also did not produce any record. Shri Banerjee, learned Govt. Advocate who appeared on behalf of the respondents, however, submitted that this petition was not maintainable because the matter related to contract between the parties and for enforcement of contractual obligation the proper remedy was by way of a suit in civil Court. Sri Banerjee has also submitted that in para 11 of Annexure A, the agreement between the parties the rates were not specified and accordingly in the absence of rates the petitioner's contention could not be accepted.

4. We have heard Shri P.K. Bhattacherjee, learned counsel for the petitioner and have considered the submissions on behalf of the parties.

5. In the absence of any counter affidavit by the respondents and also in the absence of any records which were not produced by the respondents relating to matters raised by the petitioner the facts stated by the petitioner should be accepted as correct.

6. Even though the submission on behalf of the respondents that Annexure A in its Para 11 did not specify the rates of sleepers is correct, in our opinion, it does not make any difference to the petitioner's claim for the reasons that the petitioner's assertion in the petition supported with the affidavit has not been controverted that the rate agreed upon was specified by the respondents in the certificate Annexure A (1). The rate, according to the aforesaid certificate, was Rs. 325/ and Rs.143/ for BG and MG sleepers respectively for the year 198788, the year for which the agreement between the parties was executed. It, therefore, makes no difference that in the agreement itself the rate was not specified,!! appears to us, due to inadvertance or because the current rates for the year 198788 had already been specified by the Forest Utilisation Officer, Assam (respondent No.3). We, therefore, think that the submission for the respondents in that regard has no merits.

7. In so far as the submission that the remedy of the petitioner was by way of civil suit, while it is true that generally speaking in exercise of jurisdiction under Article 226 of the Constitution of India disputed questions of fact relating to contract should not be gone into accordingly the parties are left to approach civil Court by way of suit in such matters, in the present case, we find that on the facts established which have remained uncontroverted, the action of the respondents to deduct twenty percent commission and also to deduct huge amount from the petitioner for alleged rejected sleepers was clearly unjustified and was unsustainable. The agreement did not provide for any deduction of 20% commission. As a matter of fact, the petitioner's contention is that the respondents charged four percent

commission from the Railways and in support has produced Evergreen Slippers Bill (Annexure B) which the respondents submitted to the Railways and obtained payment. It shows that the respondents had charged four percent over and above the amount of the bill for sleepers at the rates claimed by the petitioner. The petitioner's submission, therefore, is established that the respondents had claimed and obtained four percent from the Railways. Moreover, the respondents by letter dated 27th March, 1990 specified commission for supply of sleeper at 20% and also stipulated that it would be effective from 198788. This stipulation on 27th March, 1990 was clearly without any agreement between the parties and this unilateral provision for 20% commission could not be a part of the agreement which had been executed on 20th August, 1988. The petitioner was not bound by such stipulation in 1990 long after the petitioner had supplied the sleepers. According to the agreement Annexure A, the petitioner was entitled to the cost of sleepers as specified in Annexure A (1), certificate at the rates for the year 198788. The deduction of 20% commission from the amount due to the petitioner on the strength of the letter dated 27th March, 1990 (Annexure C) was, therefore, clearly untenable and cannot be sustained.

8. The petitioner's further grievance about the deduction on account of sleepers stated to have been rejected also is justified. The petitioner's submission that the sleepers had been jointly inspected before acceptance and thereafter the same had been loaded for despatch to destination has remained uncontested. The petitioner's grievance is also well justified because his further submission that the allegedly rejected sleepers were never returned to him has also remained uncontested. In view of the above facts, we find absolutely no justification for any deduction on the ground of rejection of sleepers which in any case had not been returned to the petitioner within the permissible period under the agreement. We, therefore, find no justification also for the aforesaid deduction.

9. In view of the above, the petitioner is entitled to receive payment of wooden BG and MG sleepers in accordance with the agreement Annexure A read with the certificate Annexure A(1) without any deduction on the ground of commission and allegedly rejected sleepers.

10. For the aforesaid reasons, the petition is allowed. The respondents shall settle the petitioner's bill for supply of wooden BG and MG sleepers in accordance with the agreement Annexure A read with Annexure A(1) within a period of six weeks from today. The petitioner shall also be entitled to cost which we assess at Rs. 1000/ from the respondents.