

(1982) 12 CAL CK 0027

In the Calcutta High Court

Case No : Appeal No. 35 of 1974 in Suit No. 3142 of 1955

American Pipe Company

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 10-12-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 20
Contract Act, 1872 — Section 3, 4, 55, 73
Sales of Goods Act, 1930 — Section 11

Citation : (1982) 12 CAL CK 0027

Hon'ble Judges : S.C. Ghose, C.J;R.N. Pyne, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.C. Ghose, C.J.—This appeal is directed against a judgment and decree dated Jan. 17 and 22, 1973 passed by Ajoy K. Basu, J. By the said judgment and decree, the learned trial Judge dismissed the suit of the appellant. The appellant's suit was filed in the following circumstances :--

By a contract in writing dated 21st June, 1952 (together with annexures of special conditions dated 21st June, 1952) the appellant agreed to sell and the respondent agreed to purchase through the Superintending Engineer. Tubewell Circle, East Moradabad, 50,000 running feet of pipes on terms and conditions mentioned in the said contract read along with the said annexures of special conditions. The appellant submitted tender and offered to supply the said pipes from its place of business in Calcutta within the said jurisdiction and received the acceptance thereof at the said place. The appellant also received the tender notice at Calcutta within the said jurisdiction. The said contract, inter alia, contained the following terms and conditions --

(a) The person or persons whose tender is accepted shall within ten days after such acceptance deposit with the respondent either in cash or in securities such sum together with the earnest money amounting to Rupees 13,125/-. The

appellant agreed to supply further quantity of pipes not exceeding 1,50,000 running feet over and above 50,000 running feet ordered on the same terms and conditions provided orders to supply were given within 1 1/2 months from the date of signing the contract and the appellant would furnish security equal to 5% of the value of the subsequent order or orders immediately on receipt of such order or orders.

(b) Payment would be made by the Executive Engineers concerned within a month of the supplies reaching the destination station in Uttar Pradesh in satisfactory condition after deducting 5% from the bill or bills as further security. Defective supplies will not be paid for.

(c) The goods should be supplied within four months from the date of written order. It was further agreed expressly and/or impliedly by and between the parties that security deposit comprising of (deposit money along with the earnest money and of the 5% of every bill in respect of 50,000 running feet would be refunded and payable to the appellant after completion of delivery of 50,000 running feet and security in respect of 1,50,000 running feet would be similarly payable and refunded to the appellant on completion of supply of 1,50,000 running feet.

(d) Payment according to the appellant would be made to the appellant in Calcutta within the aforesaid jurisdiction.

(e) Pursuant to the said contract the appellant duly deposited the total sum of Rs. 13,125/- with the Executive Engineer, Tubewell Circle (South) as security equal to 5% of the estimated value of the order.

(f) By its letter and telegram dated 22nd July 1952 the respondent exercised the option under Clause (8) of the Special Conditions and placed a further order for 1,50,000 running feet of pipes and the appellant duly deposited the sum of Rs. 39,375/- as security equal to 5% of the value of the subsequent order.

2. According to the appellant, the deposit in respect of the order for 50,000 running feet should be refunded after the execution of the said order and the security amount in respect of the subsequent order should be refunded to the appellant after the execution of the said subsequent order. Pursuant to this contract the appellant started supplying pipes of 50,000 running feet in terms of the contract.

3. Time for performance of supply of 50,000 running feet was at the request of the appellant extended up to 31st Dec., 1952 and the time for supply of 1,50,000 running feet of pipes was similarly extended till July 31st, 1953 at the request of the appellant. According to the appellant, in respect of the order for 50,000 running feet of pipes the appellant supplied 49,050 running feet. But according to the respondent the appellant had supplied only 45,983 feet 8" pipes.

4. The appellant states it has received a sum of Rs. 1,85,970/- in respect of pipe* supplies and contends that after giving credit for the sum paid by the

respondent the appellant is entitled to Rs. 73,071.12 p. from the respondent, consisting of Rs. 13, 125/-and Rs. 39, 375/- paid as earnest money by the appellant and Rs. 20,571.12 p. deducted from the bills as security deposit. The appellant contends that in respect of payment time was of the essence of the contract. The respondent, according to the appellant, committed breach of contract by not paying prices of every consignments of pipes within the stipulated time entitling the appellant to avoid the said control and the appellant has avoided the contract and did not supply any pipe in respect of the order for 1,50,000 running feet of pipes in any event. Since the appellant has performed the contract in respect of the 50,000 running feet of pipes it is entitled to the refund of the security and the earnest money in respect of the same. As the respondent did not pay the said sum of Rs. 73,071.12, p. due to the appellant the appellant instituted the suit for recovery of the sum.

5. The respondent's case is that under the terms of the contract the time for supply of the pipes was of the essence of the contract and the appellant wrongfully and illegally did not supply the pipes in time. The respondent further contends that time for payment was never of the essence of the contract nor it was agreed that the security money in respect of supplies of 50,000 running feet will be refunded after completion of supply of 50,000 running feet and similarly in respect of balance of 1,50,000 running feet the security will be refunded after the performance of the said order. According to the respondent, there was one contract as executed by the parties and the moneys were deposited with the respondent by the appellant as security for the purpose of the supply of 2,00,000 running feet of pipes under the terms and conditions contained in the said contract dated 21st June, 1952. The respondent's case is that the appellant only supplied 45,983" 8" of pipes in satisfactory condition and that defective pipes were duly rejected by the respondent. The appellant did not replace the rejected pipes and as such, the appellant did not perform the first part of the contract, that is supply of 50,000 running feet of pipes. The appellant wrongfully did not supply the stipulated quantity of pipes even in respect of the order for 50,000 running feet and wrongfully and illegally repudiated the contract in respect of 1,50,000 running feet of pipes. As such according to the respondent, the appellant is not entitled to the refund of the paid deposits in any event. The respondent states that due to breach by the appellant to fulfil the terms of the contract the respondent is entitled to compensation and damages in respect of the said breach and the respondent is entitled to set off the said sum of Rs. 73,071.12 p. for the damages suffered by the respondent. It is the case of the respondent that the appellant has rescinded the said contract. The respondent contended that this Court has no jurisdiction to entertain or try the suit filed by the appellant. On the aforesaid state of pleading various issues were raised and settled in the suit.

6. Mr. Modak placed various exhibits before us to show that from time to time pipes were being despatched by Railway from Calcutta to Gaziabad. Mr. Modak further placed certain other documents before us. The documents placed by Mr.

Modak before us appear at pages 309, 314, 316, 333, 335, 339, 346, 360, 363, 366, 368, 370, 375, 380, 383, 387, 388, 399, 400, 404, 410, 411-12, 420, 433, 437, 446, 447, 451, 454, 457, 465, 491 and 500 of the paper book. The said documents appearing at those pages show that from time to time goods were being despatched and Rule Rs. sent to the respondent by the appellant, payments were made from time to time by the respondent to the appellant on account of the said documents after deducting the freight and 5% of the value on account of security, repeated demands for payments not made of the bills by the appellant and ultimately intimation by the respondent that security will not be paid in respect of the delivery for 50,000 running feet of pipes unless the supplies in respect of 50,000 running feet and 1,50,000 running feet were completed in accordance with the contract.

7. With regard to the security deposit tender notice at page 3, para 3 says : "a person whose tender is accepted must deposit 5% of the value as sum or sums as security for the performance of the contract and of every condition thereof. A sum equal to 5% of the value of the bill will be deducted at the time of payment as further security. In the said tender appearing at page 177 it is written "should this tender be accepted we hereby agreed to abide by and fulfil all the terms and provisions of the conditions of contract annexed to the approved set of contract documents, or in default thereof to forfeit and pay to Governor of Uttar Pradesh or his successors in office the sums of money mentioned in the said conditions". Clause (1) of the conditions of the contract says "The person or persons whose tender is accepted shall within 10 days after his on their tender has been accepted deposit with the Govt. of Uttar Pradesh such sum as well with the earnest money deposited with the tender amount to Rs. 13, 125/-". The contractor shall also permit the Governor at the time of making any payment to him for work done under the contract to deduct 5% of every such payment until the sum so deducted will, with the earnest moneys of security moneys deposited as aforesaid, amount to Rs. 26,250/-. Clause (3) of the conditions of the contract inter alia, says "In any case in which under any clause or clauses of his contract the Contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit" whether paid in one sum or deducted by instalments". The Superintending Engineer shall have power to adopt such of the courses as he may seem best-- (a) he may rescind the contract by giving the Contractor notice of rescission signed by the Executive Engineer and then may take the whole of the Contractor's deposit for the use of Govt. for the compensation for the loss caused by the contractors' default. Clause (22) of the contract says-- "Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications of works, mentioned. The decision of such Engineer as used on the work, or as to any other question, claim right matter or thing whatsoever in any designs, drawings, specifications, estimates, instructions, order or these conditions, or otherwise concerning the work or the execution or failure to

execute the same whether arising during the progress of the work or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor." Clause (27) of the contract says "Any sum payable by the contractor as compensation under any of these conditions shall be deemed to be reasonable compensation for the act or default in respect of which the same become payable without proof of the actual amount of damage or loss sustained." Clause (33) of the contract provides-- "Notwithstanding anything stipulated in the aforesaid clauses Govt. shall have power to retain any sum due to the contractor(s) and set off all claims against him (them) whether arising out of the particular contract or out of any other transaction or contract held by him (them) alone or in partnership with others. "Provat Pramanick, the Superintending Engineer in the irrigation Department, Tubewell Division, Kanpur, stated that all the contract supplies were not completed. Mr. Modak submitted that although damages has been suffered by the respondent by non-supply is pleaded in the written statement no proof of such damages has been given. Thus, the respondent is obliged to refund the security deposit and the balance price of the goods due from it. Mr. Modak submitted that the non payment would amount to forfeiture and must be struck down. The forfeiture is not in accordance with the terms of the contract and so invalid and drew our attention to Clause 3 (1) (a) recited above of the contract. The Executive Engineer in the instant case did not give any notice of rescission as contemplated in that clause. Only notice of forfeiture is contained in D. D. 11 part of Exhibit A (1) appearing at pages 516-518. D. D. 11 is an important document and is set out hereinbelow.

D. D. No. 11

Without Prejudice. Registered Ack. Due. From

Shri Radhey Shiyam, Superintending Engineer Tubewell Circle Gorakhpur.

To

Messrs. American Pipe Co. 135, Canning Street, Calcutta.

No. C.912-TWC/T-14 Dated Gorakhpur Oct. 3/10, 1955.

Subject : Agreement for the Supply of 6" Nominal Bore (Diameter) W.I. Pipe seamless, dated (12) 21-6-52.

Dear Sir,

With reference to the correspondence resting with your letter No. CAL/APC/GEM/261 dated 18-7-1955, I am to state that the complete case has been thoroughly examined by me and my decisions in terms of Para 22 of the conditions of contract on the various points raised by you from time to time are as below :

1. The order for the additional 1,50,000 rft. of pipes having been placed on you within the period stipulated in the agreement you would be deemed to have

agreed to supply the additional quantity of pipes on the same terms and conditions.

2. As per terms of the agreement the time allowed to you to complete the supply expired on 21-10-1952. No supplies at all were received from you up to the above date. The time limit was subsequently extended on your request to 21-12-1952 Vide Chief Engineer's Order No. 1389-1W/184-B-548W dated 25-2-1953 in respect of supply of 50,000 rft. of pipes and up to 31-7-1953 in respect of the additional supply of 1,50,000 rft. Vide Chief Engineer's No. 7921W/00 1641 545W dated 13-2-1953.

3. You have failed to complete the supply even within the extended time limit. The total up to date supplies received in satisfactory condition at the destination stations are only 45,983 ft. 8 inches.

In addition, you had despatched another 2692 feet 7 inches of defective pipes which were accepted by you as defective and taken back.

4. The maximum compensation payable by you as per Clause 2 (a) of the agreement, being 10% of the cost of 2,00,000 rft. of pipes works out to Rs. 1,05,000/- against which the total security money on your account held by the Department is only Rupees 70,741/10/- including the initial deposits of Rs. 13,125 and Rs. 39,375 and Rs. 18,241/10/-deducted from your bills.

5. Your claim that the department did not fulfil the term of the agreement by delaying payment of your bills beyond one month and that, therefore, the agreement stood discharged is untenable. The statement enclosed herewith gives details regarding the receipts of the consignments at the destinations and the corresponding date of payment. A perusal of the statement clearly indicates that payments were made within one month of the date of receipt of the consignment in all cases excepting those which contained rusted pipes in contravention of paras 1 and 3 of special conditions of contract.

6. Your claim for the refund of the security deposit of Rs. 13, 125/- initially made by you before the completion of supply of even the initial order for 50,000 rft. pipes is totally wrong. Actually as per rules regarding security deposit it is refundable only after 6 months after the satisfactory completion of a work. Thus the security money deposited by you would have been due to you only after six months after the completion of the supply of 2,00,000 rft. pipes at the destinations in satisfactory conditions.

7. In view of the above contract is rescinded in accordance with para 3 (a) of the condition of contract and the security money of Rs. 70,741/10/- is forfeited to you. Encl. 1.

Yours faithfully. (Sd/- Radhey Shiam) Superintending Engineer. True Copy (Sd/- Illegible) Head Assistant. for Superintending Engineer Tubewell Construction Circle Gorakhpur.

D. D. 11 contains the decision of the Superintending Engineer, Tubewell Circle, Gorakhpur in terms of Clause (22) of the conditions of contract and is final and binding between the parties. D. D. 11 is a decision, inter alia, to rescind the contract in terms of Clause 3 (a) of the conditions of contract and forfeit security deposit. Mr. Modak submitted that notwithstanding the provisions of Clause 22 of the contract such forfeiture would be wrongful and invalid. Mr. Modak cited the case of AIR 1929 179 (Privy Council) . The case of Fateh Chand Vs. Balkishan Das, . In the said case, the Supreme Court has held that the measure of damages in the case of breach of stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for Section 74 of the Indian Contract Act has cast the duty upon the Court not to enforce the penalty clause but only to award reasonable compensation. Next Mr. Modak cited the case of Maula Bux Vs. Union of India (UOI), . In the said case, Supreme Court held that the amount deposited by the Contractor as security for guaranteeing due performance of the contract is not earnest money. In the said case, Supreme Court held that "forfeiture of earnest money under a decree for sale of property moveable or immovable if the amount is reasonable does not fall within Section 74, but if forfeiture is of the nature of penalty Section 74 applies." The Supreme Court held that whereunder the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has paid already as security for guaranteeing the due performance of the contract to the party complaining of the breach of the contract, the undertaking is of the nature of a penalty. In the case of Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, , the Supreme Court held that earnest must be given at the moment at which the contract is concluded. It represents a guarantee that the contract will be fulfilled or in other words, earnest is given to bind the contract. It is part of the purchase price when the transaction is carried out. It is forfeited when the transaction falls through by reason of the default or failure of the purchaser unless there is anything to the contrary. In the terms of the contract on default committed by the buyer the seller is entitled to forfeit the earnest. In the instant case, according to Mr. Modak the security money could not be held to be earnest because it could not form the part of the purchase price if the transaction went through. It was only a guarantee for due performance of the contract. Mr. Modak then relied on the case of Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd., wherein Supreme Court laid down that the party to contract taking security deposit from the other party to ensure due performance of the contract is not entitled to forfeit the deposit on the ground of default when no loss is caused to him in consequence of such default. Mr. Modak submitted that no loss has been proved to have been suffered by the respondent for the breach of the contract and thus, the respondent is not entitled to forfeit the security deposit.

8. Mr. Sinha urged and rightly so in our opinion that the order for supply of further 1,50,000 rft. of pipes was one of the rights given under the contract itself. When the said option was exercised and an order was placed within the

stipulated time, this order also formed part of the contract itself. Thus, there was one contract and one security deposit under the contract. Time for payment of the bills was not of the essence of the contract. Contract does not say so expressly. See page 158 Clause (17), page 168 Clause (7). Clauses 2 (a) and 2 (b) made time for delivery of the essence of the contract. There is no such express provision with regard to payment. Can time for payment be by implication of the essence of the contract ? We are of the opinion it cannot be so. See Section 11 of the Sale of Goods Act and the case of Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, . The appellant cancelled the contract by letters written to the Superintending Engineer. These letters were all dated 19th May, 1953, 18th July, 1953 and 21st July, 1953 written by the Solicitor for the appellant. By reason of the premises aforesaid repudiation for non-payment of price in time was wrongful.

Before the final rescission of the contract the appellant committed breaches of the contract by not sending the pipes F. O. R. and by not replacing the defective pipes at its own cost and by not supplying any part of 1,50,000 rft. of pipes in spite of repeated demands. Mr. Sinha submitted that following the principles laid down in Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, in the present case as the appellant never raised any contention in the pleadings that the forfeiture of the amount amounted to a penalty or that the forfeiture of the entire amount was unreasonable the forfeiture was valid and binding upon the parties. In the letter dated 19th May, 1953 mentioned hereinbefore the Solicitor for the appellant declined to make any further supply unless payment was made by the Government in respect of the supplies previously made and the security deposits were refunded. The superintending Engineer by his letter dated 10th July, 1953 being P. D. 181 stated that the amount of security deposits should be treated against one and the same agreement and has to be regained as a safeguard against proper execution of the agreement. As such, part amount of the security deposit could not be refunded against any part supplies. The question of refund of security deposit could, however, be considered after the appellant had completed the supplies. It is the case of the respondent and in our opinion, rightly so that the contract was one for supply of 2,00,000 rft. of pipes and security deposits could not be refunded unless the entire contract was performed. Thereafter, by letter, dated 3rd October, 1955 the Superintending Engineer rescinded the contract and set off the sum deposited against the compensation. See page 516 of the Paper Book. According to Mr. Sinha by Clause (22) of the contract, recited above, the Superintending Engineer was made the persona designata and as such, his decision cannot be challenged and he having forfeited the entire security deposit the appellant cannot ask for recovery of this amount. No charge of mala fide or dishonesty or corrupt practice on the part of the Superintending Engineer has been made. Thus, the action of the Superintending Engineer cannot be questioned in our opinion. See in this connection the cases of Madan Theatres Ltd. Vs. Babulal Chowkhani, and State of West Bengal Vs. Sm. Manish Maity and Others, . Mr. Modak tried to make a

distinction between earnest money and security deposit and submitted that the security deposit could not be forfeited, but it should be noted that the earnest money and/or security deposits have been deposited by the appellant as a guarantee for his performance of the contract and thus, although it is described as security deposit it may be forfeited.

9. We shall now consider whether this Court has jurisdiction to entertain or try the suit filed by the appellant. Clause (15) of the tender notice says -- "Rates should be quoted F. O. R. in a Station in U. P. Condition 16 of the tender notice says that the pipes" will be subject to inspection at destination and defective supplies will have to be replaced at contractor's risk and cost". Clause (17) of the tender notice provides that "payment will be made within one month of satisfactory receipt of material at destination station by the Executive Engineer concerned". Although there is no express provision as to where the payment should be made in the contract the aforesaid clauses of the tender notice signify that the payment should be made at the destination station. The jurisdiction of this Court has been invoked by pleadings made in paras 1 and 3 of the plaint. In paragraph 1 of the plaint the appellant has stated the following "the plaintiff in relation to the formation of the said contract submitted tender and made offer and received acceptance thereof at the plaintiff's said place of business in Calcutta within the aforesaid jurisdiction. The plaintiff also received the tender notice at Calcutta within the said jurisdiction. In paragraph 3 of the plaint it has been averred invoking the jurisdiction of this Court that price of the goods were agreed expressly and/or impliedly to be paid to the appellant in Calcutta within the aforesaid jurisdiction. According to Mr. Modak apart from implied term that the price should be paid in Calcutta within the jurisdiction paragraph 3 of the plaint has pleaded the well known principle that debtor must find out the creditor. Besides Clause (17) of the notice of tender mentioned above Clause (7) of the special condition appearing at page 168 provides payment will be made by the Executive Engineers concerned within a month of the supplies reaching the destination (Railway Station in U. P.) in satisfactory condition after deducting 5% from the bill or bills as further security. Defective supplies will not be paid for. Clause (17) at page 158 read with Clause 7 of page 168 of the paper book recited above makes it clear that the place of payment was destination station. Specially so, in view of instalment delivery and instalment payment. It is made all the more clear by Clause (16) which makes the place of inspection to be the destination station. There is no contradiction between Clause 7 at page 168 of the Paper Book and Clause 17 at page 158 of the Paper Book. Surrounding circumstances and the nature of contract makes the place of destination place of payment in our opinion. If not by express stipulation by necessary implication.

10. In the instant case contract was by correspondence through post. Contract, in our opinion, takes place where the acceptance takes place. In the instant case, the acceptance was posted at U. P. Thus, the contract was formed in U. P. In the case of *The Commissioner of Income Tax, Bombay South, Bombay Vs. Ogale Glass Works Ltd., Ogale Wadi*, cheques were posted at Delhi by the assessee.

Payments were deemed to have taken place in Delhi. In the case of a breach of contract offer is no part of the cause of action. Receipt of acceptance in Calcutta within the jurisdiction, in our opinion, does not form part of the cause of action because according to the agreed mode of communication the contract was to be formed through post. An acceptance in the instant case was admittedly posted in U. P. The acceptance took place in the instant case as soon as it was posted at U. P. Receipt of the same by the appellant in Calcutta within the jurisdiction does not form any part of the cause of action. For the reasons stated hereinbefore, we are of the opinion that no part of cause of action arose within jurisdiction and this Court has no jurisdiction to entertain and/or try this suit. It is true that the defendant did not file any cross-objection challenging the learned Judge's finding on the question of jurisdiction. But nonetheless a party is entitled to defend the judgment on any ground, even without filing any cross-objection. In this connection reference may be made to Rule 22 of Order 41 of the Code of Civil Procedure.

11. For reasons stated hereinbefore we are of the opinion that this appeal has no merit and must fail. The appeal is dismissed, but in the facts and circumstances of the case we direct that each party shall pay and bear its own cost of the appeal.

R.N. Pyne, J.

12. I agree.