

(2014) 09 CAL CK 0047

In the Calcutta High Court

Case No : APD No. 110 of 2014 and C.S. No. 311 of 1998

Associated Cement Companies Ltd.

APPELLANT

Vs

G.S. Fertilisers Pvt. Ltd.

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Contract Act, 1872 — Section 7, 7, 8, 8, 9, 9 — Evidence Act, 1872 - Section 17, 18, 19, 20, 21

Citation : AIR 2015 Cal 106 : (2015) 2 CALLT 209 : (2015) 4 CHN 5

Hon'ble Judges : Manjula Chellur, C.J.; Banerjee, J.

Bench : Division Bench

Advocate : Dhruba Ghosh, Aniruddha Mitra, A. Bose and A. Gaggar, for the Appellant; Ajay Krishna Chatterjee, Senior Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

1. This appeal is directed against the judgment and order dated 7.2.2014 wherein the appellant-defendant was directed to pay certain amounts claimed by the respondent-plaintiff. The facts that lead to the filing of the suit are as under.

The respondent-plaintiff for setting up a plant at Orgram in Burdwan, West Bengal required large quantities of cement for the construction of the plant. The appellant-defendant, a manufacturer of cement, negotiated with the respondent-plaintiff for supply of cement and the correspondence between the parties indicate on what terms and conditions the supply of cement was agreed.

According to the respondent-plaintiff, till the completion of the supply of cement under the order, the price was agreed to be Rs. 1900/- (Rupees one thousand nine hundred) per metric tonne but according to the defendant, it was the price agreed for the supplies made till the end of January, 1998 provided, the orders were placed within November, 1997. According to the respondent-plaintiff, after May, 1998 no cement was supplied by the defendant and on the other hand they demanded Rs. 2600/- (Rupees two thousand six hundred) per metric tonne which was outside the terms of concluded contract between them. The plaintiff

further claimed damages, as the construction of the plant was under progress and they had to place orders for supply of cement in the open market and they were made to pay Rs. 2600/- (Rupees two thousand six hundred) per metric tonne. Therefore, they are entitled for the amount, the difference in the price of cement purchased from the market and the price at which the cement was to be supplied by the appellant-defendant. They have also claimed another sum of Rs. 2,03,700/- (Rupees two lakh three thousand seven hundred) as the amount lying in deposit with the appellant-defendant for which no supply of cement was made and the amount is in excess when compared to the quantity of supply of cement. They have also claimed Rs. 8,655/- (Rupees eight thousand six hundred fifty-five) on account of unloading charges at the time when the contract was in force between the parties.

2. The plaintiff has led oral evidence but the appellant-defendant did not examine any one on their behalf. In appraisal of material, the learned Judge opined that the plaintiff was entitled for the claims made in the suit as per the oral and documentary evidence brought on record. Further, 12 (twelve) per cent interest was awarded on and from the respective dates from which the plaintiff was found to be entitled to the respective amounts from the appellant-defendant till realisation.

3. Aggrieved by the same, the appellant-defendant is before us. Mr. Dhruba Ghosh, learned Counsel arguing for the appellant, mainly relies upon the admissions said to have been made by the witness for the plaintiff in the evidence during the cross-examination. He contends that those admissions would clearly indicate terms of the contract. Over and above, the correspondence, the custom in the cement trading was that the price agreed between the parties would be valid for two months and, therefore, there is no justification in the claim of the plaintiff. He further contended that as the price did not vary subsequent to the conclusion of the contract till May, 1998, there was no occasion for the defendant to address any letter till 8.5.1998 indicating that there was increase in the price and they would supply the material only at Rs. 2600/- (Rupees two thousand six hundred) per metric tonne. He also took us through the contents of a sheet of paper at page 174 of the paper book contending that this sheet of paper said to be the accounts pertaining to the supply of cement and the mode of payments and the quantum of payments made by the defendant are not substantiated by any ledger or book of accounts in respect of the business contracts. Therefore, reliance cannot be placed on this piece of paper. Similarly, he contended that they should not be made to pay Rs. 8 (eight) thousand and odd towards the loading charges which was never demanded by the plaintiff during the subsistence of the contract between them.

4. As against this, learned Counsel arguing for the respondent-plaintiff took us through the Annexures A, B, C and D and contended that in the absence of any response indicating acceptance or rejection, so far as Annexure B is concerned, the letter dated 24.10.1997 addressed by the plaintiff to the defendant would

indicate, there was a concluded contract so far as the price is concerned. Hence, there was no justification in placing reliance on certain admissions made by the witness which were out of context while answering questions during the cross-examination. According to learned Counsel, the documents clearly indicate, Annexure A is an offer and Annexure B was acceptance indicating on what terms they concluded the contract and in the absence of any further correspondence and especially receipt of cheque for Rs. 3,00,000/- (Rupees three lakhs) without any objection, it would only indicate Annexure B was the concluded contract entered into between the parties. So far as admissions under Section 58 of the Evidence Act, he contends that unless there are pleadings to that effect, no amount of evidence brought on record through the evidence that is with regard to the period of two months would be of any assistance to defendant. So far as rate of cement; the admissions made in the evidence by the witness cannot be relied upon.

5. We have gone through the judgment as well as the relevant documents relied upon by the parties. Annexures A and B are dated 24.10.1997. Annexure A indicates the terms proposed by the appellant-defendant upon which they would like to supply the cement. So far as the rate, it says Rs. 1900/- (Rupees one thousand nine hundred) per metric tonne plus sales tax as applicable. The validity clause indicate the above rate was valid for all the orders placed with the firm up to 30.11.1997 and supply up to 31.1.1998. Annexure B has a reference to Annexure A dated 24.10.1997 and it further says, they were pleased to place orders for supply of cement confirming to other details wherein the quantity of cement was 1500 metric tonne. So far as price, it says Rs. 1900/- per metric tonne during the pendency of the order. Annexure C is dated 8.5.1998 wherein the defendant-appellant demanded Rs. 2640/- (Rupees two thousand six hundred forty) per metric tonne plus taxes as applicable with effect from 1.5.1998. It also says, the cement would be supplied against 100 (hundred) per cent advance payment and the said price will be valid till 31.10.1998. All other terms and conditions as per their quotation remain unchanged. This letter was replied by plaintiff at Annexure D dated 14.5.1998 wherein they demand compliance of terms and conditions as indicated in Annexure B and they further say, they have suffered damages not only by paying additional amount that is the difference price between the contract price and the market price at which they bought the balance goods and also damages of Rs. 2 (two) lakhs per day for non-supply of goods from 28.4.1998 to 13.5.1998 which resulted in stoppage of work.

6. Learned Senior Counsel, Mr. Dhruba Ghosh arguing for appellant placed reliance on a decision in Gannmani Anasuya and Others Vs. Parvatini Amarendra Chowdhary and Others, (S.B. Sinha And Markandey Katju, JJ.) on the point how facts admitted need not be proved (under Section 58 of the Evidence Act).

7. This was a case where Their Lordships were considering whether an admission made by a party can be used against him. An admission came to be made by

Karta in a Hindu undivided family who is managing the family property as well as family business affairs. In that situation, if admission is made by such Karta, it would be a relevant fact. When a claim was made for rendition of accounts in the suit, issuance of a document purported to have authored by one of the parties, the same has to be taken into consideration. It was held that if a party in cross-examination accepts the correctness of a document, the same would be relevant.

8. He also relied upon Avtar Singh and Others Vs. Gurdial Singh and Others, . The lis in this case was whether the suit land was a public street or not witness of the appellant admitted the same. Their Lordships opined that admission, it is well-known, forms the best evidence, it may be that admission does not create any title, but the nature of the kind can form subject-matter of admission. Section 58 of the Evidence Act postulates that things admitted, need not be proved. When the witness for the plaintiff himself admits that it was a public road, Their Lordships opined that the same becomes the admission under Section 58 of the Evidence Act.

9. He also placed reliance on Union of India (UOI) Vs. Ibrahim Uddin and Another, In this case Their Lordships had an occasion to elaborately refer to various decisions pertaining to Section 58 of the Evidence Act. They elaborately discussed under what circumstances admissions by a party need not be proved. This was a case where plaintiff filed a suit for declaration of title in respect of suit property. The question was whether not filing a document in rebuttal of a document amounts to an admission under Section 58 of Evidence Act. It was held that issue of drawing adverse inference was required to be decided by the Court taking into consideration the pleadings of parties and by deciding whether any document/evidence withheld, had any relevance at all or omission of its production would directly establish the case of other side. A caution was made that Court could not lose the sight of fact that burden of proof was on party which made a factual averment. In that context, Their Lordships while drawing conclusion opined as under:--

"(vii) The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it."

Learned Advocate for the appellant further emphasises Paragraph 23 and 24 which read as under:-

"23. In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made

admission under cross examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the Plaintiff."

"24. ..."Admissions" are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission."

9A. Learned Senior Advocate, Mr. A.K. Chatterjee appearing on behalf of the respondent referred to a decision reported in AIR 1973 Gauhati 111 (V 60 C 38) [Union of India v. M/s. R. Bhagchand to contend that once a party accepted the terms of contract by performing certain conditions, the conduct would contemplate acceptance. He relies upon Paragraph 8 which reads as under:--

"8. Some English decisions were referred to with approval in the Patna case relied upon by Shri Dam. I think that those cases have no bearing on and relevancy to Section 8 of the Act. It is mentioned on page 59 of Pollock and Mulla's Commentary on the Indian Contract Act, 8th Edn., that "nothing like the terms of Section 8 occurs in the original draft of the Indian Law Commissioners, nor so far as known to us in any authoritative statement of English Law" and that the terms of the section "appear to have been taken from the draft Civil Code of New York with slight verbal alteration." It follows from these excerpts that the English law has no provision parallel to Section 8 of the Act and as such recourse to English decisions for determining the scope of Section 8 may not be very apposite.

Sections 7 to 9 of the Indian Contract Act describe the various modes in which proposal may be accepted, and, if may say so, Section 8 provides the acceptance of a proposal by conduct as against other modes of acceptance, such as verbal or written communication contemplated by Sections 7 and 9. Therefore, in a way Section 8 provides undoubtedly a unique provision in the Indian Contract Act. It embraces a case to cite an instance of a reward offered for the finder of a lost article. If a person restores the found article to the one who offered the reward without accepting the latter's proposal in any other manner, the act or conduct or restoration itself is considered sufficient acceptance of the proposal to merit the reward. True that it is an ordinary rule of law that an acceptance of an offer made ought to be notified to the person who makes the offer. But since such notification is required for the benefit of the person making the offer the latter may dispense with notice to himself if he deems that course to be desirable. If the person making the offer to another intimates him expressly or impliedly a particular mode of acceptance the offeree can adopt that mode to conclude a

binding bargain. If a man writes to another to send him certain goods, then the despatch of goods would surely amount to acceptance of the offer."

10. He also placed reliance on Food Corporation of India and Another Vs. Ram Kesh Yadav and Another, which read as under:-

"11. But on facts, this case is different. The second respondent's application dated 26-4-1999 was a composite application for conditional voluntary retirement on medical grounds, subject to appointment of his son in his place. The application specifically stated that he desired to go on retirement on medical grounds if his son was provided with employment in his place. The second respondent had thus clearly indicated that if employment on compassionate ground was not provided to his son, he was not interested in pursuing his request for retirement on medical grounds. FCI ought to have informed the employee that he could not make such a conditional offer of retirement contrary to the scheme. But for reasons best known to itself, FCI did not choose to reject the conditional offer, but unconditionally accepted the conditional offer. There lies the catch.

"12. When an offer is conditional, the offeree has the choice of either accepting the conditional offer, or rejecting the conditional offer, or making a counter-offer. But what the offeree cannot do, when an offer is conditional, is to accept a part of the offer which results in performance by the offer or and then reject the condition subject to which the offer is made."

"14. When FCI accepted the offer unconditionally and retired the second respondent from service by office order dated 29-7-2000, it was implied that it accepted the conditional offer in entirety, that is the offer made (voluntary retirement) as also the condition subject to which the offer was made (appointment of his dependant son on compassionate grounds). In his application, the second respondent made it clear that he desired to retire voluntarily on medical grounds only if his son (the first respondent herein) application was contrary to the scheme or not warranted, it ought to have rejected the application. Alternatively, it ought to have informed the employee that the compassionate appointment could not be given to his son because he (the employee) had already completed 55 years of age and that it will consider his request for retirement on medical grounds delinking the said issue of retirement, from the request for compassionate appointment. In that event, the employee would have had the option to withdraw his offer itself. Having denied him the opportunity to withdraw the offer, and having retired him by accepting the conditional offer, FCI cannot refuse to comply with the condition subject to which the offer was made."

"17. The question in this case is not whether the request of the respondents was contrary to the scheme. Nor is it the question, whether the scheme would be violated if the first respondent is appointed on compassionate grounds. The limited question is whether FCI, having accepted the offer and accepted

performance of the offer by the second respondent, can refuse to perform or comply with the condition subject to which such offer was made. The answer is obviously in the negative. Having accepted the offer, FCI cannot avoid performance of the condition subject to which the offer was made. As noticed earlier, nothing prevented FCI from rejecting the application of the employee outright, or inform the employee before accepting the offer of voluntary retirement that it could not accept the condition, so that the employee would have had the option to withdraw the offer itself."

11. He also placed reliance on Union of India (UOI) Vs. Ibrahim Uddin and Another,] to contend that the Court cannot travel beyond the pleadings as no party can lead the evidence on an issue not raised in the pleadings.

12. In the present case, the controversy is with regard to the price at which the material has to be supplied by the appellant to the respondent. When documents at Annexures A and B are read, it clearly indicates that the respondent-plaintiff concluded the contract by quoting the price at Rs. 1900/- (Rupees one thousand nine hundred) per metric tonne specifically mentioned that the price will remain firm during the pendency of the order. To this Annexure B, no response or clarification was sought by the appellant indicating that as per their offer at Annexure A, such price would be valid for the orders up to 30.11.1997 to be supplied within 31.1.1998. The explanation offered by the appellant is, since there was no increase in the price, there was no requirement on their part to seek clarification or refuse the offer as indicated at Annexure B. If the price was to be valid for two months as suggested in the cross-examination to the witness, on 24.10.1997, how the appellant anticipated that the price would remain at Rs. 1900 (Rupees one thousand nine hundred) per metric tonne till May, 1998 we fail to understand. Even otherwise on going through the so-called relevant admissions in the cross-examination of the witness, it was never suggested to the witness that in spite of Annexure B there was an understanding between the parties that the price would remain at Rs. 1900 (Rupees one thousand nine hundred) per metric tonne for next two months. We expect a prudent reasonable business man would clearly indicate at what price he would be supplying the material to the purchaser and for which period. In the absence of indicating clearly such suggestions to the witness, we are of the opinion, the so-called admissions are not clear and they have no relevance to Annexures A and B. At the most these are admissions on general practice in the business and not with reference to the contract between the parties. Therefore, the learned Judge was justified in opining that Annexure B concluded the contract. This is further evident by encasement of cheque for Rs. 3 (Rupees three) lakh without any resistance on the part of the appellant-defendant. Perusal of further correspondence subsequent to the dispute between the parties which is also part of the record, it clearly indicates, there was discussion on 22.10.1997 and 23.10.1997 between the parties and only after such discussion Annexure A and B came into existence. Annexure A is an offer and Annexure B is an acceptance on the part of the plaintiff subject to their quotation of price which was not resisted

or clarified subsequently till the dispute between the parties arose in May, 1998.

13. In the light of such concluded contract, the appellant is under an obligation to supply the entire quantity of 1500 metric tonne at Rs. 1900/- (Rupees one thousand nine hundred). If the plaintiff-respondent had placed order in the open market for the balance quantity of cement the learned Judge was justified in awarding the amount that is the difference of contract price and the price at which the balance supply of material was purchased in the open market. Then coming to excess amount of Rs. 2,03,700/- (Rupees two lakh three thousand seven hundred) the appellant except placing a piece of paper no accounts or ledger supporting the entries in the piece of paper are brought on record. The plaintiff being a company definitely ought to have maintained the accounts which are reflected in the ledgers and other books of accounts. We do not understand, why the plaintiff was not able to place on record such books of accounts before the Court substantiating their stand. Therefore, over and above this person who said to have made entries on the paper was not examined. It further reveals that all the entries are made on a piece of paper on one particular day. The details given at page 174 indicates different dates on which payments were made. In the absence of other details towards what these amounts were paid and what exactly was the amount in deposit as per the books of accounts, the learned Judge was not justified in allowing this claim of the plaintiff.

14. Similarly, the unloading charges of Rs. 8 (eight) thousand and odd is not supported by any evidence as the plaintiff is also expected to maintain books of accounts in the normal course of business. There is no contemporaneous correspondence for this unloading charges at the relevant point of time when the contract was subsisting between the parties. In the absence of such material, the learned Judge ought not to have allowed this claim of the plaintiff.

15. In the light of above discussion and reasoning, the appeal is allowed in part. Claim of Rs. 7,38,400/- is affirmed to be paid with interest at the rate as awarded by the learned Judge. The balance claim of Rs. 2 (two) lakh and odd and unloading charges of Rs. 8 (eight) thousand and odd are rejected.

16. The appeal is disposed of without any order as to costs. Stay sought for is rejected.

Banerjee, J.

I agree.