
(1950) 12 P&H CK 0007
In the Punjab And Haryana At Chandigarh
Case No : F.A.F.O. No. 107 of 1950

Dewan Chand Sabbarwal

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 01-12-1950

Acts Referred:

Arbitration Act, 1940 — Section 20, 41
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2
Specific Relief Act, 1877 — Section 21, 56

Citation : AIR 1951 P&H 426

Hon'ble Judges : Kapur, J

Bench : Single Bench

Advocate : K.L. Gosain and H.R. Sodhi, for Gurdev Singh, for the Appellant;
Bishan Narain, for the Respondent

Judgement

Kapur, J.—This is an appeal from an order passed by Mr. Thakral, Subordinate Judge, First, Class, refusing to grant an interim injunction against the Union of India from continuing the work of construction of some of its flats.

2. The applicant Diwan Chand Sabbarwal, made a tender for the construction of 200 Officers flats in New Delhi on 24-2-1948. This tender was accepted on 24-2-1948 and on 7th July the contract was signed by the Superintending Engineer, Construction Circle, C.P.W.D. On 21-10-1948, this contract was signed on behalf of the Governor-General by the Chief Engineer, C.P.W.D. Originally these Officers' flats were to be built on Cornwallis Road. Subsequently it was agreed that 112 flats should be constructed on Cornwallis Road and 88 on the Golf Link Road, New Delhi. It is alleged by Diwan Chand Sabbarwal that 112 quarters had been completed by January 1950 and 88 had been started and had partly been built. The estimate of the cost of the building which was originally Rs. 29,00,000 was increased to about Rs. 38,00,000. On 24-2-1950, notice was given to the contractor, Diwan Chand Sabbarwal, for the rescission of the contract on the ground that the contract had not been completed within the time specified. Action was really taken under Clauses 2, 3 and 4 of the terms of

contract.

3. On 11-2-1950, Diwan Chand Sabharwal made an applicant. u/s 20, Arbitration Act, for the enforcement of the arbitration clause contained in Clause 25 of the terms of contract. He also applied for the issue of a temporary injunction which was granted on 14-2-1960. On 18-8-1950, the matter was referred to the arbitration of the Superintending Engineer, Mr. N.G. Diwan. Before this arbitrator Diwan Chand, the contractor, filed his claim to which reply was given on behalf of the Union, and I am informed that 30 issues were framed before him.

4. An award was to be filed by 18-11-1950, after two extensions had been given by the Court. Another extension had been asked for and the award has not yet been given. It may here be stated that the matter of temporary injunction which had been issued by the learned Subordinate Judge was also referred to the Arbitrator at the instance of both the parties who have signed their statements made in Court making this reference.

5. On 9-5-1950, the Arbitrator discharged the injunction order and on the 25th the contractor moved the Court u/s 80 for setting aside the award as to injunction and also applied Under Order 39, Rule 2, Code of Civil Procedure, read with Section 41, Arbitration Act, for the issue of another temporary injunction on the ground that the loss incurred by the contractor would be irrevocable, that one of the points in controversy, that the dept. was not justified in rescinding the contract, would be decided without enquiry and that there would be multiplicity of proceedings if the injunction was not given. The learned Judge by his order, dated 6-10-1950, refused to grant the injunction on the grounds that -(1) "harm which will accrue by the grant of interim injunction is much greater than the benefit which will accrue to the applicant."; (2) the decision of the points in controversy between the parties will take a long time and by the grant of an injunction the construction will remain incomplete, (3) amount of damages can be ascertained and (4) the balance of convenience is in favour of the injunction not being granted. It is against this order that the appeal has been brought to this Court .

6. It is submitted: (1) that the balance of convenience is in favour of the Appellants; (2) that Government has committed a large number of defaults as is clear from the issues which have been, framed by the Arbitrator and so it was not possible for any contractor to keep to the scheduled time; because the sites on which the construction was to be put up had not been given to the applicant in time. (3) that it will not be possible to measure the damages as the measurements are not agreed, and (4)(a) that if a new contractor is brought and he starts building from the stage at which the applicant had been made to leave the building the evidence will vanish, (b) that there is a large amount of material lying at the spot which has been taken over and has only been valued at Rs. 26,000 a part of which alone the applicant values at Rs. 64,000, (c) that the contractor has entered into a large number of contracts and has made advances to labourers which he will not be able to recover if his contract is ended, and (d)

that he has made himself liable for; many liabilities which will not be possible for him to meet if he is now made to leave the building.

7. In reply an affidavit has been filed by the Department which has not been replied to in some of the material particulars by the contractor. The Executive Engineer, P.D. Chawla, has stated in his affidavit that the contractor started his construction on 200 flats on 7-7-1948, and this is also mentioned in the agreement which was signed by the Chief Engineer on 21-10-1948, that the time limit was 15 months from 7-7-1948, and this limit of time was agreed to by the contractor and that before 21-10-1948, he had received two payments also. There is some dispute in the two affidavits of the Executive Engineer and the contractor as to I who had to do the levelling of the sites and also 1 whether the changes that were made in the specifications, etc., were of a minor nature or not. But the Executive Engineer has stated in his affidavit that at the end of 15 months more than 50 per cent, of the work had still to be done and notice of rescission under Clause 3(a) of the agreement was first given on 23-11-1949, but the contractor assured the Chief Engineer by his letter dated 29-11-1949, that the contractor had reorganised his partnership and would not have any more financial difficulty and he agreed in writing that 112 flats would be completed by 7-1-1950, and 88 flats by 31-3-1950, and on this assurance departmental action was stayed, but as the contractor did not keep to his promise and his progress was slow, on 24-2-1950, the Department withdrew its staying of the action under Clause 3(a) of the terms of the contract. The contractor has put in his affidavit in reply but has not specifically denied the statements made with regard to the facts which I have given 5 above.

8. It may here be necessary to quote the clauses of the contract which are relevant to the issue. They are Clause 3, 3(a), 3(c) and 4, and are as under:

3. In any case in which under any clause or clauses of this contract the contractor shall have rendered him self liable to pay compensation amounting to the whole; of his security deposit (whether paid in one sum or deducted by instalments, or committed a breach of any of the terms contained in Clause 19-B) the Divisional Officer, on behalf of the Governor-General of India, shall have power to adopt any of the following courses, as he may deem best suited to the interests of Government:

(a) To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Divisional Officer shall be conclusive evidence), and in which case the security deposit of the contractor shall stand forfeited, and be absolutely at the disposal of Government.

(b) To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands, and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (of the amount of which excess the certificate in writing of

the Divisional Officer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government, under the contract or otherwise, or from his security deposit or the proceeds of sale thereof, or a sufficient part thereof.

In the event of any of the above courses being adopted by the Divisional Officer, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials, or entered into any engagements or made any advances on account of, or with a view to the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provision aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work theretofore actually performed under this contract, unless and until the Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof, and he shall only be entitled to be paid the value so certified.

4. In any case in which any of the powers, conferred upon the Divisional Officer by Clause 3 hereof, shall have become exercisable and the same shall not be exercised, the non-exercise thereof shall not constitute a waiver of any of the conditions hereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the contractor for which by any clause or clauses hereof he is declared liable to pay compensation amounting to the whole of his security deposit, and the liability of the contractor for past and future compensation shall remain unaffected. In the event of the Divisional Officer putting in force either of the powers (a) or (c) vested in him under the preceding clause he may, if he so desires, take possession of all or any tools, plant, materials and stores, in or upon the works, or the site thereof or belonging to the contractor, or procured by him intended to be used for the execution of the work or any part thereof, paying or allowing for the same in account at the contract rates, or, in case of these not being applicable, at current market rates to be certified by the Divisional Officer whose certificate thereof shall be final, otherwise the Divisional Officer may by notice in writing to the contractor or his clerk of the works, foreman or other authorised agent require him to remove such tools, plant, materials, or stores from the premises (within a time to be specified in such notice); and in the event of the contractor failing to comply with any such requisition, the Divisional Officer may remove them at the contractor's expense or sell them by auction or private sale on account of the contractor and at his risk in all respects, and the certificate of the Divisional Officer as to the expense of any such removal and the amount of the proceeds and expense of any such sale shall be final and conclusive against the contractor.

9. On the question of irreparable injury, Mr. Bishen Narain has submitted that measurements have been made in the presence of the applicant and he accepted the same, and this was done under Clause 3(c) of the terms of contract and no objection can be taken by the contractor. As to the material on the site he has submitted that it was open to the Department to take possession of the material

and the plant under Clause 4 of the contract. Without deciding these matters finally my opinion is that no case has been made out of an irreparable injury and the balance of convenience seems to be in favour of the Government and, in favour of not giving the injunction.

10. Mr. Bishan Narain has further submitted that in the case of building contracts the contractor has no right to continue the building operations if the owner of the building does not wish him to, even though the latter may be guilty of a wrongful forfeiture, because, so it is submitted, a temporary injunction can only be granted if a permanent injunction is possible and permanent injunction cannot be granted if no specific performance is possible or where damages can be awarded to the person asking for injunction. The applicant, however, submits that Under Order 39, Rule 2, Code of Civil Procedure, he can come to Court and ask for an injunction restraining the Defendant from committing a breach of the contract. In this case, however, there is already a breach of the contract, if the contention of the applicant is correct. A notice for rescission of the contract under Clause 3 has already been given by the Department and it cannot be said that in the present case the Court will by its order restrain the breach of the contract which has already taken place, if it can be termed breach of the contract.

11. The principles which govern the grant of temporary injunctions are discussed at page 1133 of Mulla's Code of Civil Procedure, and it is there said that the issue of temporary injunction is governed by the same principles as the granting of a permanent injunction at the trial of a case; see *Nusserwanji Merwanji v. Gorden* 6 Bom. 266. Support for this proposition is also found in *N.W.R. Administration v. N.W.R. Union* 14 Lah. 330 at page 337 : AIR 1933 Lah. 203 and *Dominion of India v. Sohan Lal* AIR 1950 E.P. 40, where at page 51 Das C.J., said: "It is not a case for perpetual injunction and consequently no interlocutory injunction should have been made." In *London and Blachwall Rly. Co. v. Gross* (1886) 31 chapter no 351 at page 369 : 55 L.J. chapter 313, Lindley L.J., said:

The very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs (or for breach of contracts which seems to have been added by Sir Dinshaw Mulla) for which the damages are the proper remedy.

12. The point for me to determine is whether in the case of building contracts the remedy of the aggrieved contractor is injunction or damages. In *Hudson on Building Contracts*, page 404, it is stated:

The contractor in ordinary building or engineering contracts for executing work upon the land of another has merely licence to enter upon the site or land necessary to execute the works, depending always upon the precise terms of the contract.

Such license can be revoked by the employer at any time, and thereafter the contractor's right to enter upon the site will be gone, but such revocation, if not justified under, the terms of the contract, will render the building owner liable to

the builder for damages for breach of contract.

The measure of such damages must be calculated at the date of such revocation or re-entry.

It would seem that the building owner cannot (subject always to the terms of the contract) be restrained by injunction from re-entering upon his own land, or from preventing the builder from performing the contract.

13. It is unnecessary for me in this case to decide whether the rights of a building contractor are those of a licensee or they are something more because in my opinion no injunction can issue against a building owner at the instance of a building contractor. His proper remedy is for damages. In *Garret v. The Banstead and Epsom Downs Bly. Co.* (1865) 12 L.T. 654 : 13 W.R. 878, the Plaintiff contracted to execute the works of the Defendant Co., and the contract provided that, in certain events, the directors might take the further performance of the contract out of his hands and themselves execute the remaining works and also that a person named should be the referee in all disputes between the parties. Disputes having arisen, the Co. by their engineer violently (as the bill alleged) took possession of the works, and upon this bill being filed, the Plaintiff moved for an injunction to restrain them from such possession and from interfering with Plaintiff in the further execution of the works, and it was held that as the Court. would have no power to compel a due completion of the contract by the Plaintiff if it reinstated him, whereas he would have ample remedy in damages if he were improperly displaced by the Defendants the injury to the Defendants of granting an injunction would far exceed that to the Plaintiff of refusing it, and the injunction was dissolved. The observations of Lord Justice Knight Bruce are of some importance in this case. He said:

To suppose, in a case like this, where, if the Co. are wrong, ample compensation in damages may be obtained by the contractor, that the Co. are to have a person forced on them to perform these works whom they reasonably or unreasonably object to (whereas there would be no reciprocity if the wrong were on the other side) for the purpose of compelling the performance of the works, is more than I am able to do.

14. In another case, *Munro v. Wivenhoe etc.* (1865) 12 L.T. 655, where a contractor applied for injunction to restrain the Co., whose work he had contracted to execute from rescinding the contract, the Court refused to issue an injunction, Lord Justice Knight Bruce said at p. 757:

The Court cannot enforce specific performance of the works; it cannot look after the acts and conduct of the Plaintiff. not say how far he does or does not depart from what is right in executing the works or professing to execute them. If he is or shall be wronged by his exclusion from the works, and by the act of the Co. in executing the works themselves, that will be a case for damages to be assessed and given, either in this Court or in a Court of law, but it is not a case for specific performance or relief analogous to specific performance, which to proceed to

grant an injunction on this part of the prayer of the bill would necessarily amount to.

15. According to Indian law, injunction cannot be given where specific performance cannot be granted. u/s 56(f), Specific Relief Act, an injunction cannot be granted to prevent a breach of contract the performance of which would not be specifically enforced and u/s 21(a) and (b), Specific Relief Act, a contract cannot be specifically enforced (a) for the non-performance of which compensation in money is an adequate relief and (b) which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volitions of the parties, or otherwise from its nature, is such that the Court cannot enforce specific performance of its material terms. Thus, if in a contract damages is an adequate relief or it depends upon personal qualifications or volition of the parties specific performance cannot be given injunction cannot be given; see Woodroff on Injunctions, page 106.

16. In the present case there is a Clause (clause 3 in the terms of contract which gives the power to the terms of contract in certain circumstances, to measure up the work and take over the unexecuted part of the work in its own hands and to complete the work itself or to give it to any other contractor, and Clause 4 gives the Government, the power to take over the plant and the material lying at the site. It appears to me that to a case of this kind the rule laid down by Knight Bruce L.J. in *Garret v. Banstead and Epom Downs Ely. Co.*

17. In reply to these arguments, Mr. Gosain submitted that under English law injunction has been given up to the time that the arbitrator decides the matter in cases where the matter was sent to arbitration under a building contract and he strongly reld. on *Foster and Dicksee v. Mayor Allermen and Burgesses of the Borough of Hastings* (1908) 87 L.T. 730. I do not think that the facts of that case are really of much assistance because I find that the learned Judge (Farwell J.) there held that the case turned solely on the true construction of the clauses of the contract and as the matter was of some urgency the learned Judge instead of giving a considered judgment gave the judgment at once. He said:

If this were not an interlocutory Appellant and a matter of some urgency upon which I am bound to give judgment at once, I should have reserved the judgment and gone into the matter more fully. With the short time that I have at my disposal, I have come to a clear conclusion which I intend to express and if the parties are dissatisfied with my judgment they must go elsewhere.

18. I must say with very great respect that I am unable to discover the principle on which this case has proceeded, because in that case no decree for specific performance could have been given, and as I have said before, it was decided on the peculiar construction of the contract and as the matter was not of urgency. This case, therefore, cannot be of any very great assistance in deciding a case in India where we are governed by statute, and in view of the fact that this case goes against what was held in the two cases of the Court of Appeal which I have

mentioned above, *Garret v. Banstead and Epsom Downs Rly. Co.* (1865) 12 L.T. 654: (13 W.R. 878) and *Munro v. Wivenhoe Etc.* (1865) 12 L.T. 655. I am unable to follow it.

19. It was next contended by Mr. Gosain that a specific performance of a contract of this kind can be given and has been given in English Courts. In the first place on principle I do not see how that is possible. In a building contract it is difficult for Courts to look after the acts and conduct of a building contractor nor can it say how far he does or does not depart from the correct execution of the works which he is professing to execute and where the case is one in which the personal skill of a person is an important factor the Courts will not be able to specifically enforce it. Besides in a building contract if a contractor is lawfully dismissed he has the remedy of getting compensation by way of damages and in such cases specific performance will not be given by Courts. At page 224 of *Hudson on Building Contracts* it is stated:

So far as the author can ascertain with the exception of two old cases collected in Mr. Eden's note to *Luoas v. Commerford* (1790) 3 Bro. C.C. 166 and the possible further exceptions of *Errington v. Aynesty* (1788) 2 Bro. C.C. 341 and *Hebburn v. Leather* 1884-50 L.T. 660, not a single example ancient or modern of a decree of specific performance of a building contract pure and simple, can be found." See "White Tudor Leading Cases," Notes to *Cuddee v. Rutter* (1719) 1 P. Wms. 570 and *Fry on Specific Performance*.

20. And indeed no case was cited before me with the exception of the two cases mentioned there in which specific performance was given in England in building contracts. The other cases that were cited by Mr. Gosain are those where the dispute was between the owner of a plot of land who had leased out a certain area to a lessee for the purposes of building houses and such a lessee and that contract was enforced. I do not think, therefore, that the English law supports the proposition which Mr. Gosain wanted to submit before me.

21. Another case quoted before me was *East Lancashire Rly. Co. v. Hattersley* (1849) 68 E.R. 278 : 8 Hare 72 where the Court on the Appellant of the Rly. Co. restrained the contractor from continuing on the line or interfering with the operations of the Co. and also directed an account of what was due to the contractor for works and materials done. This case, if anything, supports the case of the respt. because in this case the Court interfered by injunction against the contractor and refused to allow him to continue the work of construction on the rly. line. A careful study of all those cases, which I have quoted above, lead me to the conclusion that a building contractor has not the right to get an injunction against a building owner and the Court has rightly not given him the injunction.

22. A serious grievance which Mr. Gosain brought to my notice was that the work which the Government wanted the contractor to do increased from Rs. 29,00,000 to Rs. 88,00,000 without at the same time, time being extended as provided for

in Clause 12 of the terms. Any breach of the terms, if proved, would give to the contractor a right to recover damages its it would be difficult for me at the stage to adjudicate as to which of the two sides is guilty of the breach of the contract but I have no doubt that the resp. the Union of India, will not do anything which will savour of high-handedness, illegality or wilful loss to a citizen least of all to a citizen who is a displaced person.

23. In the result, I dismiss this appeal but in the circumstances of this case leave the parties to bear their own costs.