
(1988) 03 CAL CK 0026

In the Calcutta High Court

Case No : Appeal No. 69 of 1979 and Suit No. 285 of 1972

Food Corporation of India

APPELLANT

Vs

Birendra Nath Dhar

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 22, 31, 93

Citation : (1988) 2 CALLT 136

Hon'ble Judges : R.N. Pyne, J;Pratibha Bonnerjea, J

Bench : Division Bench

Advocate : Sujit Sinha, for the Appellant;Jayanta Mitra, for the Respondent

Judgement

Pratibha Bonnerjea, J.—The respondent was appointed by the appellant for loading, unloading and transporting foodgrains at the godowns of the appellant at Cossipore and Grey Street, Calcutta, for a period of two years from 7.3.69 to 6.3.71. The contract did not contain any term guaranteeing that the appellant would allot any definite volume of work to the respondent every month but the appellant was under the obligation to allot work for which the respondent would be entitled to a minimum remuneration per month. Clauses XIV (a) and XIV (b) of the Tender contained the aforesaid terms. At the time of execution of the instant contract, the amount of money to be paid by the appellant to the respondent by way of minimum remuneration was left blank in clause XIV(b) of the contract. The appellant allotted work to the respondent upto 29.3.70 and the respondent carried, loaded and unloaded the same and for the works done, became entitled to receive Rs. 30,60,746.09p. The appellant duly paid the said sum to the respondent. Thereafter the appellant did not allot any work at all to the respondent during the unexpired period of the contract, i.e., from 30.3.70 to 6.3.71. The appellant also did not cancel the said contract which remained in force.

2. Under the aforesaid circumstances, the respondent instituted a suit in this

Court against the appellant for recovery of damages, being Suit No. 285 of 1972 claiming Rs. 68,696:28p: for loss of profit suffered by him for the unexpired period of the contract. Alternatively he claimed a decree on the basis that he was entitled to receive minimum remuneration of Rs. 7,500 per month for the entire unexpired period. In further alternative, he prayed for an enquiry into damages and decree for the amount found due to him from the appellant upon such enquiry. The appellant contested the said suit. On 3.8.77, by consent of the parties, the learned trial Judge referred the matter to a Special Referee for deciding the issue framed as follows :

"What are the damages suffered by the plaintiff, if any, for breach of the agreement by non-supply of "work to the plaintiff during the period from May 30, 1970 to March 6, 1971 in terms of the tender and/or agreement between the parties."

3. From this order it becomes clear that the breach of contract by the appellant was an admitted fact. Mr. P. K. Paul, Barrister-at-Law was appointed as the Special Referee for the purpose of ascertaining the quantum of damages suffered by the plaintiff the respondent herein.

4. Before the Special Referee, the respondent himself gave evidence. On behalf of the appellant, two witnesses were examined. Upon considering the oral and documentary evidence before him and upon hearing the submissions made on behalf of the parties by their respective counsel, the Special Referee submitted his report, dated 11.10.77 holding that the respondent would be entitled to recover a sum of Rs. 40,000 from the appellant by way of damages.

5. This report, dated 11.10.77 was challenged by both the parties thereto. The appellant filed an application on 19.12.77 for setting aside the said report and for a fresh reference for ascertaining the damages, if any, suffered by the respondent. The respondent also took out an application on 1.2.78 for variation or modification of the said report by increasing the quantum of damages on the allegation that on the basis of the evidence on record it would be found that the damage suffered by the respondent was much more than Rs. 40,000 allowed by the Special Referee. The appellant's application for setting aside the report, dated 11.10.77 was contested by the respondent and by an order, dated 22.5.78 the said application was dismissed with cost. The appellant did not prefer any appeal from that order. On the application of the- respondent for enhancing the damages, the learned trial Judge, upon hearing both the parties increased the amount of damages from Rs. 40,000 to Rs. 69,250 and accordingly a decree was passed for that amount on 5.6.78 with interim interest and interest on judgment at the rate of 6% per annum and costs including the costs of the reference. The present appeal is directed against the judgment and decree, dated 5.6.78.

6. The Counsel for the appellant submitted that while contesting the respondent's application for variation of the report of the Special Referee, the appellant had taken the point that there was no evidence before the Special

Referee to arrive at the finding that the quantum of damage suffered by the respondent was ,Rs. 40,000. The report was liable to be set aside. This plea had been expressly taken in the affidavit-in-opposition before the trial Court and as such the appellant would be entitled to agitate before this Court that the report of the Special Referee was not supported by any evidence and should be set aside. He invited this Court's attention to paragraphs 26 and 44 of its affidavit-in-opposition filed in this proceeding before the trial Court. The respondent, on the other hand, submitted that the appellant did not prefer any appeal from the order, dated 22.5.78 dismissing its application for setting aside the report on the identical ground. Therefore, the appellant should not be allowed to re-agitate that ground in the present appeal. The order, dated 22.5.78 became binding on the parties and the appellant would be debarred from re-agitating that point on the principles of *res judicata*.

7. In the opinion of this Court, the order, dated 22.5.78 has become final and binding. The appellant has lost its right to get the said report set aside by not preferring any appeal from the order, dated 22.5.78. Now, in this appeal, the appellant is not entitled to attack the entire report once more as the scope of this appeal is limited to the question whether the enhancement of the damages by the learned trial Court was justified on the basis of the materials available. The appellant by taking advantage of this proceeding, cannot ask for setting aside the report. What the appellant is not entitled to do directly, it cannot do it indirectly.

8. The counsel for the appellant submitted that the learned Trial Court had accepted the oral evidence of the respondent before the Special Referee that subsequent to the agreement, one of the officers of the appellant, had told the respondent that the minimum remuneration payable by the appellant to the respondent would be Rs. 7,500 per month. On the basis of this evidence, the amount of damages was increased from Rs. 40,000 to Rs. 69,250 holding that this oral evidence remained uncontroverted. The appellant's counsel invited this Court's attention to the respondent's answers to Qs. Nos. 98-102 in examination-in-chief and answers to Qs. Nos. 483-485 in cross-examination and submitted that the story made out by the respondent in his examination-in-chief was demolished completely in cross-examination. The respondent set up an entirely different story in cross-examination. In examination-in-chief, his case was that 5/6 months after the agreement, the then Regional Manager of the appellant told him that the minimum remuneration would be Rs. 7,500 per month but he could not remember his name. But, in cross-examination the respondent changed his case and alleged that although in the written agreement the figure of minimum remuneration in clause XIV(b) was left blank, the officers of the appellant told him that the blank space in clause XIV(b) should be read as Rs. 7,500 per month. As the respondent did not mention the name of the alleged officer, it was not possible for the appellant to call any witness to refute this story. But, in fact it was not necessary to call any witness on behalf of the appellant to controvert this case as the respondent himself controverted and

demolished his case in examination-in-chief in cross-examination by giving a different version regarding filling up of the blank space in Clause XIV(b) of the contract. This oral evidence in cross-examination Qs. Nos. 483-485 was inadmissible in evidence u/s 93 of the Indian Evidence Act. He invited this Court's attention to illustration (b) to this Section which is as follows :

"A deed contain blanks. Evidence cannot be given of facts which would show how they were meant to be filled."

9. He submitted that if the evidence in examination-in-chief was destroyed by the evidence in cross-examination which was inadmissible in evidence, nothing remained. The evidence in examination-in-chief could not be relied upon. On these materials, the learned trial Judge, instead of rejecting this evidence, held that the evidence remained uncontroverted.

10. Reading the evidence referred to above, this Court has no hesitation to hold that the respondent himself has destroyed his own case by his answers to the questions put to him in cross-examination and these answers are inadmissible in evidence u/s 93 of the Evidence Act and must be rejected. With due respect to the learned Trial Judge, this Court differs from the view taken by the learned Trial Court on this point.

11. Realising this difficulty, the counsel for the respondent submitted that in the present case the counsel for the appellant had conceded before the Special Referee that the minimum remuneration was Rs. 7,500 per month. He placed pages 585 and 587 of the Paper Book in support of his contention and submitted that the said admission of fact by the counsel was binding on the appellant. On this point, he relied on A 1918 Cal 282 (Jahadali and Ors. v. Ajimunnessa Bibi) A 1927 Lah 748 (Raisal Singh v. Monoharlal and Ors.) and A 1940 F.C. 25 (Raja Prithwi Chand Lall Chowdhury v. Sukhraj Rai). It was submitted by the respondent's Counsel that on the basis of this admission of fact by the appellant's counsel, which was binding on the appellant, the decree of the trial Court enhancing the amount of damages should be upheld although it may not be supported on the basis of the oral evidence of the respondent. It is not possible to accept this submission on behalf of the respondent. Before the Special Referee, the appellant's counsel Mr. Bose conceded that if the contract was terminated, the respondent would have been paid Rs. 7,500 as one month's remuneration by the appellant in lieu of one month's notice as will be evident from paragraph 10 of the Report at page 615 of the Paper Book. The Special Referee also recorded in the last sentence of paragraph 12 of the Report at the same page :

"What was disputed in this reference by Mr. Bose is the quantum of minimum remuneration and not the principal".

12. Therefore, the lawyer's concession, if any, was not made as an admission of fact that the minimum remuneration payable was Rs. 7,500 per month. Obviously the aforesaid submission was made by the lawyer in course of his

argument. In that view of the matter, this concession by Mr. Bose cannot be treated as an admission of fact binding, on the appellant. Hence neither the Special Referee nor the trial Court could rely on this concession made by Mr. Bose. In that view of the matter, it would be unreasonable to hold that Mr. Bose made an admission of fact, The cases cited by the respondent's counsel, referred to above, cannot have any application on the facts and circumstances of this case. Assuming that an admission of fact was made by Mr. Bose in respect of minimum remuneration, still this admission cannot be relied upon considering the provisions of the Evidence Act. u/s 31 of the Evidence Act, admissions are not conclusive proof. Moreover, no oral admission can be allowed for filling up the blank space in Clause XIV(b) of the contract u/s 93 of the Act. Further, this oral admission was in respect of contents of the contract. Section 22 of the Evidence Act provides :

"Oral evidence as to the contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document."

13. Certainly in the present case, there was no occasion for adducing any secondary evidence as the original contract was before the Special Referee.

14. It was submitted on behalf of the appellant that the respondent was entitled to defend the decree as it was under Order 41 Rule 22 of the C.P.C. and not on any other different ground. Hence the respondent could not rely on the alleged admission of Mr. Bose. It is not necessary to deal with this point as no admission of fact was made by Mr. Bose.

15. The appellant's counsel also submitted that the suit was filed for recovery of damages for breach of contract. On the facts of this case, the measure of damage should be the loss of profit and not the minimum remuneration per month. There was no evidence on record for loss of profit. In support of his contention, he relied on A 1962 S.C. 366 (Murlidhar v. Harischandra). He also cited several other cases. In the opinion of this Court, after the dismissal of the appellant's application for setting the report, it is useless to argue at this stage about the principles of measure of damages in case of breach of contract. The report of the Special Referee cannot be reopened on this ground in this appeal.

16. For the reasons mentioned above, the appeal succeeds and with due respect to the learned trial Judge the judgment and decree of the learned trial Court, dated 5-6-78 are set aside. The report of the Special Referee, dated 11th October, 1977 is confirmed and a decree is passed in accordance with the report for Rs. 40,000 with interim interest and interest on judgment at the rate of 6% per annum and the cost of the reference. The respondent will pay the cost of this appeal to the appellant.

R.N. Pyne, J.

17. I agree.