

(1974) 10 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 11 of 1972

Gani Joo Ahsan Joo sons.

APPELLANT

Vs

Conservator of forests, Jammu Forest Circle & Another

RESPONDENT

Date of Decision : 16-10-1974

Acts Referred:

Jammu and Kashmir Evidence Act, 1977 — Section 91

Citation : (1976) KashLJ 131

Hon'ble Judges : S.M.F.Ali, C.J and Baha-Ud-Din Farooqi, J

Bench : Division Bench

Advocate : R.S.Mehta, Amar Chand, Advocates appearing for the Parties

Judgement

Mufti, J.

(1) The conservative of forests, Jammu Forest Circle, issued a notice tenders for the right to convert and remove timber from trees marked for

falling in Compartments 101 (a), 99 and 100 (b) of Dudu Range, Udhampur Division. The petitioner was the successful tenderer. His tender was

accepted by the Government, being the competent authority, under Govt. order No. Fst/33/64 of 1964 dated 1841964 (Annexure 'C' to the

petition.) Thereafter the parties executed a formal deed on 1451964 as provided in the tender notice. The deed was signed on behalf of the state

by the Conservator of Forests contrary to the directions contained in Government order No. 187 of 1963 dated 7363 (annexure 'b' to the petition)

which required such deeds to be signed by the Chief Conservator of Forests. Upon the execution of the deed, however, the coupe was handed

over to the petitioner and he was allowed to start the work (Annexure 'p1 to the petition). He actually worked out the leaf e but fell in arrears as

regards the payment of royalty. The Government started action for the recovery of the arrears of royalty as arrears of land revenue as per letter No.

188 dated 14/1/1972 addressed by Divisional Forest Officer Udhampur Division, to Collector, Recovery of Forest arrears, Jammu (Annexure 'A')

to the petition). Aggrieved by this action, the petitioner filed the present writ petition challenging the recovery proceedings as ultra vires, illegal and

without jurisdiction on the ground that the contract was void and the obligations thereunder unenforceable. The petition came up for hearing before

a learned single Judge of the court, D. D. Thakur, J, who referred it to a larger bench observing :

I have heard the learned counsel for the parties for quite some time. Mr. Amar Chand concedes that the lease agreement impugned in this petition

is void as admittedly the Conservator of Forests who signed the agreement on behalf of the Sadari Riyasat was not authorised to enter into a

contract on behalf of the Governor, under section 122 of the Constitution of Jammu and Kashmir. This concession has been made in view of the

full Bench judgment of this court in goodwill Forest Company vs. Conservator. He has, however, contended that even when the lease agreement is

held void on account of nonfulfillment of the necessary requirements of section 122 of the Constitution he can fall back upon other documents and

spell out a contract free from any constitutional infirmity. He has relied upon the tender notice, the tender, the letter of the Government accepting

the tender submitted by the petitioner and the work order dated 1st May, 1964. According to him, these documents can be looked into for

purposes of determining whether a contract independently of the formal agreement, had come into being between the parties. He has referred to a

number of the judgments both of the Supreme Court as also of the various High courts on this question and has argued that even in the absence of

a written agreement a valid and enforceable contract can be spelt out from the correspondence exchanged between the parties.

This is how this petition has come before us.

(2) There is no dispute that the formal deed is void and unenforceable as it was executed and signed on behalf of the State by an unauthorised

person. Even so, argued Mr. Amar Chand on behalf of respondent, a valid and binding contract could be spelt out from the offer and acceptance.

That can be so only if the formal deed constitutes the record of the previously concluded contract and does not itself create a contract because if

the contract is embodied in a formal deed, other evidence will be inadmissible under section 91 of the Evidence Act to prove the contract. In

substance, therefore, the contention of Mr. Amar Chand is that in the present case the formal deed does not itself create the contract, but it is

merely the record of a previously concluded valid and binding contract between the parties. The contention of Mr. Mehta on behalf of the

petitioner, on the other hand, was that the formal deed constituted a completed contract and not only the record of a previously concluded contract

based on offer and acceptance. In any case, he further argued, the contract based on the offer and acceptance also suffered from the vice of not

conforming to the provisions of section 122 of the Constitution of Jammu and Kashmir and was therefore unenforceable.

(3) The principal question that falls for determination in this case is whether the formal deed itself created a contract or it was merely the record of

a previously concluded contract between the parties. Whether an agreement deed is a completed contract or merely the record of a previously

completed contract depends on the intention of the parties as deducible from the language of the deed and, where the deed is on a doubtful tenor,

evidence may be given of the surrounding circumstances to show how the language of the deed is related to the existing facts.

(4) Turning to the agreement deed in the present case one cannot help observing that it was intended to constitute a completed contract and not

merely the record of a previously completed contract. After giving the description of the parties whom it styles as 'Lessor on the one party' and the

'purchaser on the other part', it provides by clause (1) :

The Lessor in consideration of the payment of the purchaser (s) as hereinafter provided, of the amount of Rs. 2451111.11 np. (Rupees Twenty

four lacs fifty one thousand one hundred eleven and Naya paisa eleven only) agrees to sell to the purchaser (s) and the purchaser (s) agree/ agrees

to purchase, subject to the conditions hereinafter appears and to the conditions published in the tender notice, a copy of which is hereto attached,

the right to convert and remove timber from the trees, marked for felling in compartment (s) 101 (a), 99 and 100 (b) of the Regeneration

Selection Deodar Kaul Regeneration Regular working Circle (s) in Dudu Range of Udhampur Forest Division, abstract of which is given in clause

2 and details whereof appears in the marking list (s).

(5) The language of this clause is clearly operative and not merely descriptive. It brings about the meeting of minds between the parties its own

force and does not refer to such meeting having taken place before. The word used are that the lessor 'agrees to sell to the purchaser' and the

'purchaser agrees to purchase'. The conditions of the contract too are not limited to those given in the tender notice which this clause makes a part

of the agreement but also additional condition given in the agreement deed itself. That could not be so if the agreement deed was not intended to

create the contract by itself and was instead intended to operate merely as a record of the previous concluded contract. In the latter case the

appropriate words to be used were that ""the lessor has already agreed to sell"" and ""the purchaser has already agreed to purchase"" and the

conditions too would have been limited to those given in the tender notice as the offer and acceptance were both subject to those conditions and

none else. Clause (1) is not however the only provisions which might lead one to the conclusion that the agreement deed was regarded by the

parties as forming the foundation of the contract. The whole tenor of the deed more particularly the provisions of clauses 5 & 12 fortify this

conclusion. These clauses, in so far as relevant, read thus :

(5) ""Trees, marked for fellings will be handed over to the purchaser (s) as soon as the purchaser (s) sign/signs the agreement together with a

detailed marking list showing the measurements and the species of each tree and summary showing the volume of each specie mark in each

compartment.

12. ""The period of this lease will extend from the date of this agreement is signed by the purchaser (s) until the end of June 1968 by which time the

whole produce must be removed to or beyond Srinagar / Jammu failing which the produce left behind will remain the property of the Government.

(6) The commencement of the lease of its working could not remain suspended as these clauses amount to if there was a previously concluded

contract. The implication clearly is that the converse is true. The letter annexure 'D' to the petitioner from Conservator of Forests, Jammu to

Divisional Forest Officer Udampur Forest Division, copy whereof was endorsed to the petitioner, leads to the same conclusion. The letter reads

thus :

M/S Gani Joo Ahsan Joo and Sons Forest Lessees have signed the agreement in this offices and have paid following amounts :

a) Security.....Rs. 36, 7671

b) 1/6 Sinking Fund Rs. 4, 088/

c) Part royalty. Rs. 30, 000/

Total Rs. 70, 855/

The coupe may please be Landed over to the Forest Lessees after enlisting damage on proper receipt from the lease, under rules and permitted to start work.

(7) I have, therefore, no doubt in my mind that the agreement deed itself created the contract and did not constitute the record of a previously concluded contract.

(8) Mr. Amar Chand referred to clause 26 of the Tender notice and argued that the acceptance concluded the bargain and that the execution of

the agreement deed was a mere formality and not a condition of the bargain. In view of the unambiguous language of the agreement deed this

argument does not arise and is even unjustifiable in law. That apart, let us examine it on merits. Clause 26 reads thus :

As soon as the acceptance of the tender is communicated to the successful tenderer the contract shall be complete and binding on him. A formal

deed incorporating the terms of the contract will be executed by the successful tenderer later on. Failure to execute such a formal deed within

prescribed period shall not, however prevent the contract from being enforced against him. Any loss sustained by the Government as a result of

retendering the contract shall be recovered from him.

Prima facie this clause may justify the argument but in construing the true effect of this clause one must necessarily look at other relevant provisions

of the tender notice. The relevant provisions may be noticed here :

1. ""The form of agreement in each case which the successful tenderer shall have to enter into can be had from the Supdtt. CF Jammu Circle,

Jammu. This form gives all details of terms and conditions of the lease."" (Clause

9)

2. ""The successful tenderer will have to pay the balance of the security which shall have to be deposited in the treasuries or banks mentioned in

clause II above and sign the agreement within fifteen days of the acceptance of his tender otherwise his earnest money will be forfeited and the

purchasers will be debarred from taking further leases.

Fellings will be allowed to be commenced after the agreements have been signed and all produce must be removed beyond the coupe boundary or

the launching streams by the end of the following years of a particular years coupe.

(clause 13)

3. ""No telegraphic communication or application either by post or dasti for increasing decreasing or withdrawing any offer received before opening

the tenders will be entertained. If any tenderer withdraws his / their offer after opening of tenders his/their earnest money will be forfeited and

he/they will be liable to be blacklisted. All tenderers are bound to abide by their offers until any one of the tender is finally sanctioned and

agreement executed."" (clause 19)

4. ""The Department does not bind itself to accept any or the highest tender nor will reasons be given for the rejection of any tender. Further the

Department reserve the right to allot work to the successful tenders according to their experience, working capacity and financial resources in case

they secure more than one case. The Department also reserves the right to allot work to a successful purchaser on the condition that he pays 1st

installment or any part thereof as may be fixed by the CCF at the time of signing the agreement."" (clause 20)

(9) These provisions unmistakably suggest that the execution of the agreement deed was intended as a condition precedent and not merely a

formality which could be ignored. I might even add that the making of the security deposit and payment of the first instalment too were regarded as

conditions precedent. Regarding clause 26 with the preceding clauses it is not thereof possible to accept Mr. Amar Chand's argument that the

execution of the agreement deed was intended to be a formality and not a condition precedent of the bargain.

(10) In the view expressed above the contract must be held to be founded on

the agreement deed. Admittedly the agreement deed is void and unenforceable. The contract cannot therefore entitle the Govt. to recover the arrear royalty as arrears of land revenue as the amount due on the sale of forest purchase under section 52 of the Forest Act, 1987. The pending recovery proceedings, founded as they are on that section, are therefore illegal and incompetent. What then is the remedy left for the State in the matter, we are not called upon to adjudge in this case and we leave that question open.

(11) I. therefore, allow this petition and hold that the recovery proceedings pending before the Collector Recovery of Forest Arrears, Jammu are illegal and incompetent and hereby quash the same. In the peculiar circumstances of the case I order the parties to bear their own costs.