
(1975) 04 DEL CK 0004

In the Delhi High Court

Case No : Regular First Appeal No. 130D of 1965

Hbra Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-04-1975

Acts Referred:

Citation : (1975) ILR Delhi 526

Hon'ble Judges : Yogeshwar Dayal, J;V.S. Deshpande, J

Bench : Division Bench

Advocate : B.K. Mehtab Singh, Bikram Singh, A.B. Saharia and V.B. Soni, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) This is a plaintiff's appeal against the dismissal of his claim for Rs. 51.856/9/ by the trial court. The respondent-Union of India was the defendant No. 1 in the trial court.

(2) The plaintiff-appellant entered into a contract with the defendant-respondent for the supply of meat on terms and conditions which are embodied in the instructions to Tenders, the tender and the Acceptance of Tender. He deposited Rs. 18,000.00 as security for the performance of contract, the amount being deposited in the savings bank account, the pass book of which was delivered to the defendant respondent. The officer sanctioning the contract could rescind it if the plaintiff were to commit a breach of it and thereupon the amount of security deposit or such portion thereof as the officer sanctioning the contract should consider fit or adequate was to stand forfeited without prejudice to any other remedy that the Government might have against the plaintiff. The officer sanctioning the contract was to be indicated by filling the blank in clause 12 of the instructions to tenderers. The blank was filled by the insertion of the officer as being the Commander 181, Independent Brigade, Group therein. In clause 8 of the Tender, however, the expression "officer sanctioning the contract" was

defined to include the following three officers, namely, (a) Sub-area Commander, (b) Area Commander and (c) Q. M. G., Army Headquarters. The Government was also authorised by clause 8 of the Tender in case of rescission of the contract to recover from the plaintiff any extra expenses the Government may be put to in obtaining the supplies which the plaintiff failed to make without prejudice to any other remedy the Government may have against the plaintiff.

(3) It is not disputed by the plaintiff that he defaulted in making supplies and the Government had to purchase the supplies elsewhere at a higher rate thereby incurring an additional expense of Rs. 33,142/11/. Nevertheless, the plaintiff did not admit his liability for the payment of the amount of Rs. 33,142/11/. Immediately on the failure of the plaintiff to make the supplies, the Government informed the plaintiff on 27th January, 1953 that the contract was rescinded under clause 8 of the Tender and the security deposit of Rs. 18,000.00 was forfeited. The plaintiff was also informed that any extra expense that the Government may be put to in obtaining supplies from alternative sources would also be recovered from the plaintiff. After the completion of the purchases from the alternative sources, the Government informed the plaintiff on 3rd June, 1953 that the amounts of Rs. 16.001/5/ and of Rs. 18.343/7/ making a total of Rs. 34,344/12/ were being recovered from the money due to the plaintiff from the Government on bills for other supplies which the plaintiff had made. Thus the Government purported to recover from the plaintiff the whole of the security deposit of Rs. 18,000.00 as well as Rs. 34.344/12/ though the loss caused to the Government by the failure of the plaintiff to make the supplies amounted only to Rs. 34,344/12/.

(4) The plaintiff filed a suit against the Government on the 8th of August, 1956 for the recovery of two amounts, namely, Rs. 18,000 which had been forfeited by the letter dated 27th January, 1953 and Rs. 33,142/11/ out of the amount of Rs. 34,344/12] inasmuch as the rest of the amount of Rs. 1,202/01/ was admitted by the plaintiff as having been due to the Government.

(5) The plaintiff contended that under Article 299 of the Constitution, it was only the G.O.C.-in-C, Eastern Command who was authorised to enter into the contract with the plaintiff on behalf of the President of India. But the plaintiff had not made any offer to him. The said G.O.C.-in-C, Eastern Command had, Therefore, no authority to accept the tender of the plaintiff which could have been accepted only by the Commander 181, Independent Brigade who was the officer mentioned in clause 12 of the instructions So tenderers as being authorised to approve or reject the "tender of the plaintiff. The plaintiff, Therefore, contended that there was no concluded contract between him and the Government and that the plaintiff was entitled to recover the above mentioned two sums of money with interest.

(6) The defense of the Government was that normally the sanctioning authority for the A.S.C. Contracts was Commander 181, Independent Brigade provided that the total value of each contract sanctioned by him fell within his financial

power which were Rs. 3 lacs. As the value of meat contract concluded with the plaintiff exceeded the financial power of the above mentioned officer, it was necessary under the existing regulation that the contract should be sanctioned by the next authority which was the G.O.C.-in-C, Eastern Command. The contract which was concluded with the plaintiff was sanctioned by the G.O.C.-in-C, Eastern Command. It is to be noted that under clause 8 of the Tender, the G.O.C.-in-C. was also the sanctioning authority for the contract inasmuch as he was the Area Commander within the meaning of that clause. There was a valid contract between the plaintiff and the Government which was rightly rescinded by the competent authority who had sanctioned the contract. In accordance with the terms of the contract, the amount of the security deposit was forfeited and the extra expense incurred by the Government in making purchases of goods which the plaintiff had failed to supply was also rightly recovered from the plaintiff.

(7) Clause 21 of the Tender provided for arbitration of disputes arising out of the contract. The plaintiff had demanded reference of dispute to arbitration but the demand was not complied with by the Government. plaintiff, then moved an application on 22nd October, 1953 under Sections 8 and 20 of the Arbitration Act in the Court of Sub-Judge 1st Class Delhi but later the application was dismissed as withdrawn on 21st March, 1954. The period which was spent by the plaintiff in getting the dispute decided by arbitration was, according to the plaintiff, to be excluded in computing limitation for the suit u/s 37(5) of the Arbitration Act.

(8) The trial Court held that the tender submitted by the plaintiff was accepted by a properly authorised officer of the Government, that the contract was rescinded by the said officer who was also authorised to do so and that the Government was entitled to recover amount of Rs. 33,142/II/ from the plaintiff on account of the loss caused to the Government by the breach of contract committed by the plaintiff. The trial court, however, held that the forfeiture of the security deposit was in the nature of penalty and that the amount of Rs. 18,000.00 was a heavy one and the forfeiture of the whole of it was of a penal nature and could not be legally justified. The court further held that the period spent by the plaintiff in getting the dispute decided by arbitration could not be excluded from the computation of limitation for the suit inasmuch as Section 37(5) of the Arbitration Act did not permit such deduction on the facts of the present case. The Court then observed that the security was confiscated on 27th January, 1953 and a suit for the refund thereto had to be filed by the plaintiff within 3 years under Article 115 of the Limitation Act subject to the addition of two months to the period of limitation u/s 80 Civil Procedure Code, notice under which was given by the plaintiff before filing the suit. As the suit was filed beyond the period of limitation, even the claim for the refund of security deposit was barred by time. The claim of the plaintiff was not governed by Article 145 which provided for 6 years limitation. The present appeal is against this decision of the trial court.

(9) The contentions raised by the learned counsel for the appellant before us were as follows, namely, (1) that the contract was not accepted by an officer authorised to do so on behalf of the President of India, (2) nor was it rescinded by an authorised officer, (3) that the plaintiff-appellant was, Therefore, entitled to a decree to the whole of the amount claimed by him and (4) that the suit was not barred by limitation inasmuch as the limitation for the suit was governed not by Article 115 but either by Article 145 or Article 120 of the First Schedule of the Limitation Act, 1908. These contentions are considered below.

(10) Contention NO. 1 : There are two provisions in the contract specifying the officer who was entitled to accept the Tender of the plaintiff. In clause 12 of the instructions to tenderers the officer is mentioned as the Commander 181, Independent Brigade .It is significant, however, that the insertion in the blank space in clause 12 naming the said officer was made in pursuance of the requirement of a note at the end of the instructions to tenderers which was as follows :

" THE officer who sanctions the contract, as specified in Financial Regulations, India Part 1".

THE name of the officer to be inserted in clause 12, according to this note, was to be of the officer who sanctions the contract as specified in Financial Regulations, India Part 1. The other provision is in clause 8 of the Tender in which the officer sanctioning the contract is mentioned as the Area Commander who was the G.O.C-in-C, Eastern Command. The Explanation why the name of the Commander 181, Independent Brigade was entered in clause 12 of the instruction to tenderers has been given in the written statement of the Government as also in the evidence of Lt. Col. Khanna who deal with this contract as a deputy of the said Commander 181, Independent Brigade. Normally, the officer sanctioning the A.S.C. Contracts is the Commander 181, Independent Brigade .It is only when the value of the contract exceeds Rs. 3 lacs that it has to be sanctioned by the G.O.C.-in-C. The officer normally entitled to accept the contract was named in clause 12 of the instructions to tenderers but this was strictly not in accordance with the note at the end of the said instructions because the value of the contract was over Rs. 3 lacs and the officer entitled to sanction it was the G.O.C.-in-C, Eastern Command. Clause 12 of the instructions to tenderers has, Therefore, to be read in the light of the note at the end of it as also along with clause 8 of the Tender which mentions the Area Commander i.e. G.O.C.-in-C, Eastern Command as the officer sanctioning the contract. On reading them together, two conclusions follow. Firstly, the officer sanctioning the contract was the officer entitled to approve or reject the Tender of the plaintiff. Secondly, the said officer was the G.O.C.-in-C, Eastern Command. There are two methods by which an officer may be authorised by the Government to enter into a contract on behalf of the President of India. One method is to indicate the said officer in the terms of the contract itself which are binding on the contractor as well as the Government. The second method is to

name the officer in the notification which is issued under Article 299 of the Constitution enumerating the officers authorised to enter into contracts on behalf of the President of India. According to the first method, the G.O.C.-in-C) Eastern Command was the officer authorised to accept the Tender of the plaintiff. In the plaint, it has been admitted by the plaintiff that under Article 299 also, it was the G.O.C.-in-C who was authorised to accept the Tender of the plaintiff. By both these methods, Therefore, the officer entitled to accept the tender was the G.O.C.-in-C, Eastern Command. Lt. Col. Khanna in his evidence has stated that the tender was put by him before the Commander 181, Independent Brigade who recommended it to the G.O.C.-in-C who sanctioned the contract. We find, Therefore, that the tender was accepted by an officer authorised to accept the same.

(11) Contention NO. 2 : By Clause 8 of the tender, the officer sanctioning the contract had the power to rescind it. The rescission was done by the letter dated 27th January, 1953 which is signed by the G.O.C.- in-C, who was the officer sanctioning the contract and was, Therefore, entitled to rescind the same.

(12) Contention No. 3: The claim in suit was for two distinct amounts, namely, (a) for the refund of security deposit forfeited at the time of the rescission of the contract by the Government and (b) for the recovery of the money which was due to the plaintiff from the Government as the price of goods supplied but which was adjusted or recovered by the Government from the plaintiff on the ground that the Government had the claim for damages against the plaintiff and the contract gave the Government the right to recover from the plaintiff compensation for loss caused to the Government by the breach of contract consisting of the failure of the plaintiff to make the supplies of the goods to the Government. Though the right to forfeit the security is given to the Government without prejudice to the other remedies the Government may have against the contractor (including the remedy to recover the compensation for breach of contract), in view of the construction of Section 74 of the Contract Act by the Supreme Court in *Maula Bux Vs. Union of India (UOI)*, following *Fateh Chand v. Bal Kishan Dass*, 1963 Supreme Court 1405 the stipulation was by way of a penalty within the meaning of the said section 74. "The right of the Government, Therefore, was to recover reasonable compensation not exceeding the amount so stipulated by way of penalty. It was for the Court to determine on the facts of this particular case as to what amount of compensation would have been reasonably payable to the Government whether or not actual damage or loss was caused to the Government by the breach of contract. The plaintiff has admitted that the Government suffered a loss of Rs. 34,344/12/ by his failure to make certain supplies of goods to the Government. On the facts of this case, Therefore, reasonable compensation payable to the Government was equivalent to the actual loss caused to the Government. The forfeiture of the security deposit by the Government on 27th January, 1953 was, Therefore, in view of Section 74, a partial recovery of the claim for damages payable by the plaintiff to the Government. To this extent, the absolute right to forfeit the security deposit

without prejudice to right of the Government to recover damages From the plaintiff given by the contract was modified by Section 74 of the Contract Act. The claim for damages was thus partly satisfied by the forfeiture of the security deposit. When the Government purported to recover from the plaintiff on 3rd June. 1953 another amount of Rs. 34,344/12/, though the Government acted in accordance with the letter of the contract, the effect of Section 74 of the Contract Act was that the Government in the eyes of law recovered an excess of Rs. 18,000.00 from the plaintiff inasmuch as reasonable compensation payable to the Government by the plaintiff in view of Section 74 of the Contract Act was restricted to Rs. 34,344/12/ which was the actual loss suffered by the Government by the breach of contract. The two claims made by the plaintiff against the Government have to be treated together because the right of the Government against the plaintiff in this contract was restricted to Rs. 34,344/12/ because of the provision of Section 74 of the Contract Act. This is why the action of the Government in forfeiting the security deposit on 27th January. 1953 and in further recovering the amount of Rs. 34,344/12/ on 3rd June, 1953 has to be viewed as one action to recover reasonable compensation from the plaintiff as warranted by Section 74 of the Contract Act even though the terms of the contract have purported to keep these two rights of the Government distinct and enforceable independently without prejudice to each other.

(13) Contention NO. 4 : The question whether the suit or a part of it is barred by time depends on the nature of the cause of action for the suit which would determine which particular article of the First Schedule of the Limitation Act, 1908 would apply to the suit: On the one hand, it is arguable that as soon as the security deposit was forfeited by the Government on 27th January, 1953, the cause of action for the refund of the security deposit arose in favor of the plaintiff inasmuch as the letter forfeiting the security deposit did not mention that the forfeiture was being appropriated as reasonable compensation for the loss caused to the Government by the breach of contract on the part of plaintiff. Had the Government not made any risk purchase of the goods from alternative sources to replenish the shortage in the supplies caused by the breach of contract committed by the plaintiff, it would not have been known what loss was caused to the Government by the breach of contract. The limitation for the recovery of the security deposit would then have run against the plaintiff from 27th January, 1953. But in this particular case, the Government made the risk purchase and by the letter of 3rd June, 1953 informed the plaintiff the exact amount of loss caused to the Government by the breach of contract. It was, Therefore, for the first time that it became known that the action of the Government was contrary to the provisions of section 74 of the Contract Act inasmuch as Rs. 18,000.00 in excess of reasonable compensation were recovered by the Government from the plaintiff. Once these facts are known, it can no longer be doubted that the cause of action arose in favor of the plaintiff for the first time on 3rd June, 1953 when the excess recovery was made by the Government.

(14) What is the nature of this cause of action ? It is clear that the action of the Government in forfeiting the security deposit and in recovering Rs. 34,344/12/ was strictly in accordance with the terms of the contract. The plaintiff cannot, Therefore, complain that the Government committed any breach of contract in recovering these two amounts from the plaintiff. But the terms of the contract are subject to the mandatory provisions of Section 74 of the contract Act. The nature of the claim made by the plaintiff, Therefore, must be based on the provisions of Section 74 of the Contract Act. Its nature must, Therefore, be determined in the light of the provisions of Section 74 of the contract Act. The effect of Section 74 is to limit the contractual rights of the Government against the plaintiff to reasonable compensation not exceeding the amount mentioned or penalty stipulated in the contract. It is only because the actual recovery by the Government exceeds the amount of reasonable compensation that the plaintiff can make a claim against the Government for the refund of Rs. 18,000.00 . The nature of the claim of the plaintiff, in our view, is, Therefore, a claim based on a statute or a right arising out of a statutory provision.

(15) Learned counsel for the respondent urged that the claim of the plaintiff was for compensation for breach of contract and, Therefore, was covered by Article 115 of the Limitation Act of 1908. He pointed out that the word "compensation" was not restricted to un-liquidated damages but would cover even a definite and ascertained sum. But we could not know from him as to what was the breach of contract which could be alleged to have been committed by the Government. For, as already stated above, the action of the Government was entirely in accordance with the terms of the contract. It is only if the provisions of Section 74 of the Contract Act are regarded as implied terms of contract that an argument could be stretched in favor of the application of Article 115 to the claim in suit. Action contrary to Section 74 may then be said to be action which is a breach of an implied term of the contract. But the meaning of an "implied term" is not so wide as to include the provisions of any statute which may apply to the conduct of the contracting parties. Normally "terms will be implied where they are necessary to effectuate the intention of parties or where they are required by statute". (Sutton and Shammom on Contracts, 7th Edition page 94). The effectuation of the intention of the parties is to be gathered from the facts of the case and is a question of fact. In the present case, there could be no intention on the part of the contracting parties to restrict the claim of the Government to reasonable compensation for loss caused by breach of contract inasmuch as the expressed terms of the contract gave the Government a right to forfeit security deposit in addition to the recovery of compensation for loss caused by the breach. Nor can it be said that such a terms is required to be read into this contract by statute. Examples of statutory implied terms may be gathered from the Sale of Goods Act. Such terms may either be implied subject to contract to the contrary or may be compulsorily implied notwithstanding the terms of a contract to the contrary. But Section 74 of the Contract Act does not purport to modify expressly the terms of a contract or to imply terms in a contract. It is

generally an independent provision of law under which the Court has power to decide what reasonable compensation may be paid to a party for breach of contract whether or not loss is caused to him. Just as Section 73 of the Contract Act is not regarded as an implied term of the contract but is rather regarded as the remedy given by law to a person seeking compensation for breach of contract and indicating the amount of compensation which may be so claimed. Section 74 is a supplementary provision dealing with penalty clauses in contract and statutorily resolving the distinction between liquidated damages and penalty. Neither any principle nor authority was brought to our notice why Section 74 should be regarded as an implied term of the contract. We are, Therefore, of the view that the suit of the plaintiff cannot be regarded as one for compensation for breach of contract either express or implied. Article 115 would not, Therefore, apply to it.

(16) The decision in *Dhanraj Mills Ltd. v. Laxmi Cotton Traders*, 1960 Bombay 404 (Chagla, C. J. and S. T. Desai, .S.) is distinguishable because at page 408 it was observed that it was possible to take the view that there was an implied contract under which the defendant agreed to repay the deposit if the plaintiffs could not perform their part of the contract for no fault of their own. On the facts of that case the plaintiffs could say that the defendant had broken the said implied term of the contract. The facts of the present case do not show any such breach of an implied term on the part of the defendant-respondent. Similarly, the decision in *Union of India v. M/s. Gangadhar Mimraj and another* AIR 1962 Pat 372 (Kanhaiya Singh and S. N. P. Singh, JJ.) was based on the facts of that case making it a breach of contract on the part of the defendant not to refund the security deposit to the plaintiff. The withholding of the security deposit was wrongful because it was contrary to the terms of the agreement. In the present case, on the other hand, the forfeiture of the security deposit was sanctioned by the agreement. These two decisions applying Article 115 to the claims considered therein are not, Therefore, helpful to the respondent in this case particularly because the claim of the plaintiff before us is not really a claim for the refund of the security deposit but is a claim for the recovery of excess compensation recovered by the defendant from the plaintiff. In *Ram Lal Puri v. Gokalnagar Sugar Mills Co. Ltd.* AIR 1967 Delhi 91 (K.S. Hegde, C.J. and I.D. Dua, J.) the sale could not go through for no fault of the parties. That part of the suit which was for the refund of the earnest money was, Therefore, held to be governed by Article 120 and not by Article 115 of the Limitation Act, 1908 as there was no question of any breach of contract. The other part of the suit regarding the recovery of the advance purchase money was held to be covered by Article 97 of the Limitation Act, 1908 inasmuch as the consideration for the sale failed when the sale became impossible under the circumstances. Article 115 of the Limitation Act was also held to be applicable to the facts of *R.S. Nawal kishore Vs. The Union of India*, because the failure to return of security deposit amounted to a breach of contract express or implied.

(17) Learned counsel for the appellant contended at one stage that Article 145 of

the Limitation Act, 1908 would govern the limitation for the suit inasmuch as the deposit of the savings bank accounts pass book in respect of 18,000.00 by way of security furnished by the plaintiff was a kind of pledge made by the plaintiff with the Government. The learned counsel relied on the decision of the Privy Council in AIR 1938 110 (Privy Council) where Article 145 was applied to the suit for recovery of Government promissory notes which were pledged by way of security. Firstly, Government promissory notes could be returned in specie. The concept of a pledge is that it has to be returned in specie according to the contract of pledge or bailment. A savings bank pass book is only a piece of evidence that the money stated therein is deposited by the customer in the bank. In itself the pass book is not property as a Government promissory note is. There is, Therefore, no question of pass book as such being returned in specie. It is well known that no suit can lie for the recovery of money in specie. Secondly, the present suit is not for the recovery of money in specie but for the recovery of the excess compensation realised by the defendant from the plaintiff. Article 145 does not, Therefore, apply to the present suit.

(18) In calculating the limitation period for the suit, learned counsel for the plaintiff-appellant had urged that the period spent by him in getting his dispute decided by arbitration should be excluded in view of Section 37(5) of the Arbitration Act. But Section 37(5) applies only to the exclusion of the period between the commencement of the arbitration and the date of the order of the Court setting aside an award or declaring that the arbitration agreement shall cease to have effect. In the present case there is neither an award nor an order of the Court to the above effect. Section 37(5) has, Therefore, no application. A reference was also made to Section 14 of the Limitation Act for the exclusion of the time spent by the plaintiff in pursuing his application for reference of the dispute to arbitration. But Section 14(1) of the Limitation Act, 1908 applies only when the proceedings was in a Court without jurisdiction which from a defect of jurisdiction was unable to entertain it. This cannot be said of the application which had been made by the plaintiff. Section 14 also, Therefore, cannot be pressed into service for the exclusion of any period of time in computing the limitation for the suit.

(19) Since neither Article 115 nor Article 145 of the Limitation Act, 1908 could be found to be applicable, the residuary Article 130 of the Limitation Act of 1908 would have to be applied to govern the limitation for the claim of the plaintiff for the recovery of the excess compensation. The cause of action there under arose in favor of the plaintiff on 3-6-53 as the right to sue did not accrue to him till the Government recovered compensation from him in excess of what was warranted by the provision of Section 74 of the Contract Act. It arose, Therefore, on 3rd June, 1953. The period of limitation was 6 years from that date and the suit was, Therefore, well within time even without the benefit of Section 37(5) of the Arbitration Act or Section 14 of the Limitation Act, that a claim based on the provision of a statute is governed by Article 120 as also been held in Kamruddin Kadibhai and Co. v. The Municipal Committee, Anjangaon, A.I.R.1951 Nag 148(8)

and Mt. Sukhdei v. Lachmi Narain AIR 1947 All 31(9).

(20) For the above reasons, the claim of the plaintiff is tenable only to the extent of Rs. 18,000.00 which was the excess of the compensation recovered from him by the defendant and this claim was the subject matter of the suit which was filed within limitation under Article 120 of the Limitation Act, 1908. The appeal is, Therefore, partly allowed. The decree of the trial court is modified and the suit of the plaintiff is decreed for Rs. 18,000.00 with proportionate costs throughout against the defendant-respondent. The plaintiff will be entitled to the interest on Rs. 18,000.00 from the date of the suit till the date of the realisation at 6 per cent per annum.