
(2005) 03 SHI CK 0025
In the High Court Of Himachal Pradesh
Case No : O.S.A. No. 9 of 2002

H.P. State Forest Corporation

APPELLANT

Vs

S. Butail and Company

RESPONDENT

Date of Decision : 30-03-2005

Acts Referred:

Chartered Accountants (Amendment) Act, 1959 — Section 2
Chartered Accountants Act, 1949 — Section 15, 21, 21(1), 21(4), 22
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d)
Companies Act, 1956 — Section 9
Contract Act, 1872 — Section 23
Income Tax Act, 1961 — Section 148
Merged States (Laws) Act, 1949 — Section 3
Union Territories (Laws) Act, 1950 — Section 3

Citation : (2005) 4 BC 255 : (2005) 128 CompCas 179 : (2005) 3 ShimLC 363

Hon'ble Judges : Lokeshwar Singh Panta, J;K.C. Sood, J

Bench : Division Bench

Advocate : Kuldip Singh and Sheetal Kimta, for the Appellant; K.D. Sood, for the Respondent

Final Decision : Dismissed

Judgement

K.C. Sood, J.—This appeal arises out of the judgment and decree passed by the learned Single Judge of this Court dated November 22, 2001, whereby the suit of the plaintiff has been decreed for Rs. 10,93,425/- along with interest of Rs. 1,64,012/- at the rate of 9% per annum and also future interest at the rate of 9% per annum on the principal amount from 10.12.1999 i.e. the date of the filing of the suit till the realisation of the decretal amount.

The Facts :

2. Appellant, H.P. State Forest Corporation, hereinafter referred to as the "defendant Corporation," is a Government Company constituted under the Company Act, 1956. The Corporation is subjected to statutory audit and income tax. The respondent, M/s. S. Butail and Company, hereinafter referred to as the

"plaintiff Company", is a Chartered Accountant Company. The Company renders professional services in audit, accounts taxation and other allied matters.

3. It appears, when the assessment of the defendant Corporation for the year 1992-93 was completed, it was found that assessable income of the defendant Corporation was much more than the declared income for this accounting year. Assessed income of the defendant Corporation was finalised at Rs. 1,30,00,000/- as against the assessable income of Rs. 4,88,58,590/-. A notice u/s 148 of the Income Tax Act was received by the defendant Corporation from the Income Tax Authorities for concealment of the income. The liability of the defendant-Corporation for this year was worked out at Rs. 12,93,42,479.33. The defendant Corporation engaged the plaintiff Company for its advice, suggestions, and course of action so that the defendant Corporation could save the heavy penalty for the concealment of income.

4. The plaintiff Company by its letter dated 27th December, 1997 (Ex. PW-1/A) advised the defendant Corporation to have recourse to "Voluntary Disclosure Income Scheme". The relevant portion of the letter Ex. PW-1/A reads:

"Now the best course available with the Corporation is to go in Voluntary Disclosure Income Scheme-1997. The case of the Corporation has also been discussed with the Commissioner of Income Tax, Shimla. Under this Scheme the tax liabilities of the Corporation would be as under:

Total assessable profit : Rs. 4,88,58,590.00 Already assessed : Rs. 1,30,00,000.00
Rs. 3,58,58,590.00 Tax on above Rs. 1,25,50,510.000

In the light of the above, it is advised that the Corporation should deposit Rs. 1,25,50,510/- under VDIS-1997. Thus, the liability of Rs. 12,93,42,479/- will be extinguished automatically. Our professional for the above would be 1% of the total liabilities. Kindly let us know the decision of the management of the Corporation at the earliest possible so that the benefit under the Scheme could be availed as the same is available up to 31st December, 1997,"

The case of the plaintiff Company is that the advice as well as the facts quoted by it was accepted by the defendant Corporation and the plaintiff Company was informed telephonically to proceed further in the matter, The plaintiff Company by another communication dated 30th December, 1997 (Ex, PW-1/B) in confirmation with its earlier communication wrote to the defendant Corporation. The relevant portion of this letter Ex. PW-1/B reads;

"This has reference to our telephonic discussion on the subject noted matters and our letter No. Nil dated 27.12.1997. It is already clarified that the professional charges as mentioned in the above referred letter is 1% of the total liability extinguished i.e. Rs. 12,93,42,479/-. Further as desired declaration under Voluntary Disclosure Scheme-1997 has been filed and the documents of the Corporation has been through in the initial scrutiny. We are in constant touch with the department of Income Tax for the issue of VDIS Certificate. The same

will be sent to you as soon as it is issued."

The re-assessment for the year 1992-93 in respect of the defendant Corporation was completed by the Income Tax Department on 2nd March, 1998. The plaintiff Company wrote a letter (Ex. PW-1/C) to the defendant Corporation on 30th March, 1998 informing the defendant that the case has gone in favour of the defendant Corporation of more than 13 crores has been extinguished and unavoidable litigation is avoided. The plaintiff Company also sent its bill for professional charges in the amount of Rs. 12,93,425/- in terms of its letter dated 27th December, 1997 for remitting such at an early date.

5. The defendant Corporation, however, paid only Rs. two lacs to the plaintiff Company in the following terms.

(i) Amount paid by cheque dated 25.5.1998 Rs. 1,90,00/- (ii) Income tax deducted at source vide T.D.S. certificate issued by defendant Rs. 10,000/- Total Rs. 2,00,000/-

The case of the plaintiff Company is that the remaining amount of professional fees was not paid by the defendant Corporation in spite of the repeated reminders and registered notice.

6. The defendant Corporation in its written statement controverts the allegations. It is the case of the defendant Corporation that it never agreed to pay professional fees to the plaintiff Company at 1% of the liability extinguished. Infact a lumpsum fees of Rs. two lac was agreed to be paid to the plaintiff which was paid. It was the further case of the defendant Corporation that the plaintiff Company could not have charged fees on percentage basis as the same is prohibited under the provisions of Chartered Accountants Act, 1949, ("Act" for short). The defendant Corporation denied its liability to pay the fees as claimed by the plaintiff Company.

7. The defendant Corporation disputed the maintainability of the suit. According to the defendant Corporation, the suit is beyond the period of limitation and the plaintiff Company has no cause of action to maintain the suit.

8. On the pleadings of parties, following issues were settled by the learned trial Judge:

1. Whether the plaintiff is a registered partnership concern and the suit has been filed by a competent person?

--OPP.

2. Whether M/s. Suresh Butail and Company was appointed as a legal advisor to rendering professional services to the defendant Corporation: and the terms and conditions suggested by the plaintiff concern were accepted by the defendant Corporation and services of the concern were availed by the defendant Corporation, if so, its effect?

--OPP Parties.

3. To what extent of amount and interest the plaintiff concern is entitled to?

--OPP.

4. Whether the suit is not maintainable as alleged?

--OPP.

5. Whether the plaint is liable to be rejected under Order 7 Rule 11-D, C.P.C. as alleged?

--OPP.

6. Whether the plaintiff has no cause of action to file the suit as alleged?

--OPD.

7. Whether the suit of the plaintiff is barred by limitation as alleged?

--OPD.

8. Whether the plaintiff is estopped from filing the suit by his own acts, deeds, conduct and acquiescence as alleged?

--OPD.

9. Relief.

Learned Single Judge answered issue No. 1 in favour of the plaintiff Company holding that plaintiff is a registered partnership concern and suit has been filed through a competent person. Preliminary objections that plaint is liable to be rejected under Order 7 Rule 11-D and the plaintiff has no cause of action are overruled by the learned Single Judge holding that suit is maintainable. The plea of estoppel, subject of issue No. 8, is also decided against the defendant. Under issue No. 2 learned Single Judge held that plaintiff Company was engaged, by the defendant Corporation, to render professional services on the terms and suggested by the plaintiff Company which were availed by the defendant Corporation. Under issue No. 3 it was held that plaintiff Company was entitled to interest of 9% per annum. The plea of the defendant Corporation that the plaintiff Company was estopped from filing the suit was rejected.

9. The defendant Corporation dissatisfied with the judgment and decree of the learned Single Judge is in this appeal.

10. Heard Kanwar Kuldip Singh, learned Senior Advocate, instructed by Ms. Sheetal Kimta, Advocate, for the appellant and Mr. K.D. Sood, learned Counsel for the respondent.

11. So far as the maintainability of the suit and entitlement of interest is concerned, that is not in dispute before us. The only contention raised by Kanwar Kuldip Singh is that charging of professional fees by the plaintiff Company on

percentage basis being prohibited under the Act would render the contract between the plaintiff Company and the defendant Corporation invalid, in view of Section 23 of the Contract Act, and therefore, the plaintiff Company is not entitled to claim the fees on percentage basis even if there was a, concluded contract between the parties to pay the fees as claimed by the plaintiff Company.

12. Learned Single Judge reading Sections 21 and 22 of the Act noticed that Section 22 of the Act defines "professional misconduct" which includes any act or omission specified in any of the Schedules to the Act. Clause 10 of the First Schedule provides that if a Chartered Accountant charges or offers to charge, accepts or offers to accept in respect of any professional employment fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act would be deemed to be guilty of professional misconduct.

13. Learned Single Judge took a view that assuming Section 22 of the Act read with Clause 10 of the First Schedule prohibits the charging of fees on percentage basis even then present case is not covered under Clause 10 because such prohibition will be attracted only when percentage fees is charged on:

(a) profits or

(b) contingent upon the findings or result of the case.

Learned Single Judge concluded that the fees proposed to be charged and agreed to be paid on percentage of the amount of tax liability saved are not either dependent on the profits of the defendant Corporation or contingent upon the result of the case. The fees were agreed to be charged and paid at 1% on Rs. 12,93,42,479/- which the defendant was to save towards its tax liability irrespective of the result of the assessment which ultimately was made by the concerned authorities and resultantly the present case would not fall within the scope of Section 22 read with Clause 10 of the First Schedule of the Act.

14. So far as question of agreement between the plaintiff Company and the defendant Corporation for the payment of the professional fees at 1% of the total liability amounting to Rs. 12.93,42,479/- is concerned, it is not in dispute before us. The plaintiff Company had clearly stipulated in its letter notice above that the professional charges would be 1% of the tax liability and pursuant to this letter plaintiff Company was given to go ahead with the case by the defendant Corporation. The Financial Advisor of the defendant Corporation, appearing as DW-1 unambiguously admits having received the letter Ex. PW-1/A of the plaintiff Company stipulating that the fees of 1% of the total extinguished liability would be charged towards professional fees. He also admits the receipt of professional fees bill Ex. PW-1/D and the letters Ex. PW-1/G and Ex. PW-1/H demanding the agreed professional fees. Admittedly, the demand raised by the plaintiff Company was never disputed at any stage by any communication. The Managing Director of the defendant Corporation appearing as DW-2 clearly

admits that plaintiff Company had demanded professional fees at 1% of the total liability by letter Ex. PW-1/A. It is his evidence that as he was not competent to sanction the fees, therefore, he placed the matter before the Board of Directors and the Board of Directors agreed to pay only Rs. two lacs towards the professional fees of the plaintiff Company, In cross-examination his witness admits that no letter was sent to the plaintiff Company to the effect that the fees quoted by the plaintiff Company were not acceptable or that the fees would be paid as may be approved by the Board of Directors or fees of Rs. two lacs will only be paid. It is not in dispute that pursuant to the letter Ex. PW-1/A the plaintiff Company was given go ahead with the case by the defendant Corporation. In this view of the evidence, the irresistible conclusion is that the parties were in agreement to pay 1% of the total liability extinguished i.e. Rs. 12,93,42,479/-.

15. The contention raised by the learned Senior Counsel for the defendant Corporation is that plaintiff Company being Chartered Accountants are prohibited from charging the fees on percentage basis and consequently any agreement to pay such fees being violative of the provisions of the "Act", is not enforceable in view of the provisions of Section 23 of the Contract Act.

16. We are in agreement with the conclusion of the learned Single Judge that the present case does not fall within the ambit and scope of Section 22 read with Clause 10 of the First Schedule to the Act.

17. Reading of Clause 10 of First Schedule together with Sections 21 and 22 of the "Act" shows that charging or offering to charge or accepting or offering to accept the fees in respect of professional employment by a Chartered Accountant based on percentage of profits or which are contingent upon the findings or result of such employment, except in case which are permitted under any regulations made under the "Act", would amount to professional misconduct under the "Act".

18. As noticed by the learned Single Judge, the fees offered to be charged by the plaintiff Company are not based on the percentage of the profits of the defendant Corporation nor such fees are contingent upon the finding or result of the case. In this view of the matter, the present case is not covered by Clause 10 of the First Schedule to Sections 21(4) and 22 of the Act.

19. This apart, the "Act" came into being in the year 1949 with a view to regulate the profession of Chartered Accountants and to establish an Institute of Chartered Accountants as is evident from the preamble of the Act which reads:

"Whereas it is expedient to make provision for the regulation of the (profession of Chartered Accountants) and for that purpose to establish an Institute of Chartered Accountants:

It is hereby enacted as follows:

(a) This Act has been extended to the new Provinces and merged States by the

Merged States (Laws) Act, 1949 (59 of 1949), Section 3 (1.1.1950) and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950); Section 3 (16.4.1950), Manipur and Tripura are now States under the N.E.A. (Reorganisation) Act, 81 of 1971 but Vindhya Pradesh now forms part of the State of Madhya Pradesh--see Act 37 of 1956, Section 9(1)(e) (1.11.1956).

It has also been extended to--(i) Dadra and Nagar Haveli, by Regn. 6 of 1963 as amended by Regn. 2 of 1965 (1.7.1965); (ii) Pondicherry, by Regn. 7 of 1963 (1.10.1963); (iii) Goa, Daman and Diu, by Regn. i 1 of 1963 (1.2.1965) (Goa is now a State -- see Act 18 of 1987, Section 3 (30.5.1987); (iv) Laccadive, Minicoy and Amindivi Islands (now known as Lakshdweep Islands) by Regn. 8 of 1965; (v) Jammu and Kashmir, by Act 25 of 1968 (15.8.1968); and Sikkim (1.9.1980) -- See Gaz. of Ind., 27.6.1979, Pt. II, Section 3(ii) Ext. P. 652 and Gaz. of Ind., 1.9.1980, Pt. II, Section 3(ii), Exp. p. 1298.

(b) Substituted for "profession of accountants" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959) Section 2 (2.7.1959)."

Evident as it is, the object of the "Act" is to regulate the profession and conduct of Chartered Accountants and to provide punishment for misconduct. Section 9 of the "Act" provides for the Constitution of the Council of the Institute. Section 15 stipulates that duty of carrying out the provisions of the Act shall vest with the Council. Clause (1) of Sub-section (2) of Section 15 provides that the disciplinary powers on the member of the Council shall vest with the Council. Chapter-V defines and regulate the misconduct on the part of the members of the Institute. Section 21 of Chapter-V of the Act provides for the procedure in inquiries relating to the misconduct by the members of the Institute. Sub-section (1) of Section 21 reads:

(1) "Whereon receipt of information by, or of an complaint made to it, the Council is prima facie of opinion that any member of the Institute has been guilty of any professional or other misconduct, the Council shall refer the cases to the Disciplinary Committee, and the Disciplinary Committee shall thereupon hold such inquiry and in such manner as may be prescribed, and shall report the result of its inquiry to the Council."

A reading of above provision shows that if on an information or complaint the Council is prima facie of the opinion that any member of the Institute is guilty of any professional or other misconduct, the Council shall refer such case to the Disciplinary Committee. The Disciplinary Committee, after holding such inquiry in such manner as may be prescribed, is to report the result of its inquiry to the Council, Sub-section (4) of Section 21 provides that where the finding of the Disciplinary Committee is to the effect that a member of the Institute is guilty of professional misconduct specified in the First Schedule, the Council shall afford to the member concerned an opportunity of being heard and may thereafter make any of the orders including:

(a) reprimand the member;

(b) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit.

Where the Council is of the view that the removal of the name of a member from the Register should be for a period not exceeding five years or permanent, then Council will not make any order and shall forward the case to the High Court with its recommendations.

Section 22 of the Act is a deeming clause providing that professional misconduct shall include any Act or omission as is specified in any of the Schedules. Part-1 of First Schedule provides that a Chartered Accountant in practice shall be deemed to be guilty of professional misconduct, if he:

1. ...

2. ...

3. ...

4. ...

5. ...

5. ...

7. ...

8. ...

9. ...

10. charges or offers to charge, accepts or offers to accept in respect of any professional employment fees which are based on a percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act.

It is admitted position before us that the plaintiff Company has not been found to be guilty of professional misconduct by the Council nor punished for such misconduct u/s 21 of the Act. This Court, in our view, cannot go into the question whether or not plaintiff Company is guilty of professional misconduct under the Act.

20. In our view, the rule contained in Clause 10 is for a specific purpose i.e. to maintain the purity of the profession of the Chartered Accountants. The consequences of professional misconduct, as noticed earlier, are reprimand or removal of the name from the Register of Chartered Accountant of an erring Chartered Accountant for such period, not exceeding five years, as the Council thinks fit. This rule does not say that accepting or denying fees would render the agreement illegal.

21. Clause 10 of First Schedule read with Section 21 of the Act, in our opinion, cannot be construed to mean that charging of fees by Chartered Accountant on percentage basis is forbidden by law for the purpose of Section 23 of the Contract Act. Such infraction on the part of a Chartered Accountant would make him liable for disciplinary proceeding by the Council for professional misconduct and no more.

22. Kanwar Kuldip Singh, learned Senior Counsel heavily rely upon R.B. Basu Vs. P.K. Mukherji, to contend that charging of fees on percentage basis by a Chartered Accountant is forbidden by law for the purpose of Section; 23 of the Act.

23. In R.B. Basu Court was dealing with a reference u/s 21(1) of the Chartered Accountants Act made by the Council of the Institute of Chartered Accountants against the respondent, a Chartered Accountant and a Member of the Institute. The question raised before the Court was whether or not respondent was guilty of professional misconduct under Clauses (m) and (q) of the Schedule u/s 22. In that case, assessee wrote a letter to the Accountant that he expected relief to the extent of a stated sum in the appeals which were pending before the Income Tax Tribunal and that the Accountant getting the said relief would be paid a fee of ten per cent on that sum. This was accepted by the Accountant and it was held that Chartered Accountant was guilty for professional misconduct having contravened the provisions of the Act. Ratio of this case is of no assistance to the appellant. So far as the legality of the agreement for charging fees is concerned that was not in question.

24. In our view, where a statute merely imposes a penalty without declaring it illegal or void, the imposition of penalty by itself will not have the effect of making any contract, made in contravention of a specific provision of the statute, illegal or void.

25. We draw support for the view we have taken from Ahmed Sait and Ors. v. Bank of Mysore Ltd., AIR 1930 Mad 512 and Nazaratli Sayad Imam v. Babamiya Dureyatimsha, ILR (xl) Bom 64.

26. In Ahmed Sait memorandum of association of the plaintiff bank prohibited the bank from lending on mortgage, but the plaintiff bank lent money to the defendant, it was held that the bank was entitled to sue and such a contract would not be illegal. The Court concluded that a contract which is ultra-vires is not necessarily illegal.

27. It is true that Clause 10 of Section 21 of the Act forbids the charging of fees on percentage basis on profits, by an Accountant, but it does not extinguish the right of the parties to lay claim on the basis of such contract.

28. In Nagaralli, one of the terms of a licence to cut grass granted under the Forest Act, 1878, prohibited the licensee from assigning his interest in the licence without the sanction of the Forest Officer, and the breach of the condition was to

be visited with line. In that case it was held that the assignment was binding on the parties as there was nothing in the Forest Act to make it obligatory to the parties to observe the conditions of the licence, even though It was open to the Forest Officer to revoke the licence if he thought fit to do so.

29. In the present case it was open to the defendant Corporation to lay a complaint before the Council of the Chartered Accountants for appropriate proceedings against the plaintiff Company, but it cannot be said that such a contract is prohibited by law.

30. Prohibition contained in Clause 10 of Schedule 1 to Section 21, we again emphasise, is only for the purpose of regulating the conduct of the Chartered Accountant and any agreement in violation to Clause 10 of First Schedule cannot be said to be per se illegal u/s 23 of the Contract Act.

31. To conclude, the prohibition for charging fees on percentage basis of profits or contingent upon the result of the cases will not render the instant agreement, either void or illegal.

No other point was urged before us.

In result, the appeal fails and is dismissed.

No costs.