
(1922) 02 PAT CK 0031
In the Patna High Court
Case No : F.A. No. 10 of 1919

Jugal Kishore Marwari and others

APPELLANT

Vs

Babu Homeshwar Singh and others

RESPONDENT

Date of Decision : 04-02-1922

Acts Referred:

Citation : (1922) 02 PAT CK 0031

Final Decision : Allowed

Judgement

Dawson Miller, C.J.—This is an appeal by the plaintiffs from a decree of the Subordinate Judge of Bhagalpur dated the 21st November, 1918.

2. The appellants who are contractors carrying on business at Bhagalpur instituted the suit on the 10th May, 1916, against Maharaj Kumar Atmaj Babu Ekradeshwar Singh, the proprietor of an estate at Madhipura in the Bhagalpur district of this province, claiming damages for breach of contract. Alternative relief was claimed in the plaint but this has been abandoned and is not the subject of this appeal. The defendant died after the suit was instituted and his three sons the present respondents were substituted as defendants in his place.

3. On the 23rd May, 1915, the appellants entered into a contract in writing with the respondents' father, who may conveniently be referred to as the landlord, whereby they acquired the right for a term of just over four years to cut sakhua trees in the jungles of certain villages in the landlord's estate for the purpose of making sleepers, upon which a royalty was payable by the contractors at certain named rates. The deed recites that the first party (the landlord) at the request of the second party (the contractors) has agreed to sell to them for the term named the jungles for the purpose of making sleepers.

4. The contract is not strictly a sale and it is not contended that it is a lease. It is in the nature of a license to cut trees and make sleepers on payment of a royalty at certain rates, varying according to the dimensions of the sleepers. When work had been in operation for a short period the landlord cancelled the contract and

re-took possession. This he was entitled to do, provided the contractors had not fulfilled certain conditions specified in the contract.

5. The main question for determination in this appeal is whether the contractors committed a breach of the conditions which would entitle the landlord to cancel. The third clause is important, as it is mainly upon the construction of this clause that the landlord's right to cancel depends.

6. It reads as follows:—"We, the second party, shall, during the term [each year from the month of Kartik up to the end of Assarh] get 15,000 sleepers of every measurement prepared every month and shall, after they are counted according to the contract, pay to the first party the price thereof, according to the rates mentioned above, without any objection to this; neither we, the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below, without waiting for the expiry of the terms of this agreement. Be it noted that during the term (of the lease) every year from the month of Sravan to the end of Aswin, we, the second party, shall try our best to cause as many sleepers of different measurements to be prepared as possible, and after getting them counted according to the contract, pay the price thereof, in accordance with the rates mentioned above, to the first party on taking receipt therefor.

7. The second party shall on no account without sufficient reason willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand) sleepers of different measurements every year during the nine months from Kartik to Assarh in accordance with the terms specified above. If through negligence on the part of us, the second party, we fail to prepare so many sleepers, no plea, regarding deficiency in the number of sleepers put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand the price of the entire number of one lakh and thirty-five thousand sleepers to the first party."

8. The contract is dated the 23rd May, 1915 which corresponds to the 24th Baisak 1322 F. The months, from Kartik which is the second month in the Fusli year up to the end of Assarh, are roughly speaking the dry season of the year, although the rainy season begins generally about the beginning of Assarh which corresponds to the middle of June.

9. Whatever be the exact interpretation of this clause, it is clear that the obligation of the contractors was to cut 15,000 sleepers a month, during the nine months from the beginning of Kartik to the beginning of Assarh, making 1,35,000 altogether, and that, during the other three months from Srawan to Assin, they were to do the best they could without any express obligation to cut any particular quantity. (Here the contents of Clauses 4, 5 and 6 are given in brief which are not material).

10. It is not disputed that the contractors failed to prepare during the month of

Kartik 15,000 sleepers, and that the work had not progressed as rapidly as has been anticipated, although by the end of the second month, Aghan or the beginning of the third month, Pous the out-turn was rapidly improving. On the 2nd of Pous corresponding to the 23rd December, 1915 the landlord wrote to the contractors terminating the agreement.

11. Up to this time about 20,000 sleepers had been prepared according to the appellants but rather less than half that number according to the respondents. It is admitted that those which had been prepared had not been counted and sealed and numbered in accordance with Clause 5 of the agreement and no payments had been made. (Here evidence regarding the course followed up by each party leading to termination of contract is discussed.)

12. I think there can be no dispute that under the terms of the contract the appellants were not liable to pay for any sleepers, until the same had been counted and sealed by the landlords' men. As the sleepers differed in dimensions and the rates payable varied with the dimensions, it follows that the amount payable could not be ascertained until there had been a counting by the landlord in accordance with the contract.

13. The respondents case is that they were prevented from counting by the action of the appellants, and that in any event, whether the sleepers were counted or not, the appellants were liable to cut and pay for a minimum of 15,000 sleepers each month from Kartik to Assarh and that they had failed to pay for any. As to the first part of this contention, I am satisfied that the appellants did not prevent the respondents from counting in accordance with the contract the number of sleepers actually cut (Evidence on this point is then discussed).

14. The second part of the respondents' contention depends upon the interpretation of the contract. The construction of the document is by no means free from difficulty. The main question which arises is whether the first part of Clause 3 coupled with Clause 6 gives the landlord the right to cancel the contract, if during the first or any succeeding month from Kartik to Assarh the contractors should fail to prepare and pay for 15,000 sleepers; or whether the right to cancel arises, only in the event of the contractors objecting to pay for the sleepers actually prepared and counted during each month.

15. In determining this question I think it is necessary to consider the document as a whole, as the other provisions appear to throw some light upon the true intention of the parties. It was clearly a matter of some anxiety to the landlord that there should be no mistake about his right to monthly payments for the sleepers actually cut and counted during the month, and that in any event, if through negligence the contractors should not prepare 1,35,000 sleepers in the 9 dry months from Kartik to Assarh, he should be paid for that quantity. He safeguards his right as to payment in several ways. First of all by Clause 3 he might certainly cancel the contract, if the contractors objected to pay for the

monthly out-turn when counted.

16. This is not disputed by the contractors. He could also stop the further cutting of the trees, and by Clause 5 it is stipulated that the contractors are not entitled to take away the sleepers after they have been counted, sealed and numbered unless they first pay the price. Clause 6 deprives the contractors, in the event of a failure to pay for the months, out-turn, of the right to cut any trees in the succeeding month, and further in the same event gives the zamindar the right to take possession, at the end of the succeeding month, of all the trees and the right to claim damages for any loss suffered and to declare the deposit forfeited.

17. It will be observed that, both under Clause 5 and under Clause 6, the rights of the landlord and the restrictions imposed on the contractors, only arise in the event of non-payment of the price of sleepers actually prepared each month and not in the event of a failure merely to prepare the stipulated number and pay for them. It is obvious, however, that if the contractors neglected to fulfil their undertaking to cut 15,000 sleepers during each of the dry weather months or 1,35,000 each year during these months, the total payments would fall short and the landlord would suffer a loss of income.

18. It is, therefore, stipulated at the end of Clause 3 that, if through negligence the contractors should fail to prepare so many sleepers, they should nevertheless be liable to pay on demand the price of the entire number of 1,35,000. It seems to me that it was intended by this clause that, if at the end of the 9 months the total number cut during those months should fall short of 1,35,000 the contractors should be liable to pay for that quantity on demand, if, and only if, the deficiency was due to their negligence. This part of the clause indicates that the obligation to cut and prepare at the rate of 15,000 each month was not an absolute obligation, carrying with it the liability to cancellation of the deed, if, for any reason whatever, the actual number should fall short of the stipulated number.

19. If however the respondents' interpretation of the first part of Clause 3 be accepted, it would follow that, if for any reason the number of sleepers prepared during any of the 9 months should fall short of 15,000 the contractors' liability to pay for 15,000 would arise, whether they were counted or not and whether the deficiency was due to his negligence or any other reason. I cannot accept this interpretation as expressing the intention of the parties, nor do I think that it is the natural interpretation of the first part of Clause 3. That clause imposes two obligations upon the contractors (1) to prepare in each year of the term 15,000 sleepers, every month from Kartik to Assarh and (2) after they are counted to pay the price thereof.

20. It will be noticed that the right to cancel only arises if the contractors object to do something. As I read the clause, this can only mean, if they object to pay for the sleepers prepared and counted. They certainly did not object to cut them. They may have failed to do so, but their liability to pay for those which they

failed to cut is controlled by the latter part of Clause 3 and depends upon whether or not the deficiency is due to their negligence. This question moreover only arises, if there is a deficiency for the whole 9 months from Kartik to Assarh, in other words, if during these months they fail to cut and prepare 1,35,000.

21. This seems to imply that they may during that period make up in subsequent months any deficiency there may have been in an earlier month or months. If therefore the liability to pay for the deficiency only arises at the end of Assarh and in the event of negligence, the earlier part of the clause can only be read consistently with the latter part by confirming the right to cancel cases in which the contractors object to pay for those sleepers which have been actually prepared and counted during the preceding month.

22. If the respondents' contention is right, then the contractors had to pay, for sleepers not counted and passed by them. But, as no sleepers could be taken away by the contractors until counted and sealed, it would follow that the contractors would have to pay and yet await the landlord's pleasure before they could deliver a single sleeper to their customers. I think the landlord's obligation to count and seal and the contractors' obligation to pay must be treated as reciprocal, and that the landlord had no right to demand payment, until the sleepers were counted and sealed and their sizes ascertained. Until this had been done the exact sum payable could not be determined and the contractors could not remove them.

23. The matter may be tested in another way. Suppose the contractors were to cut say 4,000 sleepers only during the month. If these consisted entirely of the two larger dimensions, say in equal moieties the royalty on which was 17 and 14 annas respectively, their liability would be Rs 3,875 for those cut. If the contractors paid this sum and refused to pay for any more then on the respondents' construction, the landlord could cancel.

24. Suppose however that they had cut none at all during that month what would then be their liability ? It is conceded on behalf of the respondents that the contractors were not bound to cut the larger sleepers first. If they had the option of cutting the small sleepers first, they would not be liable for more than 15,000 at the smallest rate viz., 3 annas per sleeper, if that number remained still uncut. The liability in that case would be Rs. 2,818-8-0 or less than the sum actually paid, and yet in the case supposed the contract could, according to the respondents, be cancelled.

25. In case there should be any doubt as to the meaning of Clause 2 of contract, it is important to state that the respondents concede that the words, "of the length of 10 ft. and of the other length in order as" mentioned above," in the translation marked Exhibit 1 did not impose an obligation to cut the sleepers in the order mentioned in the schedule of rates and their own translation at page 220 of the paper book makes this clear. That translation reads thus:-"But the second party ought first to have sleepers prepared of the length of 10 ft., and the

other respective lengths mentioned above."

26. The learned Subordinate Judge took the view with which I agree, that the mere failure to cut 15,000 sleepers in the month would not entitle the respondents to terminate the contract. He was of opinion however that the non-preparation of the stipulated number coupled with non-payment of the price thereof would enable to cancel the contract. He further thought that the appellant's liability, if they failed to prepare the stipulated number, was the royalty payable on 15,000 sleepers of the largest dimensions.

27. With great respect to the learned Judge, I think he failed to give proper weight to those terms in the contract, which to my mind make it essential for the landlord to count and Seal the sleepers before the liability could be either ascertained or demanded. I further think that in the event of failure to prepare the stipulated number, the liability could in no case be more than the value of the smallest sleepers remaining uncut. There is a conflict of evidence as to the number which were cut by the end of Kartik and the learned Judge gave preference, to the evidence of the respondents in this respect.

28. But one of the main objects of having the sleepers counted by the landlord was to obviate any conflict between the parties on this point so that the liability could be ascertained; and this operation was in my view, essential before any liability at all arose. In the view I take, it follows that the landlord improperly terminated the contract and dispossessed the appellants and rendered himself liable, to damages.

29. It was strenuously urged, however, by the learned Government Advocate on behalf of the respondents that under Clause 6 of the contract the landlord was entitled to re-take possession at the end of the second month, if the price of the sleepers prepared during the first month was not paid in full; and that, as no payment had in fact been made this clause immediately came into operation. This argument however in my opinion fails to take into consideration the other conditions of the contract, which provided that payment shall only be made after the sleepers had been counted according to the contract and that the obligation to count lay upon the landlord.

30. It was argued however that, as under Clause 5 the contractors had the option of counting the sleepers for themselves, if the landlord failed to do so, they could not rely upon the fact that no counting had taken place. Clause 5 however does not impose any obligation to count upon the contractors but merely gives them an option to do so, which they may exercise or not as it suits their convenience.

31. If they were anxious to get the sleepers removed in order to fulfil their engagements, they might take advantage of the option contained in Clause 5; if on the other hand they were in no hurry to get the sleepers removed there was no obligation upon them either to count them or to pay the price, and they committed no breach of duty which would entitle the landlord to the benefit of

Clause 5.

32. The learned Subordinate Judge found that, if damages were to be awarded, the appellants were entitled to recover the profits which they would have made, if the contract had not been cancelled. It is conceded that this principle of the assessment of damages is the correct one but it is contended that the appellants had not made out that they would necessarily have made a profit of Rs. 6,17,876-12-0 set out in Schedule E of the plaint.

33. The evidence given by the appellants as to damages stands uncontradicted and I am satisfied that the prices claimed by them as those at which the sleepers could have been sold during the years in question, are not in excess of the market rates prevailing. The evidence of Sarat Kumar Roy an Assistant Engineer in the Public Works Department at Bhagalpur proves the rates payable by his Department for similar classes of unwrought sleepers during the years in question and, taking the lowest rate, viz., Rs. 2-8-0 per cubic foot for similar timbers, it is obvious that the rates claimed in Schedule E of the plaint work out very much lower, in fact very little more than half the prevailing rates.

34. For instance sleepers 6" X 8" X 4 1/2" at Rs. 2-8-0 per cubic foot would come to 3-12-0 per sleeper, whereas the rate claimed is Rs. 2-0-0; 10" X 10" X 5" at Rs. 2-8-0 per cubic foot would come to Rs. 8-10-10, whereas the rate claimed is Rs. 4-4-0, and the other charges for the other sleepers work out at about the same proportion. These rates are those at which the sleepers were offered to the Bengal and North Western Railway. It is proved that the Railway Company did not cavil at the rates but were not in want of sleepers at the time when the offer was made, and it cannot be assumed that the contractors had any firm offer at these rates.

35. They were however as already stated, certainly not in excess of the prevailing market rates. The rokars of the contractors showing the actual expenses incurred have been produced and the expenses deducted in Schedule E are not shown to conflict with the actual expenses appearing in the rokars. It is not clear however that anything has been allowed for cartage from the jungle to the Madhipura railway station, the prices claimed being free on truck at Madhipura, and something ought to be allowed for this. Some allowance should also be made for the chapter of accidents.

36. The contract extended over four years, and the damages claimed are based on the assumption that everything went smoothly and that the contractors were able to dispose of the whole of their stock of sleepers. Whether they could have done so or not must remain a matter of conjecture. Moreover the expenses necessary to turn out the requisite number of sleepers per month, must have been considerably increased, and one cannot assess the damages with anything like mathematical accuracy in a case of this sort. The personal energies of the plaintiffs, released from the contract could also be directed into other channels of enterprise. Taking all these matters into consideration, it seems to me that the

sum of Rs. 2,00,000 would amply compensate the plaintiffs for the loss they have suffered by the defendants' breach of contract.

37. I would allow the appeal, set aside the decree of the trial Court and enter a decree in favour of the plaintiffs for the sum of Rs. 2,00,000 with proportionate costs here and in the Court below.