

(2001) 04 KL CK 0011
In the High Court Of Kerala
Case No : A.S. No. 140 of 1999

Kerala State Civil Supplies Corporation	APPELLANT
Vs	
Muraleedharan	RESPONDENT

Date of Decision : 06-04-2001

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (2002) 3 CivCC 388 : (2002) 3 RCR(Civil) 377

Hon'ble Judges : S. Sankarasubban, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : K.A. Abraham, for the Appellant; T.M. Abdul Latheef, for the Respondent

Judgement

S. Sankarasubban, J.—This appeal is filed against the judgment and decree in O.S.No.724 of 1994 on the file of the Principal Sub Court Ernakulam. The suit for realisation of money. The plaintiff filed the suit for realisation of money under contract work. The plaintiff is a proprietary concern, and the work undertaken by the plaintiff includes transportation and delivery of articles and goods at varied rates. Accordingly, on the basis of the tender submitted by the plaintiff for transportation of levy sugar from various factories and depots owned by the defendant Corporation, plaintiff used to transport the levy sugar. So far as the present suit is concerned, it deals with the contract for lifting levy sugar quota for the month of October, 1987 and also for the months of January, February and March 1988. According to the plaintiff, on the basis of the contract, plaintiff had lifted a total quantity of 4332 M.T. of sugar. According to the conditions of the tender, the lifting and delivery of sugar should be completed within twelve days from the date of receipt of the demand draft. In the case of delay in lifting and delivering a penalty of Rs.5/- per day Metric Ton will be imposed. As per the tender the Managing Director reserves the right to extend the period of delivery, if he is satisfied that the delay was due to the reasons beyond the control of the contractor. According to the plaintiff, the clause prescribing penalty, was, without any nexus with the loss of damage, suffered by the Corporation and hence, it is

unconscionable. Clause 26 of the tender provides for terms of payment by the defendant for the work done. This clause further stipulates that the balance amount is to be paid on receipt of a copy of G.R.S. direct from the depot. The case of the plaintiff is that the plaintiff had transported sugar but there was delay in transporting the goods from certain depots. The delay was not due to any default of the plaintiff and hence, plaintiff is not liable for penalty imposed. 95% of the transportation charges is given. The plaintiff is to get back the security deposit of Rs.25,000/- and balance 5%. Hence, the suit was filed for recovery of the earnest money deposit and 5% of the transportation charges. Interest is also claimed on the above amount.

2. A written statement was filed by the defendants. In the written statement, it is stated that the suit is barred by limitation. According to the written statement, the entire contract was over on 28.3.1988 and hence, the cause of action arose on that day. The suit was filed after three years from 28.3.1988. So far as the contention that the condition in the tender prescribing the penalty at the rate of Rs.5/- per day per quintal is concerned, it is stated that it is not unconscionable. Clause itself says that if the tenderer is able to transport the goods efficiently, he is entitled for bonus on that and if there is delay, there is a penalty. This Clause is intended for the benefit of public. If there is delay in the transportation of delay sugar, that put the public into great hardship and defendants are ultimately liable for the loss caused to the dealers because of the late transportation of levy sugar.

3. On the basis of the pleadings in the case, the court below framed six issues. On the side of the plaintiff Exts. A1 to A10 were marked and PWI was examined. On the side of defendants Exts. B1 to B8 were marked. There is no oral evidence on behalf of the defendant. The first issue was with regard to the limitation. As far as limitation is concerned, we are of the view that the lower court was correct in holding that the suit is not barred by limitation. It is now admitted that plaintiff will be entitled of the balance amount only on receipt of the final G.R.S. from the depots. Further, we find that the defendant itself had taken a contention that the plaintiff is liable for penalty and in so far as the penalty was not settled, even though a reply was given by the plaintiff, it cannot be said that the suit is barred by limitation. The plaintiff is entitled to wait till the decision is given by the defendant on the reply given by the plaintiff in response to the show cause notice. Even if a decision is given, according to us, the lower court was correct in relying on Ext.AIO as giving rise to the cause of action. Ext.AIO dated 12.8.1991 was received by the plaintiff on 14.10.1991 and if that be so, the suit is not barred. So far as the other issues are concerned we are not satisfied with the view taken by the court below. The court below has held that the tender condition No. 15 to be unconscionable. To extract the words of the court below itself, in paragraph 13 of the judgment, it is stated as follows:

"Under the above circumstances, I hold that the condition No. 15 in the tender is unconscionable and unreasonable."

Paragraph 13 of the judgment does not show any reason as to why the Court below has held that this condition is unconscionable. At one stage, the court says that so it appears to me that such a condition is provided in order to ensure speedy and prompt transportation of the sugar to the destination. Thereafter, it says that it may further be noted that the authorities of the defendant Corporation are at liberty to waive the penalty or reduce in appropriate cases. Under the above circumstances, I hold that the condition No. 15 is unconscionable and unreasonable. We are not able to agree with the court below. Condition No. 15 of Ext. B3 is as follows:

"15. Lifting and delivery of sugar should be completed within 12 (Twelve) days from the date of receipt of the each D.D. for equivalent stock. In the case of delay in lifting and delivery penalty of Rs.5/- per day per tonne for the delayed supply will be imposed or the work will be awarded to the second lowest rate at the risk and cost of the contractor without notice and the difference in the amount will be recovered from the amount due to the contractor. The Managing Director reserves the right to extend the period of delivery if he is satisfied that the delay was due to bona fide reasons beyond the control of the contractor."

Clause 15(1) states that the contractors who complete the lifting and delivery of the corresponding quantity possible as per the D.D. issued to them within ten days (i.e. 9 days or earlier) from the date of the D.D. will be eligible for bonus as stated in that clause. According to us, clause 15 and clause 15(1) are to be read together. As a matter of fact, in the written statement, the defendant has stated about this clause as follows:

"Since, the levy sugar is intended for distribution to the ration card holders under Public Distribution System it is very much necessary that the lifting and transporting of the sugar to various destination points is completed well within the agreed time. The price of the levy sugar by the Corporation to the sugar mills is paid in advance through Demand Draft. In this case also the defendant Corporation paid to the concerned Sugar Mills, the price of the levy sugar including excise duty well in advance. It is an agreed term of the contract that lifting and delivering the quantity of sugar for which price is paid must be effected by the plaintiff within 12 days from the date of receipt of the demand draft by the plaintiff. So, it is provided in the tender conditions that the lifting and delivering of the sugar must be effected within 12 days of the receipt of the Demand Draft."

In paragraph 6 of the written statement it is stated that the contract between the plaintiff and the defendant provides that in case of delay in lifting and delivery of the sugar, the plaintiff shall be liable to pay Rs.5/- per day tonne for the delayed supply. This condition is mutually agreed upon. This is to ensure that there is no delay in transporting the sugar thereby avoiding a temporary void as regards the supply of sugar for public distribution. The contract stipulates that in case of default in the matter of transportation, the work, will be awarded at the second lowest rate at the risk and cost of the plaintiff. This defendant brings to the

notice of the court that this defendant was more concerned with the timely supply of sugar and not with the damages consequent to the breach of contract. Quite consistent with the purpose underlying the contract, the contract further provided that the plaintiff will be eligible to get bonus if delivery of sugar is effected within nine days. It is further stated in the written statement that, so far as the supply of levy sugar from Vellore Co-operative Sugar Mills, there is evidence to show that they did not issue sugar upto 7.3.1988. The defendant has excluded this period from working out the compensation at the rate of Rs.5/- per day per tonne. The defendant has denied the reason stated by the plaintiff for not transporting the goods in time from Travancore Sugar and Chemicals Ltd. Thus we find that this clause is intended in order to see that the goods are supplies in time. The question whether in the absence of loss suffered by the defendant question. But, here is a case, where the contract has been entered into with the free consent of both parties. We do not find this clause to be unconscionable because u/s 74 of the Indian Contract Act, when a contract has been broken if a sum is named in the contract as amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Thus the parties can stipulate the penalty to ensure that the obligations are performed without delay. In the above view of the matter we hold that clause 15 of Ext. B3 is valid and is not unconscionable or unreasonable.

4. The next question is whether the plaintiff is entitled for the amount prayed for in the suit. The plaintiff has included Rs.25,000/- which is the earnest money and also 5% of the transport charges. According to the defendant, in the written statement, an amount of Rs. 1,21,258/- is due from the plaintiff by way of penalty. It is stated that compensation for not supplying the sugar from Vellore Co-operative Sugar Mills has been excluded. In this case, we find that only PW. 1 was examined. No witness was examined on the side of the defendant. So far as the distribution from Travancore Sugar Mills is concerned in Ext.A4 the plaintiff has stated thus. "In this connection we request you to examine attached copies of our letters dated 5.2.1988.10.2.1988 and 15.2.1988. As you will observe, there were no power facilities for loading at the mill (as common with others) and they were dictating prohibitive prices which were totally unreasonable. This matter was intimated to your office by our letters dated 5.2.1988 and 10.2.1988 and since no solution was offered, we took our decision on 15.2.1988 not to delay the transport any further and completed the job on 23.2.1988". It is further stated in Ext. A4 that, due to the abnormal loading charges, we suffered a substantial loss. Ext. A6 and A7 are two letters from the defendant to the plaintiff. Ext.A6 is with regard to the delay in transportation of sugar from Vellore Co-operative Sugar Mills and Ext.A7 is with regard to the delayed transportation from Travancore Sugars Ltd. and to show cause why penalty should not be

imposed. Ext. A9 is a lawyer's notice sent by the plaintiff's lawyer to the defendant. It refers to the show cause notice issued by the defendant. Then it is stated thus: "From this letter my client had submitted an explanation on 21.7.1988 stating all facts". That letter is not seen produced in this case. Further, Ext. A10 dated 12.8.1991 clearly says that the defendant is of the view that plaintiff is liable to pay the penalty. So far as the evidence given by the plaintiff is concerned, excepting for what he says, he has not given any independent evidence to show that plaintiff was prevented by sufficient unforeseen cause to transport the goods within the time limit. The court below on the basis of the evidence of PW1 itself granted the decree. We do not approve this. In so far as there is a claim by the defendant that the plaintiff is not entitled to get recovery of the amount, it is for the plaintiff to prove that no amount is due from him to the defendant. No doubt, there is a burden on the defendant to disprove the evidence of the plaintiff that the plaintiff is not liable to pay the penalty. The plaintiff could have adduced other evidence, oral or documentary, to prove that it was not a fault in not transporting the goods in time. Further, we are of the view that, in this case, the defendant also ought to have given evidence to show why the Managing Director did not exercise the power in condoning the delay. Taking all these matters into consideration, we think it is better to remand the case to the lower court for fresh consideration. In the above view of the matter, we set aside the judgment and decree of the court below, remand the case for fresh consideration on issues 3 to 6. The finding on issues 1 and 2 are upheld. Both the parties are entitled to adduce evidence. The appellant is entitled to refund of one half of the court fee paid on the memorandum of appeal. The parties shall appear in the court below on 5.6.2001.

The appeal is disposed of as above.