
(2010) 09 P&H CK 0339

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 2522 of 1985

Krishna and Co.

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 14, 19
Contract Act, 1872 — Section 56

Citation : (2011) 2 CivCC 814 : (2011) 161 PLR 182 : (2011) 1 RCR(Civil) 907

Hon'ble Judges : Vinod K.Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vinod K. Sharma, J.—This order shall dispose of RSA Nos. 2522, 2523 and 2524 of 1985, titled Krishna & Co. v. The Union of India and Ors.; Asha and Co. v. The Union of India and Ors. RSA No. 2523 of 1985; and Deen Dayal Purshotam Lal v. The Union of India and Ors. RSA No. 2524 of 1985, respectively, as common questions of law and facts, are involved in these appeals.

2. For the sake of brevity, facts are being taken from RSA No. 2522 of 1985.

3. The Appellant-Plaintiff filed a suit for permanent injunction restraining Defendants No. 1 and 2 from an enforcing/encashing four bank guarantees, two dated 28.8.1980 and two other dated 10.9.1980, given by the Defendant No. 3 on behalf of the Plaintiff in respect of contracts dated 11.8.1980 and 22.8.1980 bearing No. 3(1)79-80/Regd. BD/Cot-ton/23/5935 and No. 3(1)79-80/Regd. BD/Cotton/24/5936, respectively. The case set up by the Plaintiff-Appellant was that a press note dated 4.8.1980 was issued by the Textile Commissioner Cotton/Defendant No. 2, to the effect that Union of India permitted the intending vendors to export 14,000 bales of Bengal Desi Cotton to all permissible destinations subject to the conditions that the last date of shipment would be 31.12.1980 and that payment be made by cent percent irrevocable non-

transferable letter of credit to be opened by the buyers on a prime bank in favour of the sellers prior to shipment. That the exporters would have to furnish along with their application a performance guarantee in the form of a bank guarantee at the rate of " 150/- (Rupees one hundred fifty only) per bale for number of bales applied for and that the exporters for allocation of quota would have to furnish a further bank guarantee at the rate of "350/- (Rupees three hundred fifty only) per bale within seven days of the issue of allocation letter in their favour.

4. In pursuance to the press note the Plaintiff entered into a contract on 11.8.1980 for sale of 250 bales of the said cotton at the rate of 121 U.S. Cents per Lbs. and subsequently on 22.9.1980 entered into another contract for the sale of 500 bales of cotton at the rate of 110 U.S. Cents per Lbs. C & F nett with Arkey Holdings Private Limited Singapore.

5. In terms of contract, cotton was to be shipped during September/October 1980. to Japan and payment in respect thereof was to be made by 100% irrevocable non-transferable letter of credit to be opened by the said purchasers in favour of the Plaintiff company prior to the shipment.

6. The Plaintiff-Appellant applied to Defendant No. 2 to register their aforesaid contracts for sale and for allotment of quota in respect thereof. The applications were made on a standard proforma provided by the office of Textile Commissioner. Along with the application Plaintiff-Appellant also submitted performance bank guarantee to Defendant No. 2, at the rate of 150 (one hundred fifty only) per bale in the prescribed form and undertook to furnish a further bank guarantee for " 350/- (rupees three hundred fifty only) per bale within seven days from the application being confirmed.

7. On 4.9.1980, Textile Commissioner informed the Plaintiff company that it was decided to allow the export of 750 bales of Bengal Desi Cotton to be made on or before 31st October, 1980. The Plaintiff was called upon to furnish further performance guarantee at the rate of 350 (Rupees three hundred and fifty only) per bale for the quantity allocated for export.

8. The Plaintiff-Appellant complied with the directions and furnished the requisite bank guarantee. As per the terms of the contract the cotton was to be shipped in September/October 1980 and the letters of credit in respect thereof were to be opened prior to the shipment.

9. The Plaintiffs representatives visited Singapore in the last week of September 1980 to ensure that the letters of credit be opened and shipment made on schedule. The purchasers informed the Plaintiff's representatives that in view of the outbreak of hostilities between Iran and Iraq their entire business and schedule in respect thereof had been dislocated and they, under the circumstances, were not confident of opening the letters of credit within stipulated date. The purchasers further informed the Plaintiff-Appellant, that the purchasers had in turn sold the said cotton to spinning mills in Poland and Taiwan

but there was dislocation owing to strike. The purchasers assured the Plaintiff-Appellant, that they would do their utmost to see that the letters of credit were opened by the scheduled date. It also requested the Plaintiff to request the Union of India to grant a minimum of three months" extension for opening the letters of credit.

10. Accordingly on the request by the Plaintiff-Appellant for extension of time, time for opening the letter of credit was extended upto 30.11.1980 and the date of shipment was extended to 15.12.1980. On the date of opening of letter of credit that is 30.11.1980 representative of the Plaintiff-Appellant visited Singapore to ensure that the letter of credit was opened, and shipment made on schedule, but the purchasers informed the Plaintiff-Appellant that they were not willing to open the letters of credit for fulfilling the contract at the rate agreed upon for the reason that on Or about 19.11.1980 Defendant No. 2 approved some contracts at the rate of 70 U.S. Cents per Lbs. i.e. much lower than the rates agreed upon between the parties. On return of the representatives, the Plaintiffs addressed letter dated 27.11.1980 to Defendant No. 2 narrating the aforesaid circumstances and requested the Defendant-Respondent to permit them to sell the goods to the purchasers at lower rates and to permit them to renegotiate the contract at the cost of suffering of loss.

11. No response was received to the request made by the Plaintiff Appellant. Request for sale of goods at lower rate was finally not accepted, rather Plaintiff-Appellant was directed vide letter dated 24.12.1980 to meet with their liability under the bank guarantee and threatened to invoke the bank guarantee.

12. The Plaintiff-Appellant thereafter by way of amendment of the plaint raised further ground that action of the Defendants was arbitrary, illegal, untenable in law and violative of Articles 14 and 19 of the Constitution of India as M/s National Federation of Industrial Cooperative Ltd. New Delhi had filed a suit against the. Union of India and Textile Commissioner in the Court at Delhi. The Textile Commissioner in the said case had imposed a penalty of " 32.20 Lakh (Rupees thirty two lac twenty thousand only). However, during the proceedings the Textile Commissioner agreed to reduce the penalty from " 32.20 Lakh (Rupees thirty two lac twenty thousand only) to " 3.22 Lakh (Rupees three lac twenty two thousand only). It was, thus, pleaded that Plaintiff-Appellant could not be discriminated against and their penalty was also required to be reduced.

13. The suit was contested by filing a joint written statement. Plea of suit being bad for want of notice u/s 80 of the CPC was taken. It was also pleaded that the suit was not properly framed and that the suit was liable to be rejected for want of territorial jurisdiction.

14. On merit, factual position referred to above was admitted and it was also admitted that in case of National Federation of Industrial Cooperative Ltd. New Delhi, penalty was reduced from " 32.20 Lakh to " 3.22 Lakh. The reason given for this was that 90% of the share in the cooperative organization was that of the

Government of India and therefore, this concession was given.

On the pleadings of the parties learned trial court framed the following issues.

- 1) Whether the Plaintiff was ready and willing to perform his part of the contract ? OPP.
- 2) Whether the contract was frustrated for the reasons beyond the control of the Plaintiff? If so, its effect? OPP.
- 3) Whether the Plaintiff is entitled to the injunction prayed for? OPP.
- 4) Whether this Court has no territorial jurisdiction to try the present suit? OPP.
- 4-A Whether the Defendant Union of India has discriminated against the Plaintiff in the matter of waiving the penalty amount? If so, its effect? OPP.
- 5) Relief.

15. The learned trial court on appreciation of evidence recorded a finding that the Plaintiff was ready and willing to perform his part of contract as they had shown their intention even to perform the contract at lower rate which was not agreed to by the Defendant-Respondent.

On issue No. 2, learned trial court held, that the case of the Plaintiff was not of frustration, but was something in-between, as the contract was not strictly frustrated The Appellant could perform their part of the contract upto the date fixed. Even otherwise Plaintiff-Appellant had offered to perform their part of contract at lower rate if the Defendants No. 1 & 2 could permit them to re-negotiate the export. Action of the Government in reducing the rate of sale was held to be not illegal, but the learned trial court held that action of the Government in not permitting the Plaintiff to renegotiate was a contributory factor for non-performance of the contract.

16. The Plaintiff was held not to be wholly responsible for nonperformance of the contract. Resultantly, it was held that the Defendants No. 1 & 2 could not be allowed to forfeit the amount of bank guarantee in its entirety on the principles of equity, moral and good conscience.

17. On issue No. 3, Plaintiff-Appellant was held entitled to injunction, whereas on issue No. 4, it was held, that the court had the territorial jurisdiction. On issue No. 4-A, it was held, that in view of the rejection of penalty, Plaintiff-Appellant was liable to penalty at the rate of 10%.

On issue No. 5, it was held that Defendant could not impose the penalty on the principles of equity, moral and good conscience, and consequently suit for injunction was decreed in part and Defendants No. 1 & 2 were enjoined from invoking bank guarantees dated 29.8.1980 and 10.9.1980, beyond 20%.

18. The Defendant-Respondent preferred an appeal against the judgment and decree passed by the learned trial court wherein the Plaintiff Appellant filed -

cross -objections.

19. Plea of the Respondent/Union of India, that in case the purchasers i.e. Arkey Holdings had not opened the letter of credit due to fixation of lower rate of cotton by Textile Commissioner on 19.11.1980 and the Plaintiff firm was not permitted to renegotiate the contract with the purchasers, it could not be treated to be frustrated contract, as the contracts, were neither incapable of performance, nor the fixation of lower rates vide press note dated 19.11.1980 could be taken to be an act which could render performance of the contracts impossible.

20. The contention raised was that the Plaintiff/firm could have recovered the amount from the purchasers. The performance of contract was not impossible. Learned lower appellate court accepted this plea and reversed the findings of the learned trial court, and dismissed the suit filed by the Plaintiff-Appellant.

21. Cross Objections filed by the Plaintiff-Appellant were also dismissed.

22. Learned Counsel for the Appellant contended that this appeal raises following substantial question of law for consideration by this Court.

Whether the judgment and decree passed by the learned courts below is the outcome of misreading of Section 56 of the Indian Contract Act 1972 and thus perverse?

23. In support of the substantial question of law, learned Counsel for the Appellant referred to Section 56 of the Contract Act 1872 which reads as under:

56. Agreement to do impossible act.- An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful,- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

24. Learned Counsel for the Appellant contended, that in view of the facts and circumstances of the case it is apparent, that the judgment and decree passed by the learned courts below is the outcome of misreading of Section 56 of the Act.

25. The contention of the learned Counsel for the Appellant was, that the fact that in pursuance to Press Note, application made by the Appellant was accepted, wherein minimum rate was fixed and in pursuance thereto Appellant

had agreed to export the Bengal Desi Cotton to the purchasers on the terms specified in the Press Note, were not in dispute.

26. Learned Counsel for the Appellant contended, that it was admitted by the Defendant-Respondent, in written statement, that before the date for execution had arrived in view of the extension, another Press Note was issued vide which rates were reduced. In view of subsequent notification, it was impossible for the Plaintiff-Appellant to convince the buyer to purchase cotton at higher rate. No fault, therefore, could be found in not exporting cotton for want of letters of credit from the purchasers.

It was also the contention of the learned Counsel for the Plaintiff-Appellant, that the request made by the Plaintiff-Appellant, to sell cotton at lower rate was also not accepted by the Government of India without assigning any reason. Therefore, an arbitrary decision, was taken which resulted in frustrating the contract.

27. On consideration, I find force in the contentions raised by the learned Counsel for the Appellant.

28. Once it is not disputed, that the period for export was extended at the rate fixed in the notification, it was not open to the Government to reduce the rate of sale though prima facie no illegality can be found in the subsequent notification issued, but at the same time the action of the Defendant-Respondent in not permitting Appellant, to sell the cotton at the rate subsequently fixed, was an act which made it impossible for the Plaintiff-Respondent to perform its part of the contract.

29. Section 56 of the Contract Act, reproduced above shows that an agreement to do an act which is impossible in itself is void. Section 56 further provides that a contract to do an act which after the contract is made, becomes impossible or by the reason of some event which the promisor could not prevent, becomes void, when the act becomes impossible or unlawful.

30. In the case in hand, though mere issuance of subsequent notification could not be said to be an act, which made the contract impossible, but the act of Union of India in not permitting Plaintiff Appellant to sell the cotton at reduced rate, at its own risk and cost was certainly an event which made an act impossible, as it cannot be accepted from any buyer in the foreign or local, to enter into a contract for purchase of goods which are available at much lesser rate. As per the terms of the contract, it was not a completed contract, which could be enforced to give right to the Plaintiff-Appellant to claim-damages, as according to the circular of the Union of India irrevocable letter of credit was prerequisite to the conclusion of contract with the foreign buyers. The case of the Appellant/Plaintiff, therefore, fell u/s 56 of the Contract Act.

31. For the reasons stated, it stands proved, that the contract stood frustrated being impossible to perform. Therefore, the Union of India was not entitled to

invoke the guarantee, executed for due performance of the contract, specially when the contract became impossible, on account of refusal by the Union of India to permit the Plaintiff-Appellant to sell the cotton bales at the lower rate.

32. Though courts do not interfere in the enforcement of guarantee, but in the case like this, it will be inequitable and against interest of justice, if the injunction prayed for is refused

33. For the reasons stated, the substantial question of law raised is answered in favour of the Plaintiff-Appellant.

Consequently, the appeal is allowed. The impugned judgment and decree passed by the learned courts below is set aside, and the suit of the Plaintiff-Appellant is decreed, but with no order as to costs.