
(2013) 01 SHI CK 0091
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 22 of 2004

Om Prakash Sharma

APPELLANT

Vs

H.P. Tourism Development Corporation

RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Citation : AIR 2013 HP 46

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : J.S. Bhogal with T.S. Bhogal, for the Appellant; G D. Verma and B.C. Verma, for the Respondent

Judgement

Dharam Chand Chaudhary, J.—The present is a suit for recovery of a sum of Rs. 22,00,000/- (Twenty two lakhs) along with interest pendente lite and future allegedly due and admissible to the plaintiff on account of escalation in prices and also security deposit together with costs and interest against the defendant. Admittedly, in November, 1996, the defendant-Corporation entered into an agreement with plaintiff, a class-A contractor and duly enlisted with Public Works Department, for construction of Yatri Niwas Phase-II at Dharamshala. The plaintiff claims that the work was executed well within the time specified in the agreement. The defendant Corporation, however, denied the same and submits that the work, which under the contract was required to be completed within one year i.e. period 2.12.1997, its execution was delayed considerably by the plaintiff as it was completed on 15.4.1999. While the plaintiff claims that the payment of his final bill was released on 21.5.2001 at the same time the defendant has come forward with the version that after acceptance of the measurement of the work submitted by the plaintiff and completion of all codal formalities, full and final payment towards his claim was made to the plaintiff on 7.1.2000. He allegedly accepted the same without any reservation or objection.

2. As regards the claim of the plaintiff to the tune of Rs. 18,79,871/- towards

escalation in prices as per Clause 10-CC of the contract and a further sum of Rs. 1,00,000/- refundable security, the stand of the defendant corporation is that he never submitted the bill on account of escalation in prices as alleged and on the basis of assessment made by the Assistant Engineer on the establishment of the defendant corporation at Dharamshala further verified by its Superintending Engineer qua tentative and provisional liability and forwarding of the same to the Corporation vide letter dated 20.10.1999, the plaintiff cannot claim this amount.

3. As regards the security deposits to the tune of Rs. 1,00,000/- (One lakh) has been withheld as the plaintiff failed to furnish the CPF clearance certificate from the competent authority to the defendant-Corporation despite repeated demands. As and when the certificate is furnished by him, this amount will be released.

4. The defendant corporation has raised preliminary objections qua limitation and the maintainability of the suit in view of the existence of arbitration clause in the agreement.

5. In reply to such objections, in the replication, the plaintiff has contended that the defendant having failed to file an application under the provisions of Arbitration and Conciliation Act is not entitled to raise the plea of maintainability of the suit on the ground of so called arbitration clause in the agreement. Also that payment of final bills was made to him on 21.5.2001 and not on 7.1.2000. The suit is thus stated to be well within the period of limitation.

6. As regards the submission of bill qua escalation in prices, it is contended that as per the practice being followed in the defendant corporation, the bills were invariably being prepared by the defendant-Corporation and contractors' counter signature were being obtained thereon at the time of making the payment. The bill for escalation in the price as per the agreement was also prepared by the staff of defendant-Corporation.

7. On such pleadings of the parties, the following issues were framed in this suit on 4.3.2005:--

1. Whether the plaintiff is entitled to the suit amount as alleged? OPP
2. Whether the plaintiff is entitled for future interest at the rate of 18% per annum? OPP
3. Whether the suit is not maintainable in view of the arbitration agreement between the parties? OPD
4. Whether the plaintiff cannot claim the suit amount as he has accepted the full and final payment from the defendant without any protest? OPD
5. Whether the suit is within the period of limitation? OPP
6. Whether the plaintiff did not make any claim under clause 10-CC of the agreement between the parties as well if so, its effect? OPD.

7. Relief.

8. The parties were put to trial on all the issues so framed. The General Power of Attorney of Brij Kishore Sharma, has stepped into the witness box as PW-1 and proved the legal notice Ex. FW-1/B served upon the defendant and postal receipt Ex. PW-1/C. The plaintiff has also examined Shri Hem Chand Sharma, Accounts Officer on the establishment of defendant-Corporation, who had stepped into the witness box as PW-2 and produced the record pertaining to escalation bill prepared by the Assistant Engineer of the defendant Corporation.

9. On the other hand, the defendant has examined its Assistant Engineer stationed at Dharamshala, Shri Pyara Singh Thakur, DW-1.

10. Having gone through the evidence available on record and the submissions made on both sides, my findings on the above issues are as under:--

Issue No. 3.

11. This issue being preliminary in nature is being taken up first for adjudication. The onus to prove this issue is on the defendant. It would not be improper to quote that the objections qua maintainability of the suit in view of the existence of arbitration clause in the agreement seems to be raised merely for rejection as no evidence to substantiate the same is brought on record. No doubt, as per admitted case of the parties, the work of Yatri Niwas Phase-II was awarded to the plaintiff pursuant to an agreement executed between the parties. The said agreement has not seen the light of the day being not produced in evidence by either party. Since the onus to prove this issue was on the defendant, therefore, the agreement should have been produced in evidence by the defendant.

12. In the absence of the agreement there hardly remains anything on record suggesting that in the agreement there was a clause qua arbitration in the event of any dispute having arisen between the parties. Otherwise also, no such objection is available to the defendant particularly when on entering appearance in the suit, the defendant has filed written statement in its defence instead of filing an application u/s 8 of the Arbitration and Conciliation Act, 1996, with the prayer to refer the dispute to the arbitrator for adjudication.

13. No doubt, DW-1 has stated that there is an arbitration clause in the agreement and that the matter was not referred to the arbitrator, however, in view of there being agreement in existence and the same has not been produced, the oral testimony of DW-1 cannot be believed as gospel truth. In order to establish a fact, documentary evidence is always preferred as compared to the ocular. Thus, on account of withholding the documentary evidence to prove the existence of arbitration clause an adverse inference has to be drawn against the defendant. Accordingly, this issue is answered against the defendant.

Issue No. 5.

14. The onus to prove this issue lies on the plaintiff. The case of the plaintiff as

set out in the plaint is that after receipt of payment of final bill on 21.5.2001, the suit is within the period of limitation. The present is a suit for recovery of the amount allegedly payable to the plaintiff on account of escalation in prices and withholding of Rs. 1,00,000/- (one lakh) as the security deposits on account of the execution of the work of Yatri Niwas Phase-II by him for the defendant-Corporation pursuant an agreement. This issue is also carved out from preliminary objection to the effect that the suit has been filed after three years from the acceptance of full and final payment by the plaintiff hence barred by limitation. The date of full and final payment to the plaintiff has been claimed in the written statement as 7.1.2000. The plaintiff, however, has disputed the same being wrong, as according to him, the payment of his final bill was released in his favour on 21.5.2001.

15. On behalf of the defendant, it has been argued that in terms of Article 18 of the Schedule to Limitation Act, for filing a suit for recovery of amount on account of execution of the work by the plaintiff for the defendant, where no time has been prescribed for making payment, the period of limitation begins to run from the day when the execution of the work is complete. It is so provided under Article 18 of the Schedule as is apparent from a bare perusal thereof. Whether the present is a suit covered under Article 18 or not, we will have again advert to the pleadings and evidence produced by the parties to the present suit. While the plaintiff has only claimed that the work was executed well within the time and to the satisfaction of the defendant at the same time as per the case of the defendant in the written statement, the work was to be executed within one year i.e. on or before 2.12.1997 whereas the execution thereof was delayed and the defendant can complete the same only on 15.4.1999.

16. In replication the plaintiff, no doubt has denied any delay in the execution of the work on his part, however, in the same breath came forward with the version that the delay in its completion had occasioned on account of the factors beyond his control and the delay so caused even was extended by the defendant itself. There is, however, no denial in the replication to the date of completion of the work i.e. 15.4.1999 in the written statement.

17. Now coming to the evidence produced by the plaintiff, Shri Brij Kishore Sharma, PW-1 has admitted that the work was completed on 15.4.1999 in his examination-in-chief. According to him, the bill was also prepared on 20.10.1999. He also submits that the final payment regarding this work was made to him on 21.5.2001. From the testimony of PW-1, the date of completion of the work as 15.4.1999 is duly proved.

18. The statement of DW-1, on the other hand, reveals that though he has not disclosed any date of commencement of work nor that of its completion and has only stated that the work was to be executed within one year, however, the plaintiff took three years for its completion. As per the version in his cross-examination, final payment was made to the plaintiff in the year 2000, he, however, has stated so on the basis of his memory and not on the basis of the

record. Any how, when the plaintiff himself admits the date of completion of the work as 15.4.1999, the limitation as per Article 18 referred supra, for filing a suit of this nature starts from the date of completion of the work, which in the present case is 15.4.1999.

19. Although the date of receipt of the final payment is 21.5.2001 as pleaded by the plaintiff, yet even if it is believed to be so in that event also the same is of no consequence for the reason that the limitation for filing the suit has to be taken from the date of completion of work and not from the date of receipt of payment.

20. The period of limitation as prescribed under the Article *ibid* is three years; therefore, the suit should have been filed on or before 14.4.2002. The same having been filed in this Court on 19th May, 2004 is definitely time barred. I am taking support from the judgment of Hon''ble High Court of Punjab and Haryana, in Jullundur Improvement Trust, Jullundur versus Kuldip Singh, AIR 1984 Punjab and Haryana 185, to arrive at such conclusion. This issue is thus accordingly answered against the plaintiff.

Issue Nos. 4 & 6.

21. Both these issues being interlinked and interconnected can conveniently be disposed of by common findings and in order to avoid repetition of pleadings and proof.

22. While the simple case as pleaded by the plaintiff in the plaint is that a sum of Rs. 18,79,871/- payable to him on account of escalation in prices has been illegally withheld by the defendant, the response thereto in the written statement is denial simplicitor with further qualification that the plaintiff never submitted the bill to this effect. Further that he is not entitled to claim any such amount merely on the basis of assessment of tentative and provisional liability of the defendant-Corporation made by Assistant Engineer vide letter dated 20.10.1999 and further verified by its Superintending Engineer. In view of neither Assistant Engineer nor the Superintending Engineer are competent to sanction any such amount, the competent authority to accord approval of any payment is the Managing Director. In reply thereto, the version of the plaintiff in replication is that as per the practice all bills are invariably prepared by the staff of the defendant and only used to be counter signed by the contractors at the time of receipt of payment. It is on the basis of such practice, the staff on the establishment of defendant-Corporation has prepared the escalation bill, which was duly verified by the Superintending Engineer." The payment on account of escalation in prices allegedly is covered under clause 10-CC of the agreement and as such required to be billed and paid to the plaintiff together with other payments due and admissible on account of execution of the work by him.

23. The onus to prove these issues lies on the defendant. It has come in the examination-in-chief of DW-1 that the work though was required to be executed within one year; however, the plaintiff took three years for its completion. Also that the plaintiff did not make any representation for enhanced payment on

account of costs escalation and to the contrary he accepted the final payment without raising any objection or protest. In his cross-examination, he has admitted that on reporting of execution of a work, the Junior Engineer concerned used to measure the work done on the spot and enters the work so executed along with its measurement in his measurement book, and thereafter he prepare the bill in the measurement book itself. He also admitted that the signature of the contractor used to be obtained in token of his acknowledgment with respect to correct measurement of the work referred therein. He, further admitted that in the present case the defendant did not submit any bill either on his pad or letter head or in any bill form and rather it is the Junior Engineer, who had prepared one bill for the work and another for escalation in the costs of material and wages of labours. He also admitted that the bill was submitted to the head office. He, however, expressed his ignorance that the bill regarding escalation was verified by the Superintending Engineer in the Head Office. It is proved from un-rebutted testimony of DW-1 that it is the plaintiff, who took three years for completion of the work and did not make any representation for enhanced payment of escalation. His testimony that the plaintiff had received the payment of final bill without raising any objection or protest also remained unsettled because he is not at all cross-examined in this behalf. No doubt, it is established from his testimony that the bill for escalation in the costs of material and wages of labours was also prepared; it was, however, not sanctioned by the competent authority.

24. Once the plaintiff received the amount in question without raising any objection or protest, the onus to prove otherwise stand shifted on the plaintiff. While in the witness box as PW-1, the plaintiff himself has admitted that final payment was made to him on 21.5.2001. It is even pleaded also so in the plaint and replication. He has opted not to produce any evidence in rebuttal. The mere testimony of PW-1 that the escalation bill was sent to the Head Office of the Corporation on 20.10.1999, when it was checked under the supervision of the Superintending Engineer is not sufficient to take a view that the plaintiff is entitled to a sum of Rs. 18,79,871/- on account of escalation in prices particularly when the competent authority never sanctioned the same. He never made any representation in this behalf as is stated by DW-1, the Assistant Engineer, who has not been cross-examined on this score. Therefore, his testimony that he had been following the bill and requesting the authorities to release the payment to him and that the representation by the defendant corporation that it was running in loss having no work in view of their being no tourist seasons cannot be believed to be true.

25. PW-2, Shri Hem Chand Sharma, who has also produced the record, no doubt, stated that on verification of escalation bill, the amount was reduced to Rs. 18,79,871/-, however, the competent authority i.e. the Managing Director did not approve the same at any stage.

26. In such a situation, no doubt, it is established from the record that the bill on

account of escalation in prices, no doubt, was prepared and forwarded to the head office of the defendant-Corporation, however, the same being not sanctioned by the competent authority nor the plaintiff made any representation to such authority in this behalf and rather received the full and final payment without any objection or protest is not entitled to claim a sum of Rs. 18,79,871/- on account of escalation. Therefore, while issue No. 4 is held in favour of the defendant, issue No. 6 is held against plaintiff. He, however, having received full and final payment without raising any objection or protest nor the payment on account of escalation is sanctioned in his favour by the competent authority is not entitled to claim any amount on this score. Both these issues stand answered accordingly.

Issue Nos. 1 & 2.

27. The onus to prove these issues lies on the plaintiff. As per the findings recorded on issue Nos. 4 and 6 supra, no doubt, a sum of Rs. 18,79,871/- was claimed by the plaintiff on account of escalation in prices, however, the same was never sanctioned by the competent authority nor he ever made any representation in this behalf and rather accepted the full and final payment without raising any objection. Therefore, so far as the suit amount to the tune of Rs. 18,79,871/- is concerned, he is not entitled to the recovery thereof from the defendant.

28. As regards a further sum of Rs. 1,00,000/-, he claimed on account of withholding of his security deposits, the stand of the defendant-corporation is that the amount of refundable security to the plaintiff, had to be withheld as he failed to produce the proof qua clearance of his liability towards the deposit of EPF with competent authority and that this amount shall be released immediately on his furnishing clearance certificate to this effect. The response thereto in replication, however, is that the plaintiff is not bound under either of the terms of contract agreement to submit the proof of clearance of EPF liability to the defendant. The defendant has also not been given any authority under the contract to retain his security deposits at all without providing EPF clearance by him. While in the witness box the only version of PW-1 qua this aspect is that a sum of Rs. 1,00,000/- (one lakh) has been retained by the defendant from his running account towards security deposit, refund whereof was due on 14.10.1999, the same, however, has not been refunded to him.

29. PW-2 Hem Chand Sharma, Accounts Officer of the defendant Corporation, has produced the record and stated that a sum of Rs. 1,00,000/- has been deducted from the running bill of the plaintiff on account of security deposits. There is no cross-examination either of PW-1 or PW-2 qua this aspect of the matter. The fact thus remains that security deposits in a sum of Rs. 1,00,000/- has been withheld by the defendant-Corporation which was payable to the plaintiff. No evidence suggesting that this amount has been legally withheld on account of non-production of EPF clearance certificate has come on record. Whether it was an obligation on the part of the plaintiff to produce the EPF

clearance certificate under the contract or not, no head or tail can be made out for want of production of contract agreement. Therefore, there is nothing to believe that the defendant Corporation is competent to withhold this amount for want of EPF clearance certificate; however, irrespective of the entitlement of the plaintiff to receive this amount no relief can be granted in this suit in view of the same is time barred as has been held in para supra while answering issue No. 5. Both these issues are thus answered against the plaintiff. Relief. In view of the findings on all issues hereinabove, the suit fails and the same is accordingly dismissed. No order so as to costs.