
(1989) 04 MP CK 0019

In the Madhya Pradesh High Court

Case No : Second Appeal No. 84 of 1975

Pran Nath Suri and Others

APPELLANT

Vs

The State of M.P.

RESPONDENT

Date of Decision : 19-04-1989

Acts Referred:

Contract Act, 1872 — Section 73, 74

Citation : AIR 1991 MP 121 : (1989) MPJR 796

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.C. Lahoti, J.

This is plaintiffs second appeal. The facts, in so far as relevant for the purpose of this appeal, lie in a narrow compass and may be summed up briefly.

A trade Quarry was put to auction for a term of 3 years (1 -4-67 to 31 -3-70) whereat the plaintiff made a bid of Rs. 3,501/-per annum. The bid, being the highest, was accepted on 6-4-1967. The plaintiff did not enter into an agreement with the State, in spite of being noticed to do so. Consequently the trade quarry was put to re-auction, sometime in the month of April, 1971 whereat bid of one Shamshad Khan was accepted. Shamshad Khan too refused to take possession of the quarry and his auction was cancelled granting him refund of the amount deposited by him. The plaintiff had deposited an amount of Rs. 176/- by way of earnest and an amount of Rs. 850/- by way of first instalment. This amount of Rs. 1025/- was directed to be forfeited and proceedings were initiated for recovering an amount of Rs.9,172/- by way of compensation for the loss claimed to have been sustained by the State Government on account of default committed by the plaintiff.

The plaintiff filed a suit claiming refund of Rs. 1025/- and praying for an injunction restraining the State Government from making the recovery. The

principal ground on which the suit is founded is that the identity of the land forming part of the quarry was not ascertainable nor did officers of the Mining Department attempt at such identification by demarcation in spite of prayers having been made by the plaintiff and that is why the plaintiff was not at fault and were entitled to the reliefs prayed for. In the written statement the allegations made by the plaintiff were denied and the forfeiture of the amount deposited by the plaintiff as well as the proposed recovery, were sought to be justified.

The trial Court granted preventive injunction to the plaintiff but said nothing about the refund claimed. The decree of the trial Court gave rise to two appeals preferred by both the parties the plaintiff pressing for the relief of refund also and the defendant-state seeking reversal of the decree of preventive injunction. The lower appellate Court allowed the appeal preferred by the State, rejecting the appeal preferred by the plaintiff and thereby entailing dismissal of the plaintiffs suit in toto.

In the opinion of this Court, both the courts below have missed the point and have failed to examine the core of controversy on which would depend the rights of the parties. It will be useful to reproduce Clauses No. 5 and 8 of the terms and conditions of auction (Ex.D/3).-

5? ?kks" k fo?; lEc/kh fu;e rFkk vU; vko";d tkudkjH dk;kZy; dysDVjsV f"koijh ls fdLH Hkh fnu lkoZtfud NqfV;ksa ds vfrfjDr dk;kZy;hu le; esa izkIr dh tk ldrh gSA izR;sd cksyhHkj dk drZO; gS fd og cksyh yxkus ls iwoZ lEcF/kr fu;e mnku dh fu;e mlesa ls fudyus okys [kfut dh ek=k vkfn ds fo" k; ds iw.kZ tkudkjH izkIr djysA ?kks" k fo?; ds mijkar bl lEcU/k esa dksbZ vkif?k ekU; ugha gksxhA rkj vFkok izkFkZuk i= }kjk Hksth xbZ cksyh dks ekU; ugha fd;k tk;sxA ftu Bsds dh cksyh 1000 :- ,d o" kZ ;k bls de gksaxh mldh ,d o" kZ dh iw.kZ jde vuqC/k lEiknu gksus ls iwoZ tek djkbZ

tk;sxA 1000&2000 rd dk /ku nks vaf" kdkvksa esa 2 ls 3 gtkj rd rhu esa tks 3 ls 4 gtkj rd 4 vaf" kdkvksa esa olwy fd;k tk;sxA ijUrQ izFke vaf" kdk fdLH Hkh n"kk esa ,d gtkj ls de ugha gksxh vkSj "ks" k vaf" kdk;sa leku jgsxA

8? lQy cksyHkj dks BsdK Loh?r dh lwpuK feyus ds 30 fnu esa fu;ekuqlkj vuqC/k ,oa izfrHkk lEiknu djkuK rFkk vuqC/k dk iath;u (registration) djkuK vfuokZ; gS le; ij vknku dk vkf/kiR; x`gu djuk BsdsHkj dk drZO; gksxA vU;Fkk mldh ?kjksGj (security deposit and earnest money) jkT; lkr dks tkdj vknku dks iqu% ?kks" k fo?; fd;k tk;sX mlls "kklu dks tks gkuh gksxh og mlls olwy dh tk;sxA

A reading of the terms and conditions shows that an occasion for taking or delivering possession over the quarry would have arisen only if the agreement and surety bond as required by Clause (8) had been executed. The parties and the courts below were belabouring under an impression that the real issue to be determined was, which of the two was at fault in the matter of delivery of possession whether the plaintiff had failed in taking possession or whether the defendant had failed in delivering possession because identity of the land was

not ascertained. That controversy was irrelevant because an occasion for delivery of possession had not arisen at all. The default had taken place with the failure of the plaintiff in executing the agreement and providing surety bond as contemplated by Clause (8) it was at that point that the rights and liabilities of the parties should have been worked out.

Clause (8) laid an obligation on the plaintiff in executing the agreement and providing surety bond within 30 days of the communication of the acceptance of the bid, failing which his security deposit and earnest money were liable to be forfeited entitling the State "to hold a re-auction of the quarry and recover the loss sustained consequent to re-auction. Plaintiff's bid was accepted and communication to that effect was served on the plaintiff on 28-4-67, vide Ex. D/1. The plaintiff could have executed the agreement and provided surety bond on or before 28-6-67 which he having not done, he became a defaulter and the State got a right in holding a re-auction. It appears that the re-auction was held only in April, 1971 when Shamshad Khan was declared a successful bidder. Papers relating to the auction held in 71, naturally in the custody of the defendant, were not placed before the Court. But it can be assumed safely that the auction in favour of Shamshad Khan must have been for the period commencing 1-4-1971 and in any case that auction could not have been for the period 1-4-1967 to 31-3-70, for which the plaintiff was a bidder. It is difficult to comprehend how the liability of the plaintiff could be adjudged and determined on the basis of auction held for entirely a different period.

Incidentally it may be mentioned that the reasons which led to the cancellation of auction in favour of Shamshad Khan are contained in the order dated 19-4-1971 (Ex. P/I). That order clearly mentions that auction in favour of Shamshad Khan was being cancelled because Shamshad Khan had refused to take possession of the quarry because the area was under dispute. Shamshad Khan was granted a refund of the entire earnest money and the amount of first instalment deposited by him. If only the plaintiff would have executed the agreement thereby fulfilling his part of obligation and then adduced some evidence to show that a similar dispute as to possession existed when the occasion for taking possession over the quarry-land arose, certainly the plaintiff would have been held entitled to full refund because it would have been highly inequitable to recognise the State's right of forfeiture when it was not in a position to secure peaceful enjoyment of the quarry given by it in auction to the plaintiff. Then Clause (8) of the terms and conditions would not have come in the way of the plaintiff. However, the position in the present case is that the occasion for taking possession did not arise on account of the default already committed by the plaintiff by not executing the agreement and hence discussion on that aspect of the case is rendered more or less academic.

9A. To work out the rights and liabilities of the parties in the present case, the circumstances relevant may" be noticed. It was obligatory on the part of the State to have taken steps for holding re-auction of the trade quarry soon after

28-4-67 i.e. the date on which thirty days expired from the date of communication to the plaintiff of the acceptance of his bid. If the State would secure a better bid at such a re-auction, the question of holding the plaintiff liable for any loss would not have arisen if such re-auction would have yielded a revenue less than what was payable by the plaintiff for the term of the lease, the plaintiff would have remained liable to make good the loss. But in no case the State was entitled to sit idle for the entire period of lease and then demand in the name of compensation from the plaintiff such amount as he would have been liable to pay if he had worked the quarry. Holding to the contrary would amount to putting a premium on the remissness of the State and its officials.

Explanation to Section 73 of the Contract Act, 1872 or at least the principle underlying it is attracted to such case. The provision has come up for consideration in several cases and the ratio appears to be-

(1) one who has proved a breach of contract by another is to be placed, as far as money can do it, in a good situation as if the obligation had been performed (i) the claimant is under a duty of taking all reasonable steps to mitigate the loss consequent on the breach of obligation and he is debarred from claiming and part of the damages which is due to highest neglect in taking such steps. See *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Rly. Co. of London*, 1912 AC 673 relied in *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*, ; *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, and *Firm Bhagwandas Shobhalal Jain, a Registered firm and Another Vs. State of Madhya Pradesh*,

Not an identity but a similarity of facts to those in the present case is to be found in a decision rendered by a Division Bench of this Court in *Pannalal Jugatmal Vs. State of Madhya Pradesh*, wherein it has been held-

"the explanation to Section 73 of the Contract Act casts a burden upon the person complaining of breach of the contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. The law, for wise reason, imposes upon a party subjected to injury from a breach of a contract the active duty of making reasonable exertions to render the injury as light as possible.

Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd., was a case where the Union of India forfeited the security deposit of a contractor for a breach of contract by him, it was held that in the absence of loss of damage to Union of India on account of breach committed by contractor forfeiture could not be sustained and award of reasonable compensation only was sustained.

P.S.N.S. Ambalavana Chettiar and Co. Ltd. and Another Vs. Express Newspapers Ltd., Bombay, is a case under Sale of Goods Act, 1930. It was held that in case of a breach of contract to sale on the part of a buyer "the seller is entitled to claim as damages the difference between the contract price and the market price on the date of breach. Where no time is fixed under the contract of sale for

acceptance of the goods, the measure of damages is prima facie the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods."

In *Bismi Abdullah and Sons, Merchants and Commission Agents Vs. The Regional Manager, F.C.I., Trivandrum and Another*, the defendant's tender on invitation by plaintiff for sale of rice was accepted but the defendant failed to make payment and lift the stock in spite of reminder and instead demanded return of earnest money. The plaintiff did not resale the stock within a reasonable time but waited for about 4 1/2 months when market started crashing down. The resale was held to be not within reasonable time and the plaintiff was held entitled only to nominal damages. Their Lordships held-

"One of the fundamental principles of law of damages is that the person entitled to claim damages must do all that is within his power to mitigate the damage. In case where there is no right to the difference in price on resale available to the seller as per the contract can claim only the difference between the contract price and the market price on the date of the breach. Where the seller has got such a right the resale must nevertheless be conducted within a reasonable time from the date of breach. The damages must have relation to the market price on the date of breach whether or not the contract empowers the vendor to resell and claim the difference. In other words "the resale can only be taken" as a step to enable the party to establish the market price on the date of the breach. Viewed in this manner the resale must be within a reasonable time from the date of breach so that there may not be such variance in market price, between the date of resale and the date of the breach,"

(Sic) cases do apply to the facts of the present case. The plaintiff bid at an auction which would have entitled him to operate the trade quarry for the period 1 -4-67 to 31 -3-70. He defaulted on 28-5-67 itself by his failure to execute the contract and to provide the surety. Nothing prevented the State in holding a re-auction of the trade quarry for the unexpired term pursuant to Clause (8) of the terms and conditions of the auction. The breach of obligation on the part of the plaintiff imported a liability of forfeiture of earnest money on him but nothing more. The State cannot be permitted to take advantage of its own negligence" in not holding the re-auction for the unexpired term and thereby not taking steps for mitigating the damages. It is noteworthy that the State adduced no evidence to show that it would have sustained a loss if the trade quarry would have been put to re-auction for the period (1 -4-67 to 31 -3-70) and if so, by what amount.

The result of the above said discussion is that the State was not entitled to recover anything in the name of compensation for breach of contract or obligation from the plaintiff. It was also not entitled to retain and forfeit the amount of first instalment paid by the plaintiff because the instalment was paid as consideration for working the quarry, an occasion for which did not arise at all. All that the State was entitled to forfeit the amount of earnest money as per Clause 8 and nothing more.

The result is that the plaintiff's appeal is partly allowed. The plaintiff's suit for refund of Rs. 850/- is decreed. The defendant-State is also permanently restrained from recovering Rs. 9,172/- from the plaintiff. Decrees of the Courts below to the extent of dismissing plaintiff's suit for refund of Rs. 175/-, being earnest money, are maintained. In view of purely legal controversy arising in the case and partial success of the parties, they are left to bear their own costs throughout.