

---

**(1978) 09 SHI CK 0002**  
**In the High Court Of Himachal Pradesh**  
**Case No : Civil Suit No. 42 of 1976**

Prem Chand and Sons

APPELLANT

Vs

State of Himachal Pradesh etc.

RESPONDENT

---

**Date of Decision :** 28-09-1978

**Acts Referred:**

Arbitration Act, 1940 — Section 33  
Civil Procedure Code, 1908 (CPC) — Section 80  
Contract Act, 1872 — Section 20  
English Sale of Goods Act, 1979 — Section 6  
Sales of Goods Act, 1930 — Section 7

**Citation :** (1978) 7 ILR HP 595

**Hon'ble Judges :** C.R. Thakur, J

**Bench :** Single Bench

**Advocate :** Chhabil Dass, for the Appellant; M.G. Chitkara, General, for the Respondent

**Final Decision :** Allowed

---

## Judgement

C.R. Thakur, J.—This application u/s 33 of. the Indian Arbitration Act (hereinafter called the Act) has been filed by Messrs Prem Chand and Sons, Forest Lessees, against the State of Himachal Pradesh, Conservator of Forests and the Divisional Forest Officer alleging that the agreement entered into between the parties is void and as such the same be cancelled.

2. The facts briefly are that the Petitioners, which is a registered firm, are carrying on the work of forest lessees, and, on a notice issued by the Respondents that an auction for the cutting and felling of timber of Lot No. 5-74/75 with respect to Tretha Range in Dalhousie Forest Division in Chamba Forest Circle would be held on 1st February, 1974, in the Bhadroha Rest House at Pathankot the Petitioners inspected the forest somewhere in the first week of November, 1973, and accordingly participated in the auction held on 1st February, 1974.

3. This forest was alleged to be situated on a high altitude within the Himalayan ranges and a notice was given, well in advance so that before the setting in of winter season - and also of snowfall which falls heavily in the area, the prospective bidders might inspect the same so as to enable them to give their bids on the dates specified.

4. That at the time of the auction the conditions were announced and it was informed vide conditions Nos. 4 and 5 that the marked trees given in the sale list were acceptable to the bidders and that the department did not hold itself responsible for the soundness or otherwise of any trees. Thus the existence of trees was a condition precedent for completion of a valid contract between the parties. A fire had broken out in the aforesaid forest on 30th November, 1974, of which the Petitioner firm had no knowledge but the department had the knowledge of the aforesaid fact. The effect of the fire was that the entire forest and the trees marked therein had been burnt due to the fire and there hardly existed 5, or 10 per cent of the trees standing at the site and those too were in a charred condition. It was the duty of the Forest Department to have apprised the persons interested with the aforesaid fire after the issue of notice of auction and should have revised their marking list after assessing the loss and damage done to the forest. There was an active misrepresentation of the fact that the trees marked in the list were in existence on the site and there were no patent defects in the same though the department did not hold itself responsible for patent defects, that is, the soundness or hollowness of the trees. Relying upon the representation of the department, the Petitioner-firm gave a bid of Rs. 86,000/- and accordingly deposited a sum of Rs. 13,000/- as earnest money. Afterwards the aforesaid bid of the Petitioner firm was sanctioned by the Conservator of Forests, Chamba Forest Circle, although the signatures on the agreement were obtained on 3rd February, 1974. After signing of the aforesaid agreement the Petitioner firm, engaged the labour and went to the spot in April, 1974, when the snow had melted away and found that almost 125 out of 576 dry standing trees and 2 dry half broken and dry fallen kail trees and 26 dry standing fir trees had completely been burnt and rest of the trees were so badly charred as were not in a commercially exploitable condition. The Petitioner-firm immediately informed the Conservator of Forests, Chamba Forest Circle and the Divisional Forest Officer concerned about the damage already done and applied for the refund of the security and cancellation of the agreement. A good deal of correspondence ensued between the parties and ultimately the Conservator of Forests, vide his letter, dated 11th July, 1974, informed the Petitioner firm that he did not find any clause in the agreement deed under which the firm could refuse to work the lot simply for the reasons that most of the trees have been burnt. He misinterpreted conditions Nos. 4 and 5 at the time of auction and advised the Petitioner firm to complete the work immediately by 30th November, 1974. The Petitioner firm controverted the aforesaid allegations and asked for replacement of the damaged trees. Thereupon the Divisional Forest Officer, vide his letter, dated 30th September, 1974, replied to the Petitioner firm that a joint inspection was held

and it was found that hammer marks on only 37 trees were missing in the lot and the same had been again hammer marked. However, for obvious reasons he refrained from commenting on the extent of damage done to the lot; Thereafter the Divisional Forest Officer, vide his letter, dated 30th September, 1974, cancelled the agreement under alleged powers vested in him under Clause 14 of the agreement and ordered the forfeiture of security and thereafter vide letter, dated 13th December, 1974, the Petitioner firm was informed that the forest lot would be resold and loss, if any, occasioned would be recovered from the Petitioner firm. However, the lot was ordered to be resold twice but the prospective bidders did not bid the same on account of the almost total damage done to the forest. It is submitted that since 1974 till 1976 the prices of the timber have gone up and the forests have been sold at a higher premium.

But in the instant case no bids were offered by the prospective bidders because of the total loss or destruction of the usufruct. The Respondent Defendants vide their letter, dated 22nd April, 1976, served a notice upon the Petitioner firm for recovery of Rs. 72,639.70. It had also been mentioned therein that in case the aforesaid sum was not paid within thirty days, action as per clauses 14B and 20 would be taken. The Petitioner firm does not admit this liability and there is a dispute between the parties which is covered by the arbitration clause in the agreement. The said agreement including the alleged arbitration clause No. 29 is liable to be held void and inoperative because the same was obtained by active misrepresentation of facts. Even if there was no misrepresentation and the Respondents did not know that the usufruct had been destroyed, then also the contract is void on account of mutual mistake.

5. The Respondents raised a preliminary objection that the application u/s 20 read with Section 33 of the Arbitration Act is self contradictory and incompetent hence deserves dismissal with costs. But it may be stated that this point was not argued by the learned Advocate General, therefore, it does not require any discussion.

6. On merit it was stated that the Respondent-Defendants were not aware as to when the representative of the Petitioner firm inspected the forest. According to conditions of sale under the agreement deed the contractors are supposed and presumed to have already inspected and satisfied themselves with regard to the forest property under auction and to see the details given in the sale lists circulated amongst them for the purpose of their complete satisfaction as would be evident from the conditions Nos. 4 and 5 of the sale of conditions. It was averred that the fire broke out only in small part of the forest on 30th November, 1973, i.e. only in 2 hacs of the area out of the total area of 108.45 hacs. It was a ground fire and the bases of a few trees only had been scorched. There was no loss of any kind to the trees, as such the Forest Department was not obliged to bring the factum of this negligible fire and consequent slight damage to the notice of the bidders, when the timber content of the trees was-not affected, the bases of just a few trees only were scorched. This was not particularly required

when the condition 4 of the conditions of sale had already laid down that the bidders were expected to have inspected the forest. It was denied that there existed 5 to 10 per cent of the trees standing at the site. The trees marked and shown in the sale lists were actually existing on the site and it was denied that there was any patent defect in the same. It was denied that the Petitioner firm visited the spot with labour during April, 1974. The Petitioner firm vide letter, dated 5th March, 1974, addressed to. To the Conservator of Forests, Chamba Circle, intimated addressed to about his visit to the forest and finding damage to the trees had asked for cancellation of the sale and return of security deposited by them. In that letter only 57 trees were admitted by the Petitioner damaged to such an extent on which the departmental sale hammer mark was not visible due to the bases of trees having been scorched and were remarked on 17th August, 1974, when the contractors agent was also there. The contractors were informed of it, vide letter No. C. III(a)-257/6391, dated 3rd September, 1974, the copy of which is Annexure R-II, and asked to start work immediately, but they did not do so. Hence the indenture with the Petitioner firm was cancelled in accordance with Clause 14 of the agreement deed entered into by them on 13th December, 1974. It was denied that the prospective bidders refused to give their bid because of the loss to the trees. The fact was that due to the passage of one year there were depreciation and deterioration to the trees. It was also stated that it was not Clause 29 which provided for referring the dispute to arbitration rather it was Clause 32.

7. On the pleadings of the parties, the following issue was framed:

(a) Is the contract void for the grounds stated in the petition? O.P.A.

8. The Petitioner firm, forest lessees, examined five witnesses including himself besides putting in documentary evidence. The Respondents also examined two witnesses and put in some documentary evidence.

9. It is an admitted case that fire broke out in the Tretha forest on 30th November, 1973. It is stated by Shri G.S. Sandhu, Divisional Forest Officer (D.W.-I), who was posted as Assistant Conservator of Forest at Dalhousie in the year 1973, that the fire broke out in the aforesaid forest on 30th November, 1973, and in May 1974, he was ordered to go in the forest and verify the extent of the fire and the damage caused to the trees. "He was ordered to go at the spot after the forest-lessees had informed the Divisional Forest Officer that fire had broken out in the forest. He again went on the spot on 17th May, 1974, and prepared the report Ex. D.W.-I/A. From the report after having carried out inspection in the presence of the representatives of the Petitioner firm as also the subordinates of the Forest Department, he reported that 37 trees were missing and he had prepared the list Ex. D.W.-I/B for the same. However, according to the report of the Range Officer, as mentioned in Ex. D.W.-I/A, the Range Officer had reported that 61 trees were missing due to the fire. But D.W.I found this report to be incorrect and according to him only 37 trees were missing. He had also stated that on his first inspection report he found 61 trees which had been damaged by

fire. According to him amongst those 61 trees there were such trees which had not been sold to the contractor but had been affected by the fire. The area in which the trees were found to have been damaged by fire was about 4/5 acres. The representative of the Petitioner firm is said to be one, Shri Padharu Ram, but his signatures do not appear on the list Ex. D.W.-I/B. According to D.W.-I, although he had asked Shri Padharu Ram to sign the list but he said that he would be coming on the next following morning and would sign the list in the Range Office. But he did not turn up on the following day: According to this witness he scrapped with axe those 37 trees and it was found that 10 or 15 trees were damaged upto 4 or 5 feet from the base. However, he stated that they were not completely damaged. They were only charred from outside upto the extent of two inches in depth. The remaining trees on scrapping were found not to have been damaged. Only the outer crest or skin of the trees was charred.

10. In cross examination it is stated by D.W.-I that they had received a report of fire on 26th February, 1974, through their Ranger. It is also stated that there was a delay in reporting the matter to the Divisional Forest Officer. Again there is another report made by him, which is Ex. D.W.-1/2. This report was made by him on 22nd June, 1974, after having inspected the spot and in this report he has mentioned as under:

"The detail of sixty-one trees whose hammer marks and numbers are not traceable of lot No. 5/74-75 is given below.-

V24 number

III16 number

II-A15 number

II-B3 number

I-A3 number

Total61 number

It is, therefore, quite manifest that the damage was quite extensive and as many as 61 trees were badly damaged and their numbers, etc. could not be traced.

11. As regards the association of Padharu Ram he has not mentioned in the report if he was present at the spot when he inspected the same, therefore, it is wrong to say that he inspected the spot in the presence of the agent of the Petitioner firm. It is quite evident that there was a damage caused to the trees in the forest, which was auctioned in favour of the Petitioner firm. This fire admittedly had taken place on 30th November, 1973, and the auction took place in February, 1974. The Petitioner's submission is that he had inspected the trees in the forest before the fire had broken out because that is such an area which becomes very difficult for a person to visit the same during the winter season due to the heavy snow-fall as the forest happens to be situated on a high altitude.

12. Therefore, in these circumstances the question that arises for consideration is, whether the agreement entered into between the parties is void, when both the parties acted under a bona fide mistake, or if the department was aware of the factum of loss by fire on the date of auction by misrepresentation of facts that the trees put to auction were existing at the spot. According to Section 7 of the Sale of Goods Act, 1930, where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract. It was within the knowledge of the subordinate staff of the Forest Department that the trees had been damaged because of the fire that broke out on 30th November, 1973. But that report had not been received by the higher authorities who were to conduct the sale. The Divisional Forest Officer received the report about the damage only on 26th March, 1974. The Petitioner also had inspected the spot where he was to purchase the trees on an auction before the 30th November, 1973, and therefore, when the fire took place after that date and before the date of the auction, both the parties were not aware about the fire and the damage to the trees on the spot. In these circumstances as is envisaged by Section 7 of the Sale of Goods Act, 1930, the contract would be void.

13. The notice of auction was issued on 10th September, and the trees were auctioned in February, 1974, at Pathankot. The Petitioner had given the bid for the purchase of 576 dry and two half broken trees which were marked. The agreement was executed on 3rd February, 1974, and the labour went in April 1974, to the forest when they found that the forest was gutted in the fire, which broke out in November, 1973.

14. The learned Counsel for the Respondents had contended that only a few trees had been gutted and the remainder trees were there. That may be so. But the auction was not done tree-wise rather the auction was done of a lot. The price was not fixed tree-wise rather the bid of Rs. 86,000/- was given for the entire lot of 576 dry and two half broken trees. The Petitioner had given the detail of the complete gutted trees as sixty-one and this is fully in accord with the report Ex. D.W.-1/2 made by the Assistant Conservator of Forests on 22nd June, 1974. The Petitioner had also brought it to the notice of the Forest Department vide Ex. P.W.5/J, dated 1st August, 1974, that there were sixty to seventy marked trees which had been totally burnt. Some of them were lying uprooted, half broken and had become totally rotten. These trees could not yield the timber. There were some other trees which were half burnt. No marking hammer number was visible on them. The Respondents asked the Petitioner to carry out the work which, in my opinion, the Petitioner rightly refused to do so because the contract had become void. The Petitioner served the department with a notice u/s 80, Code of Civil Procedure, the copy of which is Ex. P.W.-5/F. It appears that when the Petitioner refused to execute the work then the Department wanted to put the forest for fresh auction. But from the letter, Ex. P.W.-5/M, it appears that the Conservator of Forests had written to the Divisional

Forest Officer that it would not serve any useful purpose to put the lot again for auction at Chamba when it could not attract any bidder during general auctions where the competition was quite appreciable. It was further stated that orders for the disposal of trees will be issued on receipt of opinion of the Government Advocate on the notice served by the lessees u/s 80 Code of CPC According to the Petitioner about 125 trees had been completely charred or gutted whereas the department says that it was 37. But the fact remains that a good number of trees were gutted in the fire. Therefore, in these circumstances the Petitioner could not be asked to execute the work of the remainder trees. It cannot be disputed that the mistake was bilateral and, therefore, in such a case the contract as envisaged u/s 20 of the Indian Contract Act would be a void contract. It has been held in U.P. Government Vs. Lala Nanhoo Mal Gupta, as under:

"Mistakes in the formation of contracts may be of three kinds, namely, unilateral mistake, mutual mistake and common mistake. In a case of unilateral mistake only one of the contracting parties is mistaken and the other knows of his mistake. Its consequence is that the contract is void. In a case of mutual mistake the contracting parties misunderstand each other and there is no real correspondence of offer and acceptance. The parties are really not consensus ad idem and there is in fact no agreement at all. In this case also the contract is void. In a case of common mistake both the contracting parties make the same mistake. The minds of the contracting parties are ad idem and there comes into being an agreement, but it is devoid of force and efficacy because both the parties are mistaken about some fact which is vital to the agreement. Section 20 of the Contract Act deals with the common mistake of fact and not mutual mistake of fact.

15. A Division Bench of the Calcutta High Court in Ananda Chandra Das, Plaintiff Appellant v. Kali Das Bepari Defendant Respondent AIR 1919 Cal. 330 has held that where the Plaintiff and Defendant entered into a compromise in respect of a litigation which both of them believed to be pending, although, as a matter of fact, at that time the litigation had ended in a decision in favour of the Plaintiff. Neither party took advantage of the other in respect of the transaction and further held that the case fell within the terms of Section 20 that the Plaintiff was entitled to a declaration that his rights under the decree were not affected by the compromise.

16. The Additional Judicial Commissioner, Nagpur in Sheikh Shahabuddin, Defendant Appellant v. Vilayat Ali Khan Plaintiff-Respondent AIR 1926 Nag 435 also has held that "where parties enter into a contract under a mutual mistake or misapprehension as to a matter of fact essential to the agreement the very foundation thereof, there is no contract between them, or in other words such a contract is void u/s 20". Otherwise also when the property which had been inspected by the Petitioner much before the property was put to auction and in between that date the property had ceased to exist the contract has become impossible of the execution by its non-existence and as such there cannot be

said to be any valid or binding contract.

17. I may cite with advantage a case *Barrow Lane and Ballard v. Phillips and Co.* 1928 All. E.R. 74, wherein it has been laid down, "where there is a contract for the sale of a parcel of specified goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void and further where there is a contract for the sale of a parcel of specified goods alleged to consist of a certain quantity, and at the date of the contract, unknown to either party, a portion of the parcel has perished Section 6 of the Sale of Goods Act, 1893, applies, the risk falls on the seller, and the contract is void, because the goods have perished within the meaning- of Section 6 if they have been stolen and taken away and cannot be followed or discovered". This ruling fully applies to the facts of the present case and, therefore, in these circumstances when the specific goods or the total number of trees of the lot auctioned were not in existence at the time of the auction and the parties were not aware about the actual position at the spot, the contract if any, entered into between the parties unaware of the facts would be a void or a non est contract.

18. Learned Advocate-General had contended that the Petitioner had signed the conditions of sale when the bid was accepted and he had referred me to condition No. 4 of the conditions of sale marked as P.W. -5/B which reads as under:

"It is presumed that the bidders have already inspected the forests forming the lots specified in sale lists and the marked trees being leased for felling to convert extract timber and the details given in the sale lists are acceptable as final including the volume factors.

Further condition No. 5 of the conditions of sale which was also referred to me is quoted as under:

"The number of trees, their measurements, classification and other categorizations by the Divisional Forest Officer shall be accepted by the successful bidder as final and correct. The Forest Department does not hold itself responsible for the soundness or otherwise of any trees.

19. These conditions of sale purport to have been signed by Shri Prem Chand on 1st February, 1974, when the bid was given- No doubt the conditions are there, but the fact remains that Shri Prem Chand who gave the highest bid had seen the forest before the fire broke out and on the date when this forest was put to auction the department itself was not aware about the existence of the trees at the spot. The department also without knowing the factual position at the spot put the property to auction when it actually did not exist there. Therefore, if the Petitioner had appended his signatures to these conditions Nos. 4 and 5 then it will not be sufficient to hold that the contract is valid and that the Petitioner cannot take up this ground that the trees did not exist or the same had been gutted in the fire that broke out on 30th November, 1973. It is admitted by the Respondents also that the fire had broken out on the 30th November, 1973. The

forest was put to auction on 1st February, 1974, i.e., when the property as detailed in the Ust appended to the conditions of sale, Ex. P.W.-5/B did not exist. Therefore, the learned Counsel for the Respondents cannot derive any assistance from these conditions Nos. 4 and 5 of the conditions of sale, Ex. P.W.-5/B.

20. The learned Advocate-General has further drawn my attention to Clause 7 of the agreement which reads as under:

"That the trees marked for felling will remain at the risk of the Lessee from after a fortnight of the date of communication of acceptance of the proposal by the lessor. The Forest Officer will provide to the lessee a copy of the detailed marking list under a proper receipt in token of authorization to start the work in the leased forests and thereafter the Lessee shall be responsible for any damage to the forest crop in the process of forest working by negligence.

21. The learned Advocate-General also cannot derive any advantage out of this clause of the agreement. The agreement came into existence on 1st February, 1974, whereas the property which was sought to be auctioned had been gutted before the auction was held.

22. The learned Advocate-General has further contended that this agreement was signed on 14th June, 1974, and, therefore, according to him the Petitioner was fully aware about the factual position of the property at the spot. But the learned Counsel has, it appears, not cared to look to the date, i.e. 21st February, 1974, when Shri Prem Chand Petitioner signed this document. No doubt, the Conservator of Forests has appended his signatures on 14th June, 1974, It is the case of the department itself that they came to know about the loss of the property in fire after 26th February, 1974. So this argument also has got no substance.

23. The learned Counsel on the strength of *Union of India v. Salween Timber and Construction Co., (India) and Ors.* AIR 1960 SC 488 has contended that it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute. But it may be stated that the Petitioner is not trying to enforce any conditions of the agreement. But he contends that the agreement is void as on the date, when it was executed the property was not in existence and both the parties had been labouring under a mistake. Therefore, this authority does not support him. In these circumstances the Court is not concerned with the terms of the contract when the Petitioner challenges the very validity of the contract.

24. From the above, therefore, it is evident that the property was not in existence when the auction took place at Pathankot and both the parties were unaware about the fire, which had gutted the property, and as such the agreement is void, inoperative and the arbitration clause contained therein is also held to be void and inoperative. The petition, therefore, is allowed and the contract is declared void.

25. The Petitioner shall also get his costs assessed at Rs. 300.00 from the Respondent No. 1.