

(1993) 08 DEL CK 0057

In the Delhi High Court

Case No : Regular First (OS) Appeal No. 14 of 1970

R.S. Amarnath Mehra and Co.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-08-1993

Acts Referred:

Citation : (1993) 51 DLT 455 : (1993) 27 DRJ 1

Hon'ble Judges : C.L. Choudhary, J;Arun Madan, J

Bench : Division Bench

Advocate : B.K. Divan and Sanjeev Khanna, for the Appellant;

Judgement

Arun Madan, J.

(1) The present appeal arises out of the judgment and decree dated 21st day October of 1969 passed by the learned Single Judge of this Court in Suit No.111 of 1967 by which the suit of the appellant was dismissed.

(2) The case of the appellant in brief is that the appellant being a registered partnership firm instituted a suit for recovery of Rs.29,000.00 against the respondent-Union of India and two others i.e. the officials of the railways. In September, 1959 respondent No.3, Divisional Superintendent, Commercial, Northern Railway at Lucknow acting on behalf of respondent No. 1, viz. General Manager, Northern Railway, New Delhi invited tenders for the goods handling contract at Lucknow Railway Goods and Transhipment Sheds. In response to the tender enquiry, the appellant submitted its tender to the railways on 16th September, 1959 which was accepted on 15th October, 1959. The tenure of the contract was for three years from 1st November, 1959 to 31st October, 1962. The endorsement confirmed that the allotment of the contract had been sanctioned by the Divisional Superintendent with the concurrence of the Divisional Accounts Officer. On 30th October, 1959, the appellant received a communication from respondent No.3 that the contract entered into earlier between the parties be kept in abeyance. Thereafter fresh quotations were

invited by the respondents in respect of the work that was covered by the contract. The appellant while reserving its right that had accrued to it by the conclusion of the previous contract (first contract) nevertheless gave fresh quotations along with tender proforma with certain specifications. The said proforma of the agreement was neither filled up nor signed by the parties, and Therefore, specifications as were with the original tender dated 25th November, 1959 had only been executed. The work continued as per the original letter of acceptance dated 19th December, 1959. The case of the appellant, however, is that on 21st July, 1960, respondent No.3 without just cause or right and contrary to the terms of the agreement notified to the appellant that one of the items given in the schedule of rates for handling goods traffic at Lucknow would be treated as withdrawn from the appellant's contract. On the same date, by another letter addressed to " the appellant by the respondents, the entire contract was rescinded. Aggrieved by the above action of the respondents, the appellant filed a suit in view of the fact that the impugned action of the respondents was illegal and resulted into the breach of the contract between the parties and that respondent No. 1 -Union of India was liable to compensate the appellant for the wrongful action of respondents 2 and 3 who were its employees. Though by letter dated 21st July, 1960, the defendant No.3 had notified to the appellant that the contract would come to an end on 1st November, 1960, yet the notice dated 21st July, 1960 was served and by a subsequent letter dated 7th November, 1960, the contract was allowed to continue up to 8th November, 1960. The defendants availed of the services of the appellant in terms of the contract between the parties up to 8th November, 1960. The appellant also claimed compensation in respect of the items that were cancelled earlier and for compensation for the loss suffered by it as a consequence of the cancellation of the illegal contract.

(3) As the respondents failed to pay the amount to the appellant in spite of the notice u/s 80 of the Code of Civil Procedure, a suit for the recovery of Rs.29,000.00 was filed by the appellant in this Court claiming the principal amount with interest at the rate of 6% per annum from the date of institution till realisation.

(4) In the written statement, the respondents pleaded that the Court was not vested with the jurisdiction to entertain the suit besides they also challenged that the appellant was not a registered partnership firm and further averred that the suit was not maintainable.

(5) The respondents denied that the plaint had been signed by a duly authorised person and the suit had not been instituted properly on behalf of the appellant firm. The plea of limitation was also raised. On merits the respondents took the plea that no doubt the contract was initially executed between the parties on the basis of the tender submitted by the appellant but there was variation in the rates subsequently on the appellant having required the rates, while all other terms remained the same. On this basis the respondents pleaded that they had

the authority either to stop or cancel the contract in respect of all or any of the items covered by the contract, and this what exactly had been done. It was further pleaded by the respondents that merely because there was modification or slight variation in the terms of the contract it did not constitute a fresh contract.

(6) In its replication, the appellant reasserted its contentions and denied that the fresh quotations of rates were part and parcel of the earlier contract but that it amounted to a new contract. It was pleaded by the appellant that the earlier contract had come to an end and fresh contract was arrived at under which there was no right with the respondents to cancel any item covered by the schedule or to cancel the entire contract. The appellant was, Therefore, entitled to compensation in respect of item that was cancelled earlier and also compensation for the loss suffered by the appellant by the impugned cancellation of the entire contract. Since the respondents had failed to compensate the appellant with regard to the amount claimed by it for the wrongful loss in spite of notice u/s 80 of the Code of Civil Procedure, the appellant was left with no option but to file a suit for recovery of Rs.29,000.00 along with interest at the rate of 6% p.a. from the date of institution of the suit till realisation.

(7) On the pleadings of the parties, the learned Single Judge had framed the following issues:-

1. Whether this court has the territorial jurisdiction to try the suit? O.P.
2. Whether the plaintiff's firm is a registered one and the plaint has been signed and verified by a competent person? O.P.
3. Whether the suit is barred by limitation ? O.D.
4. Whether an irrevocable binding contract came into existence between the parties as alleged in para 13 and 14 of the plaint? Op
5. Whether the terms and conditions of Appendix "C" of the original tender govern final contract between the parties? If so, its effect? Od
6. Whether the defendant No. 1 committed breach of the contract by excluding Item No.7 and by terminating the contract before 30.11.1962.
7. To what compensation, if any, is the plaintiff entitled to and against whom? Op
8. Relief.

(8) With regard to issue No. 1 the learned Single Judge held that as the headquarter of respondent No. 1 in respect of its activities of running the Northern Railway is located at New Delhi, this Court has jurisdiction to try the suit. Issue No. 1 was consequently decided in favor of the appellant. With regard to issue No.2, the learned Single Judge has held that the appellant was a registered partnership firm and that the plaint had been signed and verified and the suit had been instituted by a competent person. With regard to issue No.3,

the learned Single Judge "s finding is that the suit was within time.

(9) On issues 4,5 and 6 the findings of the learned Single Judge were that the terms and conditions of appendix "C" of the original tender governed the final contract between the parties which was concluded when the fresh quotations were submitted by the plaintiff on 1st December, 1959 were accepted. It was further held that no new irrevocable contract between the parties for a period of three years came into existence and that the defendants had not committed breach of the contract. Having aggrieved by the finding"s; of the learned Single Judge, the appellant had filed this appeal.

(10) Mr. Dewan learned counsel for the appellant contended that a fresh contract had come into existence when fresh quotations were invited and these were accepted by the respondents. The; first contract had vanished and a new contract had come into operation. It was further urged by Mr. Dewan that two contracts were concluded contracts and acceptance was issued for the subsequent contract by which the first contract had vanished. It is further contended that in any case the appellant was entitled to compensation for the work which he had been deprived of illegally. In support of this contention he has also relied upon doctrine of "Novation".

(11) On behalf of the respondents it was argued that since the second agreement was not formally executed it could not be said to be a new contract but it was the extension of the first agreement and no fresh contract had come into existence. It was further contended that no fresh quotations for all the items were invited but the fresh quotations were only with respect to few items and the proforma of the agreement which was sent by the respondents to the appellant was not even signed or acknowledged by the appellant and hence by any stretch of imagination it could not be spelt out as a new contract.

(12) The Union of India invited tenders in September, 1959 for contract of supply of labour for the purposes of loading, unloading, repacking and otherwise handling of goods, coal and other merchandise. The tender form comprised of several documents. The appellant submitted its tender Along with letter dated 16th September, 1959. In the tender submitted by the appellant it was mentioned that the tender was being submitted subject to the covering letter which was in the following terms:- "We have read the terms and condition as laid down in the tender notice as also those contained in the Agreement Form hereto annexed and agree to abide by the same. We offer the following rates for the service to be performed during the period from 1.11.1959 to 31.10.1962 subject to the covering letter."

(13) The appellant was informed by letter dated 15th October, 1959 that its tender had been accepted on the terms and conditions stipulated in the tender notice. The appellant was informed by a communication dated 15th October, 1959 that the contract offered by the communication dated 15th October, 1959 was held in abeyance but the appellant may continue to do landing work at

Lucknow at the rates already quoted. By letter dated 25th November, 1959, the appellant was requested to re-quote its rates in respect of the contract, tender for which had been received and opened on 16th September, 1959. The appellant submitted the rates reserving its right under the previous contract. The appellant was informed by letter dated 19th December, 1959 that fresh quotations received on 1st December, 1959 in response to letter dated 25th November, 1959 had been accepted and the contract would be for a period of three years from 1st December, 1959 to 30th November, 1962. It is admitted case of both the parties that no formal agreement was executed between them. The appellant had been performing the contract and the defendants had been acting upon the contract that had been entered into between the parties, irrespective of the formal agreement not having been entered into. A proforma agreement was sent to the appellant for execution to which it did not agree. Clause 32 of the proforma agreement reads as under:-

"EXCEPT as hereby otherwise provided a verbal or written arrangement abandoning, varying or supplementing this contract or any of the terms hereof shall not be binding on the Railway Administration unless and until the same is endorsed on this agreement or incorporated in a formal instrument and signed by the parties hereto".

(14) This having not been done the contention of the appellant that there was a fresh agreement in supersession of the earlier agreement does not arise. In our opinion there was no question of fresh agreement coming into existence. The correspondence exchanged between the parties makes it amply clear that the intention of the parties was basically to seek revision of rates in the earlier concluded contract and not to enter into a fresh contract. The respondents invited quotations in respect of some of the items which were on the higher side. The word "re-quote" written in the letter and the intimation that since re-quoted rates higher than the original rates would continue to apply makes it absolutely clear that only a variation of rates had been sought to have the unfinished work done on lower rates. The appellant, however, continued to perform the contractual obligation and the respondents acted upon the same terms and conditions that had been entered into or acting upon between the parties right from the beginning .

(15) We are of the view that in the facts of the instant case, it is amply clear that no fresh contract was ever executed between the parties and the doctrine of "Novation" is not applicable to the facts of this case. The principle of "Novation" would not apply inasmuch as "Novation" operates as a release of the original debtor and its effect is to discharge a party from its obligation under the old contract. Section 62 of the Indian Contract Act defines "Novation" as under:-
Section 62:

"EFFECT of novation, rescission and alteration of contract--- -----If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

(16) It would thus be seen that "Novation" implies a fresh contract directly or by implication in place of the original contract. Till the 2nd contract contemplated is brought into existence the old contract will exist and continued to be enforceable. The consideration of the new contract is the discharge of the old. What is relevant is the intention of the parties in this case. Black's Law Dictionary Sixth Edition at page 1064 defines "Novation" thus:-

"NOVATION. A type of substituted contract that has the effect of adding a party, either as obligor or obligee, who was not a party to the original duty. Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties. The substitution by mutual agreement of one debtor for another or of one creditor for another, whereby the old debt is extinguished. A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all parties. See Restatement of Contracts, Second, § 280. The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one. *Blyther v. Pentagon Federal Credit Union*, D. C. Mun. App., 182 A.2d 892, 894. In the civil law, there are three kinds of novation: where the debtor and creditor remain the same, but a new debt takes the place of the old one; where the debt remains the same, but a new debtor is substituted; where the debt and debtor remain, but a new creditor is substituted. *Wheeler v. Ewardell*, 173 Va 168, 2 S.E.2d 377."

(17) In Aiyar's Judicial Dictionary (1st Edition at page 802) the terms "Novatio" and "Novation" are defined thus:

"NOVATIO. The substitution of a new obligation for an old one. If the parties to a contract agree to substitute a new contract for it, or to rescind it, or alter it, the original contract need not be performed. (Section 62, Indian Contract Act of 1872). A common instance of innovation is a partnership case when the members of the new firm take over the liabilities of the old firm. So is an arrangement by way of composition in bankruptcy.

Novation, in fact, the act of replacing a debtor by another who assumes the responsibility to which there must be the assent of the original debtor and creditor as well of the substitute." Novation is a legislative expression of the common law of England. It is a term derived from English Civil Law and it means -that there being a contract in existence some new contract is substituted for it either between the same parties or between different parties, the consideration being the discharge of the old contract. In this regard we may refer to the decision of the House of Lords in *Scarf v. Jardine* 7AC 345 All England Reports 651. Novation of a contract implies a fresh contract, directly or by implication, in place of the original contract. (see Cheshire, Fifoot and Furmston's Law of Contract, 11th edition, page 505 (Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made). It is the established proposition that the consideration for the new contract is the discharge of the old. If the new agreement is

enforceable then it is not a contract and, Therefore, cannot serve as a Novation.

(18) As has been observed in Lindley on Partnership 6th edition, page 246 cited in *British Homes Assurance v. Paterson* (1902) 2 Ch 404 . "in order that one liability may be extinguished by being replaced by another, agreement, it is essential that the person on whom the correlative right resides would be a party to the agreement or should, at all events, show by some act of his own that he accedes to the substitution. Such a contract obviously raises the inference that the parties have agreed to modify their contract, but cannot have the effect of changing the operation of an unambiguous agreement.. It may at best support, along with other evidence, a claim for rectification. AIR 1938 26 (Privy Council) .

(19) It was further urged by Mr.Dewan that the appellant was entitled to compensation under doctrine of "quantum meruit".

(20) It is well settled law by the Apex Court that in order to avail the remedy under "quantum meruit", the original contract must have been discharged by the defendant and in such a way as to entitle the plaintiff to regard himself as discharged from any further performance and he must have elected to do so. This remedy by way of quantum meruit is re stimulatory i.e. it is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into, as so observed by the Apex Court in *Puran Lal Sah Vs. The State of U.P.*, . The Apex Court has so opined in *Bombay Housing Board (now the Maharashtra Housing Board) Vs. Karbhase Naik and Co., Sholapur*, that except the rates settled by an agreement, the contractor was under no obligation to carry out the additional or altered work. On failure to cancel the order for additional or altered work on receipt of the notice specifying the rates would not result in agreement as to the rates to be charged or in substitution of a new agreement in place of old. We are thus of the view that in the absence of positive act on the part of the parties to an agreement to execute a fresh contract by executing an instrument in writing as envisaged by Clause 32 of the Proforma Agreement referred to herein above, the appellant was not bound to carry out the work on the basis of fresh terms and quotations. It is thus clear from the judgment of the Apex Court in *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, , which is in the following terms: "Where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. "In *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, , the Apex Court has so opined. "When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is apart. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately. The above view was also confirmed by the Apex Court in *State of Punjab and Others Vs. Om Parkash Baldev Krishan*,

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(21) We are of the confirmed view that there is a nothing to suggest that the parties intended to substitute a fresh contract.

(22) When a contract consists of a number of terms and conditions, each condition does not form a separate contract to which it operates. Calling of fresh quotations and fresh rates at lower price would not amount to a new contract.

(23) Thus under the circumstances we cannot infer that a fresh contract had come into existence on invitation of fresh quotations as contended by the learned counsel for the appellant.

(24) Thus in our opinion, the learned Single Judge was right in his observations that when the plaintiff/appellant submitted new rates and those were accepted, the terms and conditions of the original contract continued to be enforced and that the plaintiff's contention that a fresh contract was entered into is unsound. We accordingly confirm the findings of the learned Single Judge and dismiss the appeal. But in the circumstances of the case leave the parties to bear their own costs.