

(1937) 12 PAT CK 0020

In the Patna High Court

Secretary of State of Another

APPELLANT

Vs

Surendra Mohan Lahiri and Another

RESPONDENT

Date of Decision : 20-12-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2

Contract Act, 1872 — Section 28

Specific Relief Act, 1877 — Section 21

Citation : AIR 1939 Patna 118

Hon'ble Judges : Courtney-Terrell, C.J; Mohammad Noor, J

Bench : Full Bench

Judgement

Mohammad Noor, J.—This appeal arises out of a suit instituted by the plaintiffs respondents against the Secretary of State and his officer (defendant 2) for recovery of Rs. 7916 odd as damages for breach of a contract for building an inspection bungalow at Brahmagiri in the interior of the district of Puri. The contract of the work was given to the plaintiffs on 29th September 1928. They were required to finish it within eighteen months, time being of the essence of the contract. The plaintiffs finished the manufacture of bricks before March 1929, but the construction of the building was not commenced till some time in January 1930. There was a payment on account of Rs. 1500 before March 1929 which included Rs. 711 for the price of the bricks stacked at the site. In March 1930 difference arose between the Executive Engineer (defendant 2) and the plaintiffs about the quality of the bricks to be used in the construction. It is not disputed that the plaintiffs had burnt about 300,000 bricks in the locality though the quantity actually required was only about 150,000. They had prepared more bricks to be on the safe side so that only good bricks might be used. On 16th March 1930, when the foundation wall had reached the plinth level, defendant 2 visited the site and was of opinion that the bricks stacked and used till then in the construction were bad and under burnt. It is clear from his letter to the Superintending Engineer, dated 28th March 1930 (Ex. Z-8) that the defects in the bricks were to some extent due to the nature of the local soil itself. He asked the

contractors to use better bricks. Correspondence ensued between the plaintiffs" and the Department and I shall refer to some of them later. On 28th August 1930, as directed by the Superintending Engineer, the plaintiffs produced six bricks before the Executive Engineer (defendant 2) as samples of good bricks and expressed their readiness to complete the work with bricks of the samples produced by them. The Executive Engineer approved four of the bricks, kept two of those four with him, gave the other two to the plaintiffs, and rejected the remaining two as not being according to the standard required. There is nothing on the record to show the quality of the two bricks rejected and why they were found "below the standard. Be that as it may, the plaintiffs were ordered to sort out the bricks according to the samples approved. It is clear from the correspondence that the plaintiffs did not agree to this proposal and were only willing to complete the work if all the six samples of bricks were approved and not only with the class of bricks selected by the Executive Engineer.

2. The plaintiffs" case, as their petitions show, was that the Executive Engineer selected only first class bricks and the contract did not provide that only first class bricks were to be used. The objections of the plaintiffs were rejected and they were repeatedly asked to sort out bricks according to the samples given to them. This they admittedly failed to do with the result that the contract was rescinded on 13th December 1930. Afterwards the amount of work which had been completed was measured and, after giving credit for Rs. 1500 which had already been paid to the plaintiffs, the Department offered them Rs. 559, obviously forfeiting their security deposit of Rs. 650. The plaintiffs refused to accept the sum and instituted the present suit claiming the amount stated above, which includes the Rs. 650, the security deposit, and their estimated profit in the work. The defendants pleaded that the suit was not maintainable and justified the cancellation of the contract. The learned Subordinate Judge has passed a modified decree for a sum of Rs. 4960. This includes Rs. 1957-8-0 the price of 135,000 bricks which the defendants were allowed to take away according to their own selection within six months from the date of the decree. It was provided that in case the defendants failed to exercise this option it would be open to the plaintiffs to select 135,000 bricks, leave them for the defendants and to dispose of the remainder as they thought fit. The defendants have preferred this appeal, and there is a cross, appeal on behalf of the plaintiffs against the reduction of the amount claimed by them.

3. The first point raised on behalf of the appellants is about the maintainability of the suit on the basis of Clause 30 of the agreement. This clause, provided that in case of dispute between the parties the matter was to be referred to arbitrators one to be selected by each party. It is contended that as the plaintiffs did not seek to have the dispute settled by arbitrators the suit was barred. In my opinion this objection is untenable. The position has been clearly stated by Mulla in his commentary on Para. 18, Schedule 2, Civil P.C. The position as explained by him is this: By Section 28, Contract Act, agreements in restraint of legal proceedings are declared void. To that Section there was a proviso that if the parties agreed

to refer their dispute to arbitration, the existence of the agreement would be a bar to seeking redress in the ordinary Courts, and that a party had a right to sue for specific performance of the agreement to refer the dispute to arbitration. Then came the Specific Relief Act of 1877 which by Section 21 superseded the proviso to Section 28, Contract Act, and in those territories where the Specific Relief Act. is in force though a contract to refer disputes to arbitration barred suits in ordinary Courts, but the right to sue for specific performance of such a contract was taken away. The relevant provision of Section 21, Specific Relief Act, ran as follows:

And, save as provided by the Civil Procedure Code, no contract to refer a controversy to arbitration shall be specifically enforced, but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

4. Then came the present CPC in the year 1908 in which a separate schedule (Schedule 2) was added in connexion with the settlement of matters by arbitration. Most of the procedures therein mentioned were taken from the old CPC but some were new. There are procedures for referring a matter pending before a Court for decision by arbitrators and for decree on the basis of the award given, for getting a matter settled out of Court and then having a decree on the basis of the award given and for applying to the Court for forcing the other party to refer a matter in dispute to arbitration if there is a contract between them to that effect. By para. 18 the Court has been given power to stay a suit brought by a party to an agreement to refer the dispute to an arbitration or by his representative if either party apply for the same at the earliest possible opportunity and in all cases where issues are settled before the settlement of issues, and if the party applying is ready and willing to do all that is necessary for the proper conduct of the arbitration. Thus, there is a complete machinery for enforcing the agreement of parties to refer a matter in dispute between them to arbitration and consequently that portion of Section 21, Specific Relief Act, which barred suits when there was an agreement to refer a dispute to arbitration was repealed by Para. 22. The last 37 words of Section 21, Specific Relief Act, which now do not apply to any agreement to refer to arbitration or to any award to which Schedule 2, Civil P.C. applies are these:

But if any person who has made such a contract (that is, a contract to refer to arbitration) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

5. As has been pointed out by Mulla, these 37 words have been omitted in view of the provisions of para, 18 referred to above. The policy of the Legislature seems to me to be this. Once a machinery by which the parties can have their dispute settled by arbitrators is provided, the choice to have the dispute so settled is to be left to them. If any party who has contracted to settle such dispute by arbitration backs out of it and institutes a suit in disregard of the

contract the Court has been given discretion at the instance of the other party to have the suit stayed. But if neither party wishes to have recourse to arbitration, the ordinary "tribunals established by law will have jurisdiction to pronounce judgment; upon the matters in dispute. I am fortified in this view by the fact that when the Arbitration Act of 1919 was passed, which in the first instance applied to Presidency towns only, these last 37 words of Section 21, Specific Relief Act, mentioned above, were repealed in those places where the Act applied.

6. When the Civil Procedure Code-provided procedure for stay of the suit the bar to the institution of the suit was removed. Para. 18 of Schedule 2 of the Code is practically a copy of Section 19, Arbitration Act of 1919. I am therefore clearly of opinion that the suit is maintainable. If the defendants wanted to bind the plaintiffs to their; contract for having the matter settled by! arbitration, it was open to them to apply to the Court before the settlement of issues to stay the suit. This seems to be the view taken in *Ram Prosad v. Mohan Lal A.I.R (1921) . Cal. 770* and *Appavu Rowther v. Seeni Rowther AIR (1918) Mad. 719*.

Coming to the merits of the case, the simple question involved is whether the contract was legally rescinded. The Public Works Department of Government relied upon clause 3 of the contract, which in turn refers to Clause 14 thereof. Clause 14 provides among other things that if it appears to the Engineer in charge or to any of his subordinates that the contractor is proceeding with the works with materials of any inferior description or that any material or article provided by him is unsound or of an inferior quality or otherwise not in accordance with the contract the contractor shall, on demand in writing from the Engineer, notwithstanding the material having been inadvertently approved before, change the material. If he does not do so, he is liable to pay a penalty of Re. 1 per cent, on the estimated amount of work per day for a period not exceeding ten days. Clause 3 says that when the penalty imposed exceeds or becomes equal to the amount of security given by the contractor the department has the option of rescinding the contract altogether. Now in this case it is said that as the contractor failed to sort out bricks according to the order of the Executive Engineer he rendered himself liable to a penalty of Rs. 130 per day, the estimated cost of the work being Rupees 13,000 and as ten times that amount would be Rupees 1300, i.e. much in excess of the security given by the plaintiffs they rendered themselves liable to be" turned out. It was contended on behalf of the plaintiffs that out of the 300,000 bricks which they had admittedly prepared for the construction of the building sufficient bricks were available according to the standard prescribed in the contract and that the Department was not justified in asking them to select bricks according to the sample of only four bricks given to them. Their case was that very small quantity of bricks could come up to that standard as all the four bricks were first class and therefore they were not able to finish the work.

7. Their case is that the Department was not justified in insisting upon all the bricks being of first class which was against the terms of the contract. Now the

contract provided for bricks of local make and clamp burnt. The plaintiffs admitted that very large number of bricks were not of first class because the local clay was sandy. They refuted the charge of the bricks being under burnt. The learned Subordinate Judge on going into the evidence found as a fact that more coal was used by the plaintiffs than was ordinarily required and that the demand of the Department was beyond the contract, and we have no reason to differ from him.

8. Now the learned advocate for the appellants contended that according to Clause 25 of the contract the decision of the Superintending Engineer about the quality of the bricks was final, but unfortunately the Superintending Engineer never decided the matter as required by that clause. I have stated before that six bricks were produced before the Executive Engineer, four of them were selected by him and two were rejected and the plaintiffs were asked to sort out the bricks according to the sample of those four bricks, two of which were kept in the office of the Engineer and the other two were given to the contractors.

The two bricks which were rejected were given back to the contractor. There is not one word on the evidence of this case that the Superintending Engineer ever saw these two rejected bricks and decided that they were not according to the standard of bricks provided in the contract. When the contract made the Superintending Engineer the sole judge in case of a dispute between his subordinates and the contractor, it was the duty of the Superintending Engineer to decide it. In their protest the plaintiff definitely stated that the Executive Engineer was wrong in insisting that the building should be completed with bricks which, should be according to the sample of the four bricks selected by him, which were all first class and the contract did not provide for the use of first class bricks only. The evidence of the Superintending Engineer Mr. Bery (D.W. 3) is this:

It is possible to find out 1&farc; lacs of bricks according to the two bricks selected. The proportion of good bricks to bad ones will depend upon the moulding and the burning of the bricks by a contractor. In clamps 80"85 per cent, may be good bricks. In good clamps we may get 80-85 per cent, well burnt bricks, call them first class or seconds class.... These 80 or 85 per cent, can be divisible into two classes, first and second.

9. It is clear from this evidence that according to the witness both first and second class bricks were available in the clamps burnt by the plaintiffs and could be used according to the contract. As I have said, the plaintiffs' grievance was that the Executive Engineer (defendant 2) insisted on having first class bricks only. Therefore it was obviously for the Superintending. Engineer to decide whether the bricks which were rejected by the Executive Engineer were second class bricks with a the standard of the contract or whether they were inferior bricks which could not come up to the required standard. The matter has not been decided and therefore the suit was not barred according to the contract, and it is open to the Civil Court to enter into the question whether the demand of

the Executive Engineer was just or otherwise. The learned Subordinate Judge has gone into the matter very carefully and has examined every material fact and the correspondence and has come to the conclusion that the bricks which were available on the spot came up to the reasonable standard of the contract, and this finding is according to the evidence of the Superintending Engineer. Under these circumstances it cannot be said that the rescission of the contract was justified and the contractor was not justified in refusing to sort out the bricks according to the samples of the bricks which were given to them by the Executive Engineer. Therefore, in my opinion, the suit has been rightly decreed. Though the contract has not been rescinded on the ground of delay on the part of the plaintiffs in the completion of the work, the defendants have referred to it. Here also I agree with the learned Subordinate Judge and hold that there was no delay. Though the contract was given in September 1928 the defendants' officers did not lay out the foundation on the site till November 1929. They themselves took fourteen months. Within four months of laying out of the foundation the work had to be stopped owing to the dispute about the quality of the bricks.

10. There is one matter which is likely to create some confusion and it is this: As I have said the learned Subordinate Judge has allowed the plaintiffs Rs. 1900 odd as the price of the bricks which would have been used in the construction of the building and he has given the defendants option to select 135,000 bricks from those which have been prepared by the plaintiffs and on the defendants failing to exercise this option within six months, the plaintiffs are authorized to leave 135,000 bricks and to dispose of the rest. An objection was raised on behalf of the appellants that the cost of sorting is to be met by the plaintiffs. In my opinion this objection is justified, but the parties could not come to terms as to what the cost of that sorting is likely to be. The learned advocate for the plaintiffs respondents has however agreed that the defendants may take away the entire stock of bricks which has been manufactured by the plaintiffs and are in the clamps. The question of sorting therefore does not arise.

11. I would therefore modify the decree of the learned Subordinate Judge to this extent, that there will be no sorting of bricks and the entire bricks which were manufactured, i.e. all the bricks at the site or at the clamps, will be taken away by the defendants. With this modification the appeal is dismissed with costs. The cross appeal is not pressed and it is dismissed but without costs.

Courtney-Terrell C.J.

I agree.