

(2004) 03 AP CK 0101
In the Andhra Pradesh High Court
Case No : AS No. 303 of 1995

State of A.P. and Others	Vs	APPELLANT
Tangudu Varaprasada Rao		RESPONDENT

Date of Decision : 15-03-2004

Acts Referred:

Andhra Pradesh Forest Contract (Disposal of Forest Produce) Rules, 1977 — Rule 28
Contract Act, 1872 — Section 56

Citation : (2004) 4 ALD 528 : (2004) 5 ALT 93 : (2005) 1 CTLJ 402

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Government Pleader for Forests and Endowments, for the Appellant;
A. Ravi Shanker and S. Rentuka, for the Respondent

Final Decision : Dismissed

Judgement

B.S.A. Swamy, J.—The State of Andhra Pradesh represented by the Collector, Srikakulam District and other defendants in the Court below preferred this appeal against the judgment and decree dated 17.12.1989, O.S. No. 42 of 1989 on the file of Subordinate Judge, Sompeta, wherein the learned Judge decreed the suit of the plaintiff for Rs. 3,86,000/- with an interest at the rate of 6% p.a. from the date of the judgment till the date of realization.

2. The defendants-department has got Cashew gardens to the extent of 253.96 hectores known as "Mendu Forest and Mendu Forest Extension under Kasibuga Forest Range of Srikakulam District. The defendants-department used to lease out the above cashew gardens in the flowery season public auction every year in the month of January and February for collection and sale of cashew nuts. Usually, the said garden will be in possession of the lessee from March to June of the financial year.

3. It is the case of the plaintiff that he participated in the auction conducted by the defendants-department on 20.4.1989 and became the highest bidder for the year 1987-88. His highest bid value was Rs. 4,21,000/-. According to the terms

and conditions of the bid agreement, he has deposited the entire bid amount of Rs. 4,21,000/- on 22.2.1989 apart from Rs. 26,130/- by way of security deposit, Rs. 71,430/- towards income tax and Rs. 32,470/- towards sale tax as per rules. Thereafter, on 4.3.1989, the parties entered into an agreement-Ex-A5 and the plaintiff was given possession of the auctioned garden and as per the terms of the contract, the garden will be in his possession till 30-6-1989. On the night of 29.3.1989, there was an unexpected and unusual hail-storm not only in "Mendu and Mendu Extension" but also on all the cashew trees in surrounding villages resulting more than 80% of the crop was damaged in the auctioned garden of the plaintiff. Immediately, he gave a telegram to the defendants by informing about the hailstorm situation and requested them to come and inspect the area to assess the damage so that he can claim the amount by reimbursement. Accordingly, the 4th defendant visited the Mendu and Mendu Extension on 1.4.1989 and has taken photographs of the damaged garden. On the directions of the 1st defendant, the Mandal Revenue Officer and the Agricultural Officer of Kasibugga visited the said garden. The Agricultural Officer opined under Ex-A23 that the cashew nuts garden was damaged 80% and the remaining 20% fruits were also turned to blackish colour. At the fag end of the lease period, the respondent could collect only 59 bags of cashew nuts. Thereafter, the plaintiff requested the defendants to return the proportionate lease amount paid by him. As there was no response from the respondents, the plaintiff got issued a legal notice Ex-A24 to all the appellants u/s 80 C.P.C. claiming refund of the amount deposited at the time of entry into the agreement-Ex-A5. But the defendants neither sent reply to the notice nor settled the claim amount. Hence the plaintiff filed the suit for reimbursement of the amount under Ex-A5.

4. The defendants filed written statement by admitting the fact that the plaintiff was given possession of the Mendu and Mendu extension cashew garden under Ex-A5. He stated that even though the 4th defendant has assessed the loss but under condition No. 29 of sale notice that the contract or shall abide by A.P. Forest Contract (Disposal of Forest Produce) Rules, 1977. Under Rule 28 the Forest Contractor shall not be entitled to any compensation whatsoever for any loss that may be sustained. Thus the plaintiff has no right to claim for reimbursement of the loss sustained by him as he clearly understood the conditions of the sale notice before participating in the auction. Hence the suit is liable to be dismissed with costs.

5. On the above pleadings, the Trial Court framed the following issues, which are extracted hereunder:

1. Whether the plaintiff is entitled for the suit amount?
2. Whether the suit is not maintainable under law?
3. Whether the suit is not maintainable for want of proper notice u/s 80 CPC?
4. To what relief?

6. In support of their case, while the respondent got himself examined as P.W.1 besides P.W.2 and Ex-A1 to A49 documents were marked. On behalf of the appellants herein one R.S. Janaki Ramayya, Forest Range Officer, Kasibugga Range has been examined as D.W.1 but no documents were marked.

7. The Court below on appreciation of both oral and documentary evidence held that though the agreement Ex-A5 states that it is subject to provisions of the Act and the rules. Rule 28 was not specifically referred under the agreement and as such, the same is not applicable to the facts of the case. Taking the above view, the trial Court decreed the suit. Hence this appeal.

8. The only question that arises for consideration in this appeal would be whether the respondent is entitled to claim refund on the ground that the contract has been frustrated due to natural calamity in the light of the terms of the agreement Ex-A5 ?

9. There is no dispute with regard to the destruction of cashew nut crop in the gale storm that has occurred on 29-3-1989. In this case oral evidence do not render any assistance to adjudicate the issue in controversy. Ex.A.4 is the tender notice dated 2-1-1989. Condition No. 29 of Ex.A.4 states that at all times the contractor should abide by the provisions of A.P. Forest Act and A.P. Forest Contractors (Forest Produce) Rules, 1977. Likewise, Clause 19 of the agreement evidencing conclusion of the contract is to the effect that the contractor shall at all times will comply with the provisions of A.P. Forest Act, 1967 and Forest Contract (disposal of Forest Produce) Rules, 1977 any statutory modification thereafter and all rules made by the Government thereunder. When once it is made clear that the contract is subject to the conditions of the Act and the rules made thereunder, Rule 28 of the Rules comes into play which is extracted below.

"28. Government indemnified against natural calamities and acts of the third parties.--The Forest Contractor shall not be entitled to any compensation whatsoever for any loss that may be sustained by reason of fire tempest decease, Post, flood, draught or other natural calamity or by reason of any wrongful act committed any third party or by any reason of unsoundness or breakage or loss or utility of any forest produce purchased under the contract."

This being an exhaustive clause whereunder the Government has taken all the necessary care to protect itself from indemnifying the persons entering into contract for whatever reason in the event of sustaining loss on any ground. Hence it cannot be said that the Rule 28 of the Rules were not specifically incorporated in the concluded contract Ex.A.5. The appellants were making their intention clear from the time of issuing auction notice till completion of the contract. Further the respondent is not new to the contract with the Forest Department. I understand that he is a regular participant in the auctions conducted by the Forest Department for sale of forest produce. Hence it cannot be said that the appellant-respondent is not aware of this provision and as such he cannot claim indemnity for the loss sustained by gale storm during the

subsistence of the contract. The only ground on which the lower Court decreed the suit on the ground that Rule 28 do not form part of the agreement by relying on the judgment of the Rajasthan High Court.

10. Now in this appeal the Government Pleader contends that the view taken by the trial Court cannot be sustained in the light of the preponderance of the view expressed by the superior Courts. In support of his contention he cited a judgment of the Supreme Court in *Badri Prasad Vs. State of Madhya Pradesh and Another*, .

"The entire coupe whose cut timber was sold to the respondent was divided into four Sections A, B, C, and D. This was done in accordance with Rule 18 of the Forest Contract Rules. This rule provides that the operations carried out in the contract area under a forest contract for the sale of standing trees are divided into two stages (a) cutting and (b) carting. Cutting operations include felling and all processes of conversion etc., without removing further from the place where it was felled that may be necessary to carry out such processes carting operations include all operations for the removal of a felled tree, or its converted products from the place where the tree was felled, whether such removal be to a depot or to a saw mill or other destination. Sub-rule (2) of Rule 18 authorizes the Divisional Forest Officer to divide the contract area, shortly termed a coupe, into such number of sections, not exceeding eight, as he may think fit. The Divisional Forest Officer can regulate and confine the operations of the forest contract in accordance with the provisions mentioned in Clauses (a) to (c) of that sub-rule. Clause (b) provides that a forest contractor can be allowed to carry out cutting operations first in Sections 1 and 2 of the coupe only and as soon as he begins cutting operations in Section 3 he shall be deemed to have surrendered all his rights to the standing trees in Section 1 and similar would be the result on his beginning cutting operations in Section 4 and so on, till all the sections of the coupe are completed. Clause (c) authorizes the forest contractor to begin carting operations from the sections whose trees he has begun to cut and provides that his rights to the forest produce in Section 1 cease when he starts cutting operations in Section 4 and so on."

He also relied on the decision in *Raja Dhruv Dev Chand v. Raja Harmohinder Singh and Anr.* AIR 1965 SC 1024. In that case the appellant obtained lease of five squares of land in Tahsil Okara for the Karif season 1947 and rabi season 1948 from the Court of Wards, Dada Siba Estate. Following partition in the year 1947 this territory has gone to Pakistan and the appellant migrated to India. Thereafter, he filed a suit against the Court of Wards in the Sub-Court, Kangra at Dharmasala for refund and the suit was decreed. But the High Court of Punjab reversed the decree and dismissed the suit While considering the correctness of that judgment their Lordships of the Supreme Court observed as follows:

"The rationale of the doctrine of frustration under the English common law need not be considered, for in India by the provisions of the Indian Contract Act have turned a limited exception under the English common law into a positive general

rule in Section 56 of the Indian Contract Act. Section 56, insofar as it is material provides "An agreement to do an act impossible in itself is void."

Their Lordships of the Supreme Court held in paras 8, 11 and 12 as follows:

"8. The rule in Section 56 exhaustively deals with the doctrine of frustration of contracts, and it cannot be extended by analogies borrowed from the English common law. In *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, Mukherjea. J.*, observed at p. 319 (of SCR). = (at p.47 of AIR):

"the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English Law on the subject of frustration. It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law de hors the statutory provisions.

11. By its express terms Section 56 of the Contract Act does not apply to cases in there is a completed transfer. The second paragraph of Section 56 which is the only paragraph material to cases of this nature has a limited application to covenants under a lease. A covenant under a lease to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. But on account the transfer of property results from the lease granted by the lessor to lessee is declared void.

12. By the agreement of lease the appellant undertook to pay rent for the year 1947-48 and the Court of wards agreed to give on lease the land in its management is not claimed that the agreement of lease was void or voidable. Nor is it the case of the appellant that the lease was determined in any manner known to law. The appellant obtained possession of the land. He was unable to continue in effective possession on account of circumstances beyond his control. Granting that the parties at the date of the lease did not contemplate that there may be riots in the area rendering it unsafe for the appellant to carry on cultivation, or that the crops grown by him may be looted, there was no covenant in the lease that in the event of the appellant being unable to remain in possession and to cultivate the land and to collect the crops, he will not be liable to pay the rent. Inability of the appellant to cultivate the land or to collect the crops because of wide spread riots cannot in the events that transpired clothe him with the right to claim refund of the rent paid."

In the case on hand also the contract was concluded and the plaintiff-respondent was put in possession of the cashew nut tope and by no act of the appellant-defendant the possession the respondent over the land was not disturbed. It is

not the case of the respondent that he is not in possession of the tope till the end of lease. In fact at the end of the lease period he could collect the remaining produce. Hence following the above judgment it cannot be held that the agreement of lease is Void or voidable. The Government Pleader also cited a judgment in Badri Prasad Vs. State of Madhya Pradesh and Another, . In this case the Respondent No. 2 became highest bidder of cut timber and arcat trees of specified area of forest in the auction held on 24-12-1956. As per the Rule 18 of the Forest Contract Rules the entire coupe was divided into four Sections ABCD. The contractor-second respondent began his operations in Section A of the coupe in the last week of February, 1957 and committed default in payment of second instalment though demanded till 25-4-1957 which was due on 1-3-1957. On 25-4-1957 the forest officials told the second respondent not to remove the forest produce in view of non-payment of second instalment. In the meantime in forest fire broke out and the cut timber sold to second respondent was burnt and the goods purchased by second respondent ceased to exist. So he did not pay the remaining 2nd,3rd and 4th instalments. At that stage the surety of the second " respondent- the appellant in the case filed suit for declaration of his non-liability to pay the amount of instalments remaining due from second respondent and for an injunction against the first respondent State from recovering that amount from him by contending that the contractor had not been put in possession of the cut timber sold to him except of such timber which had been in Section A of coupe No. 9. Therefore there had been no transfer of property in the timber sold to him and that he was therefore not liable for paying the amounts due on 2nd, 3rd and 4th instalments. The suit was dismissed by the High Court on appeal. Originally the contention of the appellant that the cut timber sold and existing in Sections B,C, and D of the coupe had not passed to second respondent since two hammer marks were not put on the cut portion of the fell trees before they are actually taken away from the forest area. On that ground the appellant contended that he is not liable to pay the remaining three instalments. Their Lordships observed in Para 19 as follows:

"There is nothing in the contract that possession would not be delivered over the cut timber in Sections B, C, and D till the 2nd, 3rd, and 4th instalments have been paid. The relevant provisions of Rule 18 of the Forest Contract Rules, extracted earlier, do not contain any such restriction. It only provides that the operations necessary to be conducted by the contractor had to start with Section A or the first section and that the rights of the contractor to the material purchased would be deemed to be surrendered in certain circumstances. This has nothing to do with the payment of the instalments by the contractor. He can proceed to operate on the entire property purchased, according to his inclination in accordance with the procedure, as regulated by the rules. There is therefore no force in the submission that there could have been no delivery of possession over the produce sold and existing in Sections B, C and D till the various instalments had been paid."

The next case cited was in Merla Suramma v. Kakileti Sitaramaswamy and Anr.

1956 (2) An.WR 442. In this case the plaintiff leased out the suit schedule property on payment of rent of 105 bags a year. The lease deed provided that irrespective of heavy rains or draught, etc., (athivrishti, anavrishti doshamula vagaira) and whether the tenant cultivated the land or not the rent is payable. When the lessee defaulted in payment of rent the plaintiff filed the suit for recovery of rent. The tenant resisted the plea of the plaintiff by saying that there was unforeseen cyclone in October, 1949 and the crop on the suit land was damaged and yielded only 60 bags in all. The Subordinate Judge held that the condition in the lease deed was not comprehensive enough to include a cyclone and that further since this was unforeseen and not provided for is frustrated the common basis of the contract and hence the tenant could get equitable relief.

11. A Division Bench of this Court held that the reasoning of the Subordinate Judge is not sound. Assuming the cyclone was an unforeseen contingency it is difficult to bring this case within the doctrine of frustration of a contract. We are not here concerned with the development of this concept in English Law and the conflicting theories that are embodied in the decisions of the English Courts. The law on the subject is codified in Section 56 of the Contract Act which recites:

"An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor couldn't prevent, unlawful, becomes void when the act becomes impossible or unlawful."

.....

The second paragraph enunciates the law relating to the rescission of a contract by reason of some supervening impossibility or illegality. It should be remembered that this section occurs in the chapter dealing with discharge of contracts. So the doctrine entrenched in this section can come into operation only when the performance of a contract become impossible or unlawful by an event that intervenes subsequently. The lower Court relied on *Firm Sarada Prosad De Vs. Bhut Nath Mallik, and Twen Lverseas" Trading Company v. Uganda Sugar Factory* (1945) I MLJ 417 : AIR 1945 PC 144 to support its contention. These pronouncements are not relevant to the present enquiry since there is no question of the contract being discharged here.

As pointed out by their Lordship of the Supreme Court in *Gosh v. Mugneeram Banger and Company* (1954) I MLJ 417 : (1954) SCJ 1, the word "impossible" has not been used in the sense of physical or literal impossibility. The performance of a contract may not be physically impossible but it might be impracticable or useless having regard to the object and purpose of the parties had in view. So, the section applies, when the performance of a contract is beset with practical difficulties. This supervening event should take away the basis of the contract. It should be of such a character as to strike at the root of the contract. It is difficult to bring within the ambit of the rule a case where a contract has been given effect to, i.e., where one of the parties to it has

performed his part of it and it remains for the other to fulfil his obligations under the contract. In such an event the party who had the advantage of the contract cannot be relieved from his liability on the covenants merely because some event had occurred which had resulted in some loss to him. In this case, there is no scope for the application of the doctrine of frustration as the lessee had full use of the land, raised the crops and harvested them, his only complaint being that consequent on the cyclone his crops were under water for a number of days resulting in damage thereto and ultimately in poor yield. In effect the claim amounts only to a rebate of the rent.

The rule relating to frustration of a contract cannot come into play merely because fulfilling the terms of the contract is burdensome or more expensive to one of the parties. This principle is enunciated in some of the decided cases. In *Hari Laxman v. Secretary of State for India* ILR (1952) Bom 142 a suit was brought by the Secretary of State for India in Council against the lessee of the salt pans belonging to Government for recovering the rent and cost of repairs which the latter were bound to make under the agreement. The defendants sought to escape from their liability for payment of rent and for making repairs on the defence that there was a strike of local workmen which rendered it impossible to manufacture salt. This defence was not given effect to. It was decided that the defendants could not be excused from paying the rent and carrying out the repairs on account of the alleged strike of workmen as they could employ workmen on payment of higher wages and that the contract did not become impossible of performance.

The rule stated in *Sankaran v. District Board of Malabar* (1993) 66 MLJ 108, also accords with this view. The proposition that the concept embodied in Section 56 of the Contract Act is inapplicable to a case where the contract has not ceased to be executable and the parties stuck to it throughout the relevant period finds support in this pronouncement. The position is stated thus by Denning L.J. in *Davis Contractors L.D. v. Fareham U.D.C.* L.R. SD. (1955) 1 Q.B. 302 :

"This case then becomes simply one where, without the fault of either party there has been an unexpected turn of events which renders the contract more onerous than the parties had contemplated. This is no ground for relieving the party of the obligation he has undertaken."

12. Mr. Anand also cited a judgment of the Supreme Court in *Smt. Sushila Devi and Another Vs. Hari Singh and Others*, , was cited which is to the same effect. In this case the respondent became the highest bidder in taking the land on lease for three years for agricultural purposes and as per the terms of the notice the respondent has to get the lease executed within fifteen days from the date of acceptance of the lease. But even after expiry of the period the respondent continued in possession of the lands. Subsequently, Tehsil Gujranwalla where lands are situated became a part of Pakistan as a result of partition and the respondent migrated to India because of the communal disturbances. In these circumstances the respondent seemed to have filed a suit for refund of the

amount deposited as security for payment of rent as security for payment of rent as well as to pay them a sum of Rs. 2,000/- as damages. Their Lordships of the Supreme Court having considered the facts observed there is a clear distinction between a completed conveyance and an executory contract. Events which discharge a contract do not invalidate a concluded transfer see *Raja Dhruv Dev Chand Vs. Harmohinder Singh and Another*, , by holding that there was an agreement of lease but not the lease. But the lease deed was not executed and registered. Section 56 of the Contract Act attracts to the facts of this case and held that the object of the lease became impossible because of the supervening events. As per the terms of the agreement between the parties taking possession of the property became impossible performance. Having taken that view their Lordships agreed with the view taken by the Courts below that the contract has become impossible to perform.

13. Mr. Anand appearing for the respondents contended that the act of nature cannot be considered as a ground of frustration. The Court is not prohibited from pronouncing that the contract is frustrated taking into consideration the unexpected events or changed circumstances which are more contemplated by parties at the time of entering into contract. It is pertinent to refer to Paras 15 and 16 of the sixth decision cited above;

"15. In *Alanduraiappar Koil Chithakkadu v. T.S.A. Hamid* AIR 1963 Mad. 194, a lessee of a shandy tope agreeing to pay an annual rent for a period of five years was held not to be entitled to remission merely for the reason that the shandy was hit by two cyclones during the period of lease and that for some period on account of the cyclone, "the shandy did not form properly or regularly and the lessee did not get any income". The Court held in that case that in the absence of any provision for remission on account of losses, no such remission can be granted by the Courts.

16. In *Sri Amuruvi Perumal Devasthanam Vs. K.R. Sabapathi Pillai and Another*, , the plaintiff Devasthanam granted a lease of lands in open auction to the defendant on the terms and conditions set out in the auction notices and a deed of lease was executed by the Devasthanam and the defendants. The Government of Madras thereafter promulgated Ordinance IV of 1952 which restricted the quantum of rent payable by the tenants to the landlords. The defendants remained in possession till after the expiry of the period of the lease, but neglected to pay rent and failed to comply with the terms of the lease. It was held that the plaintiff was held entitled to recover the stipulated rent from the defendants."

Though their Lordships made a passing remark it cannot definitely be said that the Court has to intervene and declare that the contract was frustrated when an unexpected incidental or circumstance intervenes as it was not contemplated at the time when parties entered the agreement. At any rate ignoring law declared by the superior Courts in candid terms I cannot exercise that power. Hence I have no option except to reverse the judgment of the lower Court and dismiss

the suit filed by the respondent seeking refund of the amount on the ground that the contract has become impossible to perform as contemplated u/s 56 of the Indian Contract Act.

14. In the light of the foregoing discussion I hold that the Trial Court's view that Rule 28 of A.P. Forest Contract (Disposal of Forest Produce) Rules, 1977 do not form part of the agreement is contrary to the declared by the superior Courts of the country and the same cannot be sustained in law. Accordingly, the appeal is allowed by setting aside the judgment of the Trial Court and the suit is dismissed. In the circumstances no costs.