

(1997) 04 GAU CK 0013
In the Gauhati High Court
Case No : F.A. No. 33 of 1990

State of Assam and Others

APPELLANT

Vs

Mukunda Oja and Others

RESPONDENT

Date of Decision : 10-04-1997

Acts Referred:

Contract Act, 1872 — Section 56

Citation : AIR 1997 Guw 113

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : H.N. Sarma, Additional Government Advocate, for the Appellant; P. Pathak and K.N. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This first appeal has been filed by the State of Assam against the judgment and decree dated 22-12-89 passed by the learned Asstt. District Judge, Barpeta in M.S. No. 11/88. By the impugned decree, the learned Judge decreed the suit against the State of Assam for an amount of Rs. 1,24,850/- with interest at the rate of 6% per annum from the date of filing of the suit.

2. On 30-8-90, this Court admitted the appeal and the execution of the decree was stayed on condition that the State of Assam shall deposit half of the decretal amount within 1 months from that date. The amount was deposited and thereafter on 8-11-90 this Court passed an order that the plaintiff shall be entitled to withdraw the same by furnishing bank guarantee to the satisfaction of the Court. This order was subsequently modified on 30-7-91 and the plaintiff was allowed to withdraw the amount by furnishing security of immovable property. The half of the amount deposited was withdrawn by the plaintiff.

3. The suit was filed by 4 plaintiffs. The case of the plaintiffs was that the defendant had allowed the plaintiffs to store in the Cold Storage Cooling Chamber of Howly as per terms and conditions of the agreement dated 11-9-87.

The monthly rent For storage was Rs. 5/- p/ctl. From the plaint it is seen that only Mukunda Ojha deposited in all 1401 bags of potatoes on different dates as mentioned in para I of the plaint. But potatoes were damaged in the Cold Storage and it is stated that this damage was caused due to gross negligence and carelessness on the-part of the defendants and as such this suit was filed for realisation of an amount of Rs. 1,95,650/- being the amount of value of seeds potatoes at the rate of Rs. 350/- per ctl. with interest at the rate of 12% thereon.

4. A written statement was filed on behalf of defendants 2 and 3 and their whole defence was on the basis of Cold Storage Order, 1980. This Cold Storage Order, 1980 was made in exercise of power conferred by Section 3 of the Essential Commodities Act, 1955. The agreement along with conditions made between the parties were marked an Ext. "Ka" and "Kha". Regarding the power supply, in the printed form (Ext. "Ka") in Clause 8 it is stated as follows ;

"The Cold Storage Plant is powered by electric supply from ASEB. There is electrical generating set. to be operated whenever long time break down of power supply from ASEB results."

5. This primed clause was cut down and it was inserted by hand at the time of agreement i.e. on 15-9-87 which is inter alia as follows :

"No generating set is available at present at Howly unit."

6. The plaintiff knew that no generating set was available at the Howly Unit and the agreement was also made accordingly. There was an amendment regarding condition of storage of fruits vegetable and other commodities in the 1980 Order. The amendment is as follows :

"Condition for storage of fruits vegetable and other commodities :

Clause No. 3 : Cold Storage shall not be responsible for the damage of the goods stored cause due to circumstances out side the management's control, cold storage shall be at liberty to dispose of the damage stock if not withdrawn within the seven days of date of issue of the written intimation. This intimation shall be sent under registered cover.

(ii) Terms and conditions for storage of commodities in departmental Cold Storage.

Clause 7: The authority will take all possible care for properly storing the commodities bul will not be liable for any damage of the goods stored cause by factor beyond control of the authority."

7. The amendments incorporated in the order are statutory in nature. The parties will be governed by this amendment. The whole case of the defendants is that there was power failure and if there was any damage that was due to power failure and it was earlier made known to the plaintiffs that no generating set is available at present at Howly Unit and as such the damage caused was beyond

the control of the management and as such they are not responsible for any damage.

8. In the suit as many as 10 issues were framed by the learned Judge. The Issues Nos. 7, 8 and 9 which are relevant for the purpose of disposal of this appeal are quoted below :

"Issue No. 7: Which of the parties violated the Cold Storage Rules.

Issue No; 8: Whether the defendant party was negligent and careless.

Issue No. 9: Whether the plaintiff is entitled to get a decree for Rs. 1,95,650/- with interest and costs."

9. Before the learned Asstt. District Judge, the following witnesses were examined : PW 1 Mikunda Ojha. PW 2 Pomu Das. PW 3 Abdul Hamid DW 1. Rabindra Nath Baruah. DW 2 Chakradhar Das. DW 3 Md. Safique Haque.

10. A large number of documents were exhibited in the suit by both the plaintiffs and defendants. Regarding Issue No. 7 the learned Judge without considering anything came to the finding that as the rules were not handed over to the plaintiffs at the time of signing of the agreement (Ext. 1) it cannot be said that the plaintiffs are bound by the rules and as such the Issue No. 7 was decided in favour of the plaintiffs. Whether statutory rules/orders are to be handed over to a party at the time of agreement in order to make it binding, that aspect to the matter shall be considered at a later point of time. Regarding Issue No. 8 without considering any materials on record, the learned Judge abruptly came to the finding that the defendant did not take necessary care at the time of deposit of the potatoes. It was also found that potatoes were deposited by the plaintiffs in the Cold Storage. Regarding failure of electric supply and its impact on the claim of the plaintiffs that aspect of the matter was not decided and/or considered by the learned Judge.

The learned Judge in deciding Issue No. 9 came to the finding that there was loss to the plaintiffs and having relied on Sections 73 and 74 of the Contract Act, the suit was decreed as indicated above. Hence this, First Appeal.

11. I have heard Mr. H.N. Sarma, learned counsel for appellant and Mr. K.N. Choudhury, learned counsel for respondents.

12. The first contention of Mr. Sarma, is that if something is beyond the control of the management or the authority, no damage whatsoever can be thrust on a person. In support of his contention he relied on Section 56 of Contract Act. Section 56 of the Contract Act refers to an agreement to do impossible act or acts which are beyond the control of the persons. If the performance of the contract becomes impossible and/or not feasible for all practical purpose, the contract will stand discharged. Where the performance of contract dependent on happening of a particular event each taking a chance the doctrine of frustration may not be applicable. But the question that will arise in such a case is that whether

the parties can take advantage of such a state of things which they envisaged at the time of contract. Some instances of frustration of contract are narrated in Ansons' Law of Contract, Paper Book Edition (23rd) at p. 457 and they are quoted below:

"We may group certain heads the cases in which the Courts have been ready to infer from the nature of the contract and from the circumstances surrounding it, that it has been frustrated by the happening of a subsequent event.

The first and most simple case is probably that where the performance of the contract is made impossible by the destruction of the specific thing essential to that performance, for example the destruction of the music-hall in Taylor v. Coldwell. So if factory premises in which machinery is being installed are destroyed by fire, or a crop of potatoes to be grown on a particular field largely fails, or a ship under charter party is seized by foreign insurgents, the contract is discharged.

Secondly the principle of frustration has been held to apply to cases concerning the non-occurrence of a particular event. In the so-called "coronation cases" which arose out of the postponement of the coronation of King Edward VII owing to his sudden illness, it was applied to contracts the performance of which depended on the existence or occurrence of a particular state of things forming the basis on which the contract had been made. In Krell v. Henry for instance :

The defendant agreed to hire a flat from the plaintiff for June 26 and 27, 1902; the contract contained no reference to the coronation procession, but they were to take place on those days and to pass the flat. The processions were cancelled.

Two-thirds of the rent had not been paid when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it. The Court considered that the processions and the relative position of the flat lay at the foundation of the agreement. The contract was therefore discharged."

13. This question also may be considered from another angle i.e. what will happen if a person after securing a contract with his eyes open turn round later on, whether it can be allowed to assail the validity of those terms or the rules which constitute the terms of the contract. This aspect of the matter came up for consideration in State of Orissa and others Vs. Narain Prasad and others, etc. etc., wherein the Supreme Court in para 21 of the judgment pointed out as follows :

"The approach adopted in this decision has to be borne in mind in every such case it is also to be kept in mind that while the decisions referred to hereinbefore are by Smaller Benches, this decision is by a Constitution Bench. A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, according to this decision and question the validity of those obligations or the validity of the rules which constitute the terms of the contract. The extraordinary jurisdiction of the High

Court under Article 226 which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour."

In para 36 the Supreme Court pointed out as follows :

"Lastly, we may also invoke the law in *Har Shankar and Jage Ram* that the writ petitioners having entered into agreements voluntarily, containing the conditions aforesaid and having done the business under the licences obtained by them, cannot be allowed to either wriggle out of the agreements nor can they be allowed to challenge the validity of the rules which constitute the terms of the contract. The High Court should not have exercised under Article 226 of the Constitution in aid of such licensees."

In this para reference was made to two earlier cases i.e. *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, *Har Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, *Excise Commr. v. Ram Kumar*, these cases were relied on and approved.

The law of damage is that damage must be the result of natural and ordinary consequence, inaction, negligence or failure to perform some duty imposed on the defendant by contractual obligations or by the general law to take due care. Damage is pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default in a breach of contract or in tort damages are the recompense given by process of law to a person for the wrong that another has done to him. The essentials of damage are: (1) detriment to one by the wrong doing of another; (ii) reparation awarded to the injured through legal remedies; (iii) its quantum being determined by dual components of pecuniary compensation for the loss suffered and often not always a punitive addition as a deterrent-cum-denunciation by the law. A person may suffer damage in various manners, but if it is not the result of wrong doing of another or if the other person is not guilty for the breach of contract, no liability can be fastened to the other person. Further the burden entirely lies on the person claiming damage to prove the wrong doing of the other as well to establish the loss suffered by him. Whether it is a claim based on contract or tort the burden is squarely on the person claiming damage.

14. On the other hand, on the question of frustration. Mr. K.N. Choudhury learned counsel for respondents relies on the following decisions ;

1. *Ganga Saran Vs. Ram Charan Ram Gopal*, wherein the Supreme Court pointed out that doctrine of frustration could not avail the defendant when the non-performance of the contract was attributable to his own default. That was a case where the suit was instituted to recover damages for breach of a contract. The defendant firm undertook to supply to the plaintiff 184 bales of cloth of certain specification manufactured by the New Victoria Mills. The plaintiff delivered 99 bales and there was a dispute about the remaining 85 bales. Thereafter there

was an agreement to deliver 61 bales out of 85 bales, the 61 bales were not supplied and as such suit was filed. The point which was taken up was that the performance of the contract had been frustrated by circumstances beyond the control and hence the claim of the plaintiff must fall through. It was found by the Supreme Court that the defendant was in a position to supply 61 bales of the contracted goods at the time when the breach of the agreement is alleged to have happened. It was found by the Supreme Court that the performance of the contract had not become impossible and it was in that context that the aforesaid was laid down by the Supreme Court.

2. The next case relied on by *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*, wherein para 9 of the Supreme Court pointed out as follows :

"The word "impossible" has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally useless from the point of view of the object and purpose which the parties had in view, and if an untoward event or change of circumstances totally upsets the very foundation it can very well be said that the promisor finds it impossible to do the act which he promised to do."

After discussing the laws in para 20 the law has been laid down as follows :

"It is well settled and not disputed before us that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract; Per Lord Wright in--1944 AC 265 at p. 274(1). What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the Court "ex post facto". On the actual circumstances of the case. 1944 AC 265 at p. 274(1)."

15. In *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, the Supreme Court in para 7 the law has been laid down as follows :

"Such a difficulty has, however, not to be faced by the Courts in this country. In *Ganga Saran Vs. Ram Charan Ram Gopal*, this Court emphasised that so far as the Courts in this country are concerned they must look primarily to the law as embodied in Sections 32 and 56 of the Contract Act. In *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*, also, *Mukherjea, J.* (as he then was) stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be express or implied in cases where the Court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. Although in English law such cases would be treated as cases of

frustration, in India they would be dealt with u/s 32. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from performance of the contract. The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change or circumstance which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all not could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs it is the Court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situations."

16. In *Govindbhai Gordhanbhai Patel and Others Vs. Gulam Abbas Mulla Allibhai and Others*, wherein paras 10 and 11 by considering Section 56 the Supreme Court laid down the law as follows:

"10. The meaning of the aforesaid expression "impossible of performance" as used in the above quoted section would be clear from the following observations made by Lord Loreburn in *Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 AC 397. 403 which is generally considered to contain a classic and terse exposition of the law relating to frustration :

"The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible." (Para 10)"

"11. We are therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the Contract Act."

17. This matter also can be looked at, from another angle. There was a contract that the Cold Storage is dependent on the power supplied by the ASEB and there is no generating set at Howly Unit. So, if there is failure of power supply from ASEB, what will be the fate of this contract This contract was subject to a implied condition that the contract can be performed only when there is continuous power supply and if there is failure of power supply the contract itself will come to an end as it will not be able to perform the contract and in such a case will not the defendant be excused from performance of contract. In such an eventuality if there is failure of power supply from ASEB it cannot be reasonably be assumed that the parties contracted for doing something which was beyond the capacity of the parties.

18. As indicated above, a contract was made and there the question of supply of electricity loomed large and that was known to the parties, The plaintiff look the

stand that during this period in, Howly and Byrpala there had not, been disruption of electric supply and in support of this claim, a certificate from the Electricity Deptt. was exhibited which is Ext. 5. DW 1 deposed inter alia as follows :

"Potatoes were stored during the period from 15-9-87 to 12-12-87. During that period there was regular power failure. Ext. "ga" is the power failure statement. There was power failure for 110 limes total lime being 302 hrs. Voltage was not stabilised for 15 limes. This power failure is outside the control of the management.... the potatoes were damaged due to failure in power supply."

DW 2 who is the Operator of the Cold Storage deposed as follows :

"There was no generator set. There was failure of power supply. The voltage too was less."

19. So. this evidence read with documentary evidence lead to the conclusion that there was failure of power supply and goods got damaged because of failure of power supply and the plaintiff with his eyes open took the risk to, store the potatoes. In the Cold Storage Unit and now as because the potatoes got damaged, the plaintiffs cannot turn round and claim compensation. The plaintiffs took a chance and they must suffer for. taking undue risk when they were told at the time of the contract itself that there is no generating set in Howly Unit. The findings of the learned Judge, in Issue No. 7 that as because rules were not handed over to the plaintiffs at the lime of signing the agreement the rules will not he binding on him has no legs 10 stand upon. The rules are statutory in nature and these rules/conditions specifically say that Cold Storage would not be responsible for the damages to the goods stored due to circumstances outside the management's control. The supply of power was a factor beyond the control of the Cold Storage authority and this being the position, the question of granting damage to the plaintiffs for goods damaged which was beyond the control of the management and/ or authority does not arise. The finding on Issue No. 7 as arrived at by the learned Judge shall stand set aside and quashed. Once there is a finding on ihis issue in favour of the defendant the question of decreeing the suit does not arise. The suit is to be dismissed on this ground alone.

20. Next let us take up issues 8 and 9 as decided by the learned Judge. Issue No. 8 is with regard to negligence and carelessness and Issue No. 9 is with regard to entitlement of the plaintiffs to get damages with interest. Regarding Issue No. 8 what can be said is that for the failure of power supply it cannot be said that the defendants were negligent. Regarding storage of potatoes more in quantity beyond the capacity of the unit that part need not be decided for the disposal of this appeal. Regarding Issue No. 9, the learned Judge did not consider properly Section 73 of the Contract Act. Section 73 provides for compensation for loss or damage for breach of contract. In order to thrust the liability for loss or damage on the defendant first it must be found that the breach was caused because of the fault on the part of the defendant. As found above, with regard lo

Issue No. 7 the damage of potatoes was not caused because of the fault of the defendant. A suit for damage u/s 73 would only lie if there is a breach of contract by the defendant.

21. That being the position in the case in hand, the question of granting damage does not arise, A person is entitled to the damage if the defendant does any wrongful act and direct result of which causes loss or injury to the plaintiffs. In such an eventuality the defendant must make compensation in money to the extent of the damage or injury can be ascertained in terms of money. The principle which has been applied by the learned Judge in order to estimate damage or to measure the damage is also not correct principle, but for disposal of this case, it is not necessary to consider that aspect to the matter.

22. Accordingly, this appeal is allowed with costs all throughout. The amount of money which the plaintiffs have realised by virtue of the stay order of this Court shall now be paid back by way of restitution within a period of 3 (three) months from today. The amount realised by the plaintiffs by virtue of the order of this Court shall carry interest at the rate of 18% from the date when the money was withdrawn by the plaintiffs.