
(1963) 06 GAU CK 0001
In the Gauhati High Court
Case No : First Appeal No. 42 of 1958

State of Assam

APPELLANT

Vs

Debi Dutta Tularam

RESPONDENT

Date of Decision : 27-06-1963

Acts Referred:

Constitution of India, 1950 — Article 229, 299(1)
Contract Act, 1872 — Section 65, 70
Government of India Act, 1936 — Section 175(3)

Citation : (1963) 06 GAU CK 0001

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : M.C. Pathak, for the Appellant; P.K. Goswami and S.R. Khaund, for the Respondent

Judgement

G. Mehrotra, C.J.—This is Defendant's appeal. There is a cross-objection by the Plaintiff also. Plaintiff brought a suit for recovery of Rs. 37,678/12/- as damages against the State of Assam for breach of a certain contract. The case of the Plaintiff as disclosed in the plaint is that the Chief Engineer, P.W.D., Assam acting; on behalf of the State by an advertisement dated Shelling, the 20th May, 1953 and published in the Assam Gazette dated 27th May, 1953 called for tenders to be submitted up to noon on the 30th June 1953 for the manufacture and supply of 1st class kiln bricks according to specifications therein mentioned. Delivery was to be completed by the 31st December 1953 along the Brahmaputra River bank at Dibrugarh for the work of construction of revetment for protection of Dibrugarh town from erosion of Brahmaputra River.

The Plaintiff submitted his tender to the Chief Engineer, depositing Rs. 2,000/- earnest money and it was accepted as per letter of Chief Engineer, P.W.D. Assam dated 20th July 1953 for a total quantity of 15 lakhs at the rate of 90 per 1000 Nos. Under, this letter the Plaintiff was directed to sign the formal tender in I-I. Form in the presence of the Executive Engineer, Town Protection Division, Dibrugarh and thereupon immediately start the work of supplying the bricks. In

pursuance of this letter the Plaintiff signed the H form tender on the 1st September 1953 and gave the additional security of Rs. 1,700/-. Thereafter he started investing money for the purpose of the contract work.

On the 25th September 1953 the Government wrote a letter to him intimating that the Government have decreed to postpone permanent protection works till the results of the model experiments are known and as such the orders for supply of bricks were cancelled. The Government thus by this letter cancelled the offer and the Plaintiff, has brought the present suit for recovery of the damages for cancellation of the contract. Various items of damages have been claimed. The trial Court decreed the suit for Rs. 14,163/- which included a sum of Rs. 3,700/- the security money deposited by the Plaintiff. In the decreed interest also is allowed by the Court below. The Plaintiff has filed an objection for the balance amount and the State of Assam has filed the present appeal challenging the decree of the Court below.

2. After the appeal had been filed, an application was subsequently made to this Court that the Appellant be permitted to urge the following additional grounds :

For that the alleged agreement Ext. 17 on which the Plaintiff's claim is based is not expressed to be made in the name of the Governor of Assam nor it is executed in such manner as authorized and as such the State of Assam cannot be made liable on the basis of such contract or agreement.

3. The first point urged in the appeal is that the contract on which the Plaintiff has based his claim is not in accordance with the provisions of Article 299 of the Constitution, which reads as follows:

299, (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor or the Rajpramukh by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

Clause (2) protects an officer from personal liability in respect of a contract which is executed in accordance with the provision of Article 299(1). If the contract is executed in accordance with Article 299 it gives protection to the person who executes the contract or the Governor or the President from personal liability under the contract. But if the contract is not executed in accordance with the provisions of Article 299(1), then such a contract will not be binding on the

Government. This proposition has been well settled and It cannot be disputed that the contract if not executed in accordance with the provisions of Article 299(1), such a contract is not enforceable against the Government, nor can the Plaintiff get a decree for the damages for cancellation of that contract. Whether the Plaintiff will be entitled to any decree for the benefits derived under the contract on the basis of Section 65 or Section 70 of the Contract Act Is not the question before us.

Reference may be made in this connection to the cases of Seth Thawardas Pherumal Vs. The Union of India (UOI), The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd., , Seth Bikhraj Jaipuria Vs. Union of India (UOI), , State of West Bengal Vs. B.K. Mondal and Sons, and D. Kalita v. Union of India, reported in (S) AIR 1955 Gau 86. Mr. Goswami who appears for the Respondent, has very strenuously contended that as no point was taken by the Defendant, in his written statement challenging the validity of the contract and further that as in effect the contract was accepted by the Defendant in his written statement, he cannot in the first place be allowed to urge that point at this late stage and secondly he contends that even if he is allowed to urge that point, the Plaintiff Respondent should be given an opportunity to establish, any such legal contract under Article 299 of the Constitution. In effect the Plaintiff will w prejudiced if he is no suited on the mere ground that the contract does not conform to the provisions of Article 299, particularly when this point was not urged before the Court below and even before this Court, when the appeal was filed. The point is sought to be urged by a later application.

(I) The next point taken by Mr. Goswami is that in so far as the sum of Rs. 1,600/- is concerned, the Defendant himself has admitted his liability and has filed no appeal against the decree in so far as it relates to the compensation of Rs. 1,600/- and the security money of Rs. 3,200/-. The Defendant having failed to challenge that part of the decree, he cannot be allowed at this stage to challenge the correctness of the entire contract when a part of the contract has been admitted by him to be a valid contract.

In our opinion, there is no force in the contention raised by the Respondent. In the plaint the Respondent non" based his claim exclusively on the contract which he alleges is evidenced by two documents. The first is the loiter or the Chief Engineer by which he has accepted Files terms offered by the Plaintiff and the second is the tender form which the Plaintiff in pursuance of the letter signed. In the plaint there is no indication that apart from these two documents there was any other contract and thus the question of the Plaintiff being given any opportunity to prove any other document which may conform to the requirements of Article 299 of the Constitution does not arise. The Plaintiff has, as I have already pointed out, based his case on these two documents and the only question, therefore, is whether the two documents which form the contract according to the Plaintiff, fulfill the requirement of Article 299 of the Constitution.

It is true that the questions which require investigation of facts, will not be

allowed to be raised at the appellate stage. But if on the facts which are alleged by the plenum himself in his plaint certain question of law is attracted and if on those admitted facts it- can be shown that the contract of the Plaintiff does not fulfill the requirement of Article 299 of the Constitution, the Court will not such its eyes to those plain facts and will not refuse to adjudicate as to the validity of such a contract on the ground that it does or does not conform to the requirement or Article 299 of the Constitution. If there WAS any indication in the, plaint: that the case was based on contract different from the one comprising the letter and the signature on the tender form, the Plaintiff could have said that he was deprived of an opportunity to prove that contract. No useful purpose, can be served by giving him an opportunity to prove some supposed contract which he never indicated in his plaint.

5. There is another aspect of the matter which should be considered. There are two-fold requirements of Article 299. Firstly the contract should be expressed to be made in the name of the Governor and secondly it should be executed on behalf of the Governor by a person who is authorized to do it. The Defendant may not have expressly pleaded that the person who signed the contract has no authority. If the case was based only on this ground, it may have been said that the Plaintiff has been prejudiced by not taking that point in the earlier stage. If the point had been taken the Plaintiff would have been in a position to prove the fact that the person who signed the contract had an authority to do it. But here there is a greater infirmity In the contract, namely, that the contract relied upon by the Plaintiff does not appear to be in the name of the Governor.

It was contended by Mr. Goswami that the H. For is not before us and it can not be said with certainty that the H-Form which embodies the contract does not express the contract to be made in the name of the Governor, in the plaint it is expressly mentioned that the H-form us the tender form, and the tender form¹ from its very nature; cannot be a contract expressed in the name of the Governor.; It is only in the form" of an offer made by the tendered to supply on certain terms and conditions and if those conditions are accepted by the authority, it cannot be a contract in the form expressed in the name of the Governor; at all. From the very averments made in the plaint itself thus it is clear that there cannot be any doubt as to the" form of the contract entered into between the parties. is the record there is an application with certain documents but as those documents are not exhibited Mr. Goswami says that we cannot take notice of those documents. As I nave already ported out, from the very averments made in the plaint it is clear that the contract could not have been made in the name of the Governor, it is thus not necessary to go into the tender form at all and take that document on the records of this case.

6. Strong reliance has been placed on the case or Dominion of Dominion of India Vs. Raj Bahadur Seth Bhikhraj Jaipuria, Particular reference has been made to the following passage at page 601:

It cannot be disputed that he question whether or not the provisions of Section

175(3) (Government of India Act, 193b) have been complied with is purely a question of fact, and therefore, has to be pleaded. Unless the facts constituting the invalidity of the contracts are mentioned in the written statement, it is not incumbent upon the Plaintiff to establish by evidence that the contracts were valid and legal. The position in the instant case is however, entirely different and the case of Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another, above referred to is clearly distinguishable on facts.

After making these observations their Lordships gave certain facts alleged in the plaint and then at page 60g the following observation is made:

I think paragraph 5 of the plaint does not assist the Plaintiff at all. In my opinion, there is a clear denial in the written statement of the authority of the Divisional Superintendent to bind the railway administration by such contracts. In my opinion, where the averments in the plaint themselves were sufficient to establish- the noncompliance of the provisions of Section 175 (3) of the Act, it was not necessary for the Defendant to raise a further fact, and if those facts were sufficient to prove the infraction of the constitutional provisions contained in that section, it becomes the duty of the Court to give effect to those provisions.

We are in complete agreement with these observations, if the allegations in the plaint themselves point out certain infraction of the provisions of Article 299 of the Constitution, the Court will not shut its eyes to it and to declare such a contract unenforceable merely because the point has not been taken by the Defendant in his written statement. In our opinion, therefore, on the averment in the plaint. It is clear that the contract for the breach of which the Plaintiff has claimed damages was not a valid contract under Article 299 of the Constitution and thus no damages can be decreed on the basis of the breach of such a contract as the Government cannot be bound by such a contract at all.

7. We need not at this stage say anything about the claim- of the Plaintiff to proceed in person against the officers who executed these contracts.

8. The case, however, with regard to Rs. 1,600 and odd and Rs. 3,700/- the security money stands on a different footing. When we are upholding the decree of the Court below to the extent of Rs. 5,000/- and odd, we are not doing it on the ground that the contract to that extent is held to be valid but on the ground that the Appellant has not filed any appeal challenging the decree of the Court to that extent. That itself disentitles the Appellant to get any decree setting aside the decree of the Court below to the extent of the amount of Rs. 5,000/- and odd, and in this view of the matter the argument advanced by Mr. Goswami that the Defendant having accepted the decree on the basis that the contract is valid in part the Defendant cannot raise the invalidity of the contract as a whole cannot be accepted. The Defendant admitted that the Plaintiff has suffered a loss of Rs. 1,668/-. In the grounds of appeal also Defendant has accepted this amount. The valuation of the appeal is Rs. 8,795/- though the decree was for Rs. 14,163/-. The decree of the Court below included the sums of Rs. 3,700/- the

amount of security and Rs. 1,600/- but Rs. 3,700/- the amount of security and Rs. 1668/- the amount of compensation were not included in the appeal. Thus the appeal of the State is allowed to this extent that the decree of the Court below for recovery of a sum of Rs. 8,795/- is set aside and the decree of the Court below for Rs. 3,700/- plus Rs. 1,668/- totalling Rs. 5,368/- with the rate of interest as decreed by the Court below will remain in tact. But we make no orders as to costs throughout.

9. In the view which we have taken in the appeal, the cross-objection has no force and it is rejected but there will be no order as to costs.