(1995) 01 OHC CK 0012

In the Orissa High Court

Case No : First Appeal No. 60 of 1991

State of Orissa and Others — APPELLANT

Vs

Durga Enterprisers, Jagatsingpur — RESPONDENT

Date of Decision : 30-01-1995

Acts Referred:
Constitution of India, 1950 — Article 14, 299, 299(1)
Contract Act, 1872 — Section 55

Citation : (1995) 1 OLR 453

Hon'ble Judges : S.K. Mohanty, J

Bench : Single Bench

Advocate : S.S. Rao. Additional Government Advocate, for the Appellant; Bidhayak Patnaik and M.K. Sadu, for the Respondent

Final Decision : Allowed

Judgement

1. Defendants are appellants. Plaintiff brought the suit for realiation of Rs. 1,30,987/- being the price of shutters manufactured by him against purchase orders Exts. 1 to 5 issued by the Executive Engineer (Defendant No. 4) taking delivery of the same from plaintiff''s workshop. Plaintiff further claimed damages amounting to Rs. 15,720/-at the rate of 12 per cent per annum on aforesaid sum with effect from 25-8-90 when the articles are claimed to have been made ready for delivery, till institution of the suit.

2. Plaintiff''s case in brief was that he manufactured telescopic out-let shutters for hume pipes of various dimensions in his industrial unit and coming to know that the State of Orissa (defendant No. 1) was in need of such shutters, he submitted his quotations before the Executive Engineer, who acting on behalf of the State, placed orders between 16-7-90 and 20-7-90 for supply of 133 numbers of shutters at the price quoted by him. When Executive Engineer placed the orders, plaintiff represented to him that it may not be possible on his part to supply the shutters within the stipulated time on account of repeated load-sheddings by the Orissa State Electricity Board and he was assured that if he

faced any difficulty on account of loadshedding, on his application time for supply of the shutters shall be extended. On such assurance from defendant No. 4, plaintiff started manufacturing the shutters. In course of manufacture there were frequent loadshedding. Therefore, on 28-7-90 plaintiff put in a written application to the Executive Engineer praying for extension of time, but received no reply. So then put in a second application on 10-8-90 for extension of time and received reply dated 25-8-90 to the effect that the purchase order had been cancelled. But by then the plaintiff had completed manufacture of all the 133 numbers of shutters. Thereafer the plaintiff approached the defendants several times to take delivery of the articles and make the payment, but to no effect. According to him, two other firms with whom orders were placed for supply of same type of shutters, were given extension of tiem and they made the supplies during the extended periods and have been paid the price but similar advantage has been denied to the plaintiff. It is specifically pleaded that time being not the essence of the contract and in view of the assurance given by the Executive Engineer, the plaintiff having manufactured the shutters and kept ready for delivery, he is entitled to a decree as prayed for.

3. Defendant No. 4 alone filed written statement in the suit. He contended inter alia that in the notice calling for quotation it was stated that the materials were to be supplied within 10 days from the date of issue of the supply orders and no extension of time whatsoever would be allowed. Plaintiff accepted this condition and submitted his quotation but failed to supply the shutters within the time stipulated in the purchase orders and consequently the plaintiff cannot legally claim any amount from the defendants. It is denied that the plaintiff was given any assurance that time for supply would be extended on account of load-shedding.

4. The learned Subordinate Judge came to find that defendant No. 4 having not passed any orders rejecting the prayer for extension of time within the stipulated period when applied for by the plaintiff, it is deemed that defendant No. 4 had extended time for supply of the goods in question. He has held that time was not the essence of the contract with the plaintiff and has accordingly decreed the plaintiff''s suit giving the direction to the defendants to receive the shutters from the plaintiff on payment of Rs. 1,10,987/- within the time stipulated, failing which the plaintiff will be at liberty to realise the aforesaid amount through court. Such decree is assailed in this appeal.

5. Mr. Rao for the defendant-appellants submitted that in the purchase orders time was the essence of contract and because of non-compliance within the stipulated period, the plaintiff is not entitled to enforce the contract or claim any amount. He further attacked the finding that the Executive Engineer is deemed to have extended the time for supply of the shutters. A legal plea is also taken at the hearing that the State cannot be made liable for want of valid contract as envisaged in Article 299 of the Constitution of India.

6. Exts. 1 to 5 are the purchase orders. P. W. 2, the plaintiff''s Manager, has

admitted in his evidence that those orders were received between 16-7-90 and 20-7-90. It is specifically stipulated in these orders that the plaintiff was to supply the shutters within 15 days from the date of receipt of the orders. In other words, plaintiff was to make the supplies between 31-7-60 and 4-5-90. The stand taken by the plaintiff in the plaint is that when orders were placed, he represented to the Executive Engineer that on account of repeated load sheding it might not be possible for him to supply the shutters within stipulated time and on such representation the Executive Engineer assured him that in case the latter faced any difficulty on account of load shedding, on his application he would extend the time. Thus, the plaint averments are to the effect that the Executive Engineer gave verbal assurance to extend time on application. But in the first letter Ext. 6 dated 23-7-90 addressed by plaintiff to the Executive Engineer in relation to these orders it is stated that he contacted the Executive Engineer on 22-7-90 and requested that 20 days more time may be allowed to him to complete the work to which he had agreed. Thus the recitals in Ext. 6 are somewhat different. Next letter from the plaintiff is Ext, 7 dated 28-7-90. Herein, mentioning that the work as per purchase orders is in progress, plaintiff has made a grievance that he has not been able to get extension of time for supply of the materials and has requested sanction of extension of time at an early date. The third letter is Ext. 12 dated 10-8-90. Herein, it is stated that the plaintiff is taking all possible efforts to complete the work as soon as possible but due to electric load sheding, progress of the work is hampared. He has assured therein that the work will be completed soon and has prayed for 20 days more time to complete the work and to supply the materials. In other words, in Ext. 12 the plaintiff has prayed for extension of time till 30-8-90. Thus Ext. 12 reveals that although the time stipulated in the purchase orders expired between 31-7-90 and 4-8-90, the materials were still under manufacture. Of course plaintiff''s letter dated 1-9-90 indicates that by that date all the shutters had been manufactured. It may be noted here that in Exts. 7 and 12 there is no mention about any verbal assurance by the Executive Engineer to extend time.

7. The Executive Engineer in his reply dated 14-8-90 (Ext. 8) has intimated the plaintiff with reference to his letter dated 10-8-90 that no extension of time will be allowed for supply of the shutters and as such he was requested not to go ahead with the manufacture of shutters for supply to the Executive Engineer.

8. On above documentary evidence, two points arise for determination, firstly whether time was the essence of the contract between the plaintiff and the Executive Engineer and secondly if after the contract was entered into, the Executive Engineer on the request of the plaintiff had assured to extend time and if so what is the effect of such assurance on the contract. As to whether time is the absence of contract, assumes importance in view of Section 55 of the Indian Contract Act, according to which if time is the essence of the contract, than non-performance within the stipulated time (makes) the contract is voidable at the option of the promisee.

In M/s. Venkateswara Minerals, Firm v. Jugalkishore Chiranjitlal, Firm AIR 1986 Kant 24 : IlR (1985) Kan 2912 it has been held that intention of the parties to a written contract is to be ascertained from the document itself and it is not possible to go outside the terms cut down. In this decision reference has been made to Halsbury''s Laws of England - IV Edition - Vol. IX para 481, wherein it is stated that time will not he considered to be of the essence (sic) (i) the parties expressly stipulates that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the In Sachidananda Patnaik v. G.O. and Co., AIR 1964 Orissa 269, It has been held that for a finding that time was the essence of the contract, the language of the stipulation must, show in unmistakable terms that the intention of the parties was to make their rights dependent upon the observation of the time limit.

In Dominion of India v. Raj Bahadur Seth, AIR 1957 Pat 586 : ILR 36 Pat 633, it has been held that whether or not time should be regarded as an essential condition of the contract, is purely a question of intention of the parties to be gathered from the terms of the contract and the surrounding circumstances of the case. What transpired between the parties subsequent to execution of the contract does not afford any evidence as to the actual intention of the parties at the time when the contracts were made.

9. In view of the above legal position, the purchase orders Exts. 1 to 5 embodying the terms of the contract are to be examined to answer the first point. Herein, the Executive Engineer has stated that the plaintiff''s quotation is accepted and has called upon him to supply shutters in question as per the approved rate within 15 days from the date of receipt of the purchase order, failing which the offer of this order will automatically be treated as cancelled. As already stated, the five purchase orders were received between 16-7-90 and 20-7-90. In other words, according to the said orders supplies were to be made between 31-7-90 and 4-8-90. The language used is very clear indicating the consequence of non-supply within 15 days from the date of receipt of the orders. In other words, it is expressly stated that time of supply must be strictly adhered to, failing which the purchase order will stand cancelled. Thus, on a consideration of the purchase orders, and applying thereto the aforesaid legal position, there can be no escape from the conclusion that time was the essence of the contract for supply of the shutters.

10. The next point is if the time stipulated in the purchase orders for performance of the contract has been extended or waived by the Executive Engineer in any manner. There is not even a scrap of paper to support the plaintiff''s stand that the Executive Engineer after issue of purchase orders assured to extend time if the plaintiff faced any difficulty in manufacturing the shutters on account of load sheding. The sole statement of the plaintiff that when

he expressed his inability to supply the shutters within a short time of 15 days, the Executive Engineer assured him to give extension of time, is not corroborated by any other evidence. So plaintiff''s case on this point is not acceptable. Accepting for a moment that the'' Executive Engineer gave oral assurance to extend time on application as stated in the plaint, merely sending of letters as in Exts. 6 and 7 for extension cannot be construed as meaning that time was in fact extended. Without any further document evidencing extension of time, it cannot be held either that time for performance of the contract be extended or that the condition as to time being the essence of the contract was in fact waived. In this case where time is the essence of contract, from the mere fact that the Executive Engineer with reference to plaintiff''s letters did not send any reply before expiry of the stipulated period refusing extension of time, an inference of deemed extension cannot be drawn.

11. On a consideration of the above materials, it is held that time being the essence of the contract as revealed from the purchase orders, and the same having neither been waived nor extended, the Executive Engineer had the option to avoid the contract and no right under the contract accrued in favour of the plaintiff, because of non-performance of the contract by letter within the stipulated period.

12. Now assuming for a moment that lime was not the essence of the contract and even if it was so, time was duly extended, the next question is whether under the law there exists a valid contract between the plaintiff and the State so as to make the State liable in this suit. In this regard Mr. Rao for the State pressed into service the provisions contained in Article 299(1) of the Constitution of India. Mr. Patnaik for the plaintiff, on the other hand, submitted that the State of Orissa having not filed any written statement nor having contested the suit, it is not open to the State to take this plea in appeal. It is averred in paragraph 3 of the plaint that the Executive Engineer acting on behalf of the State received plaintiff''s quotations and issued the purchase orders and in paragraph 7 that the Executive Engineer was competent to enter into the contract with the plaintiff for supply of shutters on behalf of the State of Orissa. In the written statement filed by the Executive Engineer it is stated that the aforesaid averments are false and plaintiff is to prove the same.

13. Article 299(1) of the Constitution of India makes provision in the matter of contracts entered into by the State or Union Government. It is the settled law that provisions of this Article are mandatory in nature and a contract made in exercise of the executive power of the Union or State must satisfy three conditions. Firstly, it must be expressed to be made by the President or the Governor of the State; Secondly, it must be executed on behalf of the President or the Governor and thirdly, it must be executed by such person and in such manner as the President or the Governor may direct or authorise. Failure to comply with any of these conditions renders the contract void and unenforceable and there is no question of estoppel or ratification a case where there is

contravention of the provisions of Article 299(1). For authority, decisions in K.P. Choudhury, AIR 1967 SC 203; Mulchand, AIR 1989 SC 1238 and State of Punjab, AIR 1988 SC 2149 may be seen. In fact of the aforesaid legal position, the only plaint averment that the Executive Engineer was competent to enter into contract on behalf of the State and acted on their behalf do not fully comply with the provisions of Article 299(1). In this connection Mr. Patnaik for the plaintiff placed reliance on the decision of the Apex Court in Kalyanpur Lime Works AIR 1954 SC 265, and Dominion of India Vs. Raj Bahadur Seth Bhikhraj Jaipuria, . In Kalyanpur Lime Works, the question arose in relation to lease of some hills by the State of Bihar for quarrying lime stone. Referring to the provisions contained in Order 6, Rule 8 and Order 8, Rule 2, C.P.C. it is held that the party denying merely the factum of the contract and not alleging it unenforce-ability in law must be held bound by the pleadings and the precluded from raising the legality or validity of the contract. This Apex Court decision was dismissed in Dominion of India wherein it is stated that where the averments in the plaint themselves were sufficient to establish the non-compliance of the provisions of Section 175(3) of the Government of India Act, 1935 (corresponding to Article 299(1) of the Constitution of India), it was not necessary for the defendant to raise a further plea and if those facts were sufficient to prove infraction of the constitutional provision, it becomes the duty of the court to give effect to those provisions. It is further held that even if there was no pleading to that effect but the evidence adduced by the plaintiff himself established the illegality, the court will not uphold such contract on the technical ground that no such plea was taken in the written statement.

14. In the case at hand it is not clearly mentioned in the plaint that a valid contract between the plaintiff and the State was brought into existence. From the plaint allegation that the Executive Engineer so led on behalf of the State and had authority to do so, at best means that he was duly authorised by the Governor to enter into contracts. This satisfies only one of the conditions embodied in Article 299(1) of the Constitution. This being the position, even if the State did not file written statement in the suit, it is incumbent to the plaintiff to establish the three principal ingredients contained in Article 299(1) of the Constitution to make the State liable under the contract. Therefore, there can be no legal bar for the State to raise the plea of non-compliance of Article 299(1) in appeal. The plaintiff has based his claim on the purchase orders which according to him are the documents evidencing contract between the parties. These purchase orders do not express either to be made by the Governor of the State or to have been issued on behalf of the Governor. Therefore, the other two important conditions embodied in Article 299(1) are not satisfied so as to bind the State. Consequently it is held that in the facts of the case in any event the State cannot be made liable.

15. A stand has been taken on behalf of the plaintiff that two other suppliers similarly placed were given extension of time and meanwhile they have supplied the shutters and taken payments. There is an admission to this effect in the

evidence of P. W. 1. It is thus apparent that the treatment noted out to the plaintiff was unfair. But this fact can be of no assistance to the plaintiff because the court can grant relief to the plaintiff upon establishment of his right and not otherwise. As discussed above, the plaintiff has failed to establish his right and therefore, his claim cannot succeed.

16. In the result, the appeal is allowed and the impugned judgment and decree are set aside. In the special Act of this case, parties shall bear their costs throughout.