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**(2005) 02 RAJ CK 0075**

**In the Rajasthan High Court**

**Case No : Civil Special Appeal No. 136 of 1997**

State of Rajasthan and Others

APPELLANT

Vs

Nathu Lal

RESPONDENT

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**Date of Decision : 03-02-2005**

**Acts Referred:**

Contract Act, 1872 — Section 74

Rajasthan Forest Act, 1953 — Section 85

**Citation :** AIR 2006 Raj 19 : (2005) 4 BC 475 : (2005) 2 RLW 1336 : (2005) 3 WLC 341

**Hon'ble Judges :** Rajesh Balia, J;Dinesh Maheshwari, J

**Bench :** Division Bench

**Advocate :** N.M. Lodha, A.A.G, for the Appellant; K.N. Joshi, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Dinesh Maheshwari, J.—The appellants State of Rajasthan and others have submitted this appeal against the order dated 28.11.1995 passed in Writ Petition No. 86/1986 whereby the learned Single Judge allowed the writ petition, quashed the demand notice-Annex. 13 and directed the State Government to deposit the amount of Rs. 29,627/- received from the petitioner in the welfare fund at the disposal of the Chief Minister.

2. The matter pertains to the attempted recovery towards alleged breach of contract by the writ petitioner-Nathulal. Brief facts leading to the present appeal are that the appellants issued a notice inviting offers for the contract of collection of Tendu leaves in different forest areas. The invitation was issued on 30.1.1973 (Annex.R/1) fixing the date of auction as 22.2.1973. It is not in dispute that the petitioner was one of the bidders for the area of erstwhile Bijoliya Jagir falling in Mandalgarh range of Forest Division, Chittorgarh for the season of 1973. The petitioner gave highest bid for the said area for Rs. 51,100/-. The bid amount was recoverable in four equal installments of Rs. 12,775/- each. It is also not in dispute that on the very day of the auction i.e., 22.2.1973 itself, the petitioner

deposited a sum of Rs. 29,627/- comprising of Rs. 22,550/- towards two installments, Rs. 500/- as earnest money and Rs. 3577/- towards sales tax. An agreement was also executed by the petitioner (Annex.1) on 22.2.1973 confirming the terms and conditions of the contract which provide inter alia that the possession of the area contracted would be delivered to the contractor by the Officer of the Department upon acceptance of the contract. Laying down different conditions to be followed by the contractor while executing the contract, it was also provided that the contractor would be required to make payment by way of four installments. The terms and conditions also provide that if there be any dues remaining against the contractor, then the government would be entitled to recover such amount in accordance with Section 85 of the Rajasthan Forest Act, 1953. It was also provided that for interpretation of any of the conditions of the agreement or for determination of the questions which may be related to the agreement directly or indirectly or in case of any dispute or difference, then every such question would be placed before the Chief Conservator of Forest and his decision would be final and binding. It was also provided that in case of violation of any of the terms of the agreement, the contract could be annulled and if the contract be put to fresh auction and bid received be falling short, then the difference could be recovered from the contractor as arrears of land revenue.

3. The petitioner alleged that despite conclusion of the auction on 22.2.1973, no acceptance of the bid was received by him till 20.5.1973 and possession was also not delivered. The petitioner alleged that the contract in question was a seasonal business and the collection of Tendu leaves start from 1st March every year and the Tendu leaves are to be collected within a month or two and by the month of May, the entire leaves are wasted. According to the petitioner, when he did not receive any information by 20.5.1973 he sent a communication on 21.5.1973 addressed to all concerned pointing out that the season was already over and as such he was not prepared to do anything now in pursuance to the contract and his deposit may be refunded. The petitioner has alleged that after receipt of his such letter, an ante-dated letter (Annex.6) was sent to him by the department which was of course dated 21.5.1973 but was dispatched only on 23.5.1973 after receipt of his letter and in support of such averments, the original envelope has been produced as Annex.7. The petitioner alleged that despite no contract having been given to him, the order was passed by the non-petitioner No. 3 Divisional Forest Officer forfeiting the deposit and demanding the remaining amount and against such demand, he appealed to the non-petitioner No. 2 Chief Conservator of Forest on 6.4.1976 but the non-petitioner No. 2 without applying mind and without considering the record rejected the appeal by his order dated 9.12.1985 (Annex.12). The petitioner alleged that after rejection of his appeal, the non-petitioners threatened recovery under Public Demands Recovery Act (PDR Act). The petitioner challenged the notice dated 26.12.1985 (Annex. 13) and the previous orders Annex.8, 9 and 12 by way of writ petition.

4. The non-petitioners-appellants in their reply admitted the fact of bid of Rs. 51,100/- by the petitioner on 22.2.1973, of his signing the agreement on

22.2.1973, and so also his depositing the amount of Rs. 29,627/- on that very day. However, it was alleged that the State Government approved the bid on 3.4.1973 and sanction of the contract was conveyed to the petitioner by the Divisional Forest Officer, Chittorgarh by his notice dated 5.4.1973 (Annex.R/3). According to the non-petitioners, the possession was to be delivered after sanction was received and when sanction was conveyed to the petitioner on 5.4.1973, it was his duty to have commenced the work and to have taken possession from the Range Officer. The non-petitioners denied the allegation of the petitioner that he did not receive any information upto 20.5.1973 reiterating that sanction was conveyed to him by the letter dated 5.4.1973 and subsequently also, the Range Forest Officer informed the petitioner by his letter dated 6.5.1973 that the petitioner had not taken possession yet. The Division Forest Officer allegedly issued a notice on 16.5.1973 asking as to why action as per Clause 8 of the agreement be not taken and it was further mentioned in the notice that if possession would not be taken within three days, the non-petitioners would adopt proceedings for cancelling and re-auctioning of the contract.

5. The non-petitioners further submitted in their reply that contract for collection of Tendu leaves is given only for a period of about one year and after acceptance of the auction bid, the petitioner was to take possession within a period of fifteen days and the contract was to last till 30.6.1974 with the condition that the contractor was allowed to remove material upto 15.7.1974. It has been submitted that Tendu leaves are collected in the month of May and collection continues till Monsoon arrives which may be end of June and July. The non-petitioners denied ante-dating letter sent by them dated 21.5.1973 and further pointed out that upon receipt of the petitioner's letter dated 21.5.1973, yet another letter was sent on 7.6.1973 by registered post which was received by the petitioner. The petitioner submitted appeal to the Chief Conservator but the same was dismissed on 9.12.1985. The area was put to re-auction but nobody came forward to extend the bid and therefore the petitioner was liable for remaining amount of the contract. An objection has also been taken in the reply that when the petitioner was issued notice by the Tehsildar under the PDR Act, the petitioner filed an application before the Collector, Bundi. The Collector by his order dated 4.1.1978 found that no such application was maintainable against the demand of recovery but yet on the administrative side examined the papers and found the recovery to be justified. Against the order passed by the Collector on administrative side, the petitioner also filed a petition before the Board of Revenue for Rajasthan, Ajmer which was rejected by the Board finding it to be not maintainable. It has been alleged that petitioner is guilty of suppression of these material facts.

6. The learned Single Judge considered the substance of the submission of the parties and found that it was undisputed that factually no possession was taken by the petitioner and that for nearly 12 years nothing was done and then notice Annex. 13 came to be issued requiring the petitioner to pay balance of bid

money failing which the coercive recovery u/s 229 of the Land Revenue Act would be taken. The amount of Rs. 29,627/- deposited by the petitioner was also never returned to him. The learned Judge found notice Annex. 13 to be unsustainable in law. The learned Judge found that contract was frustrated and remedy on account of such frustration or breach of contract is an action for liquidated damages in a court of civil jurisdiction and the recovery under Land Revenue Act in such circumstances is not permissible. Notice Annex. 13 was held illegal and quashed. However, so far the deposited amount of Rs. 29,627/- was concerned, the learned counsel for the petitioner did not press any ground for refund of the amount and instead made a request of transferring the amount to some charitable institution of the Government which prayer was allowed and the amount was directed to be placed in the welfare fund at the disposal of the Chief Minister.

7. The learned Addl. Advocate General arguing the appeal contended that the petitioner failed to take possession of the area despite sanction made in his favour and as such he was liable for balance amount of contract when no other bid came up when the area was put to auction. It was also contended that the recovery was being made as arrears of land revenue under and by virtue of Section 85 of the Rajasthan Forest Act. The learned Addl. Advocate General also submitted that respondent-writ petitioner has pursued the remedy before the Collector and the Board of Revenue and was not entitled for issuance of any writ at his instance and for contesting the recovery, the only remedy was to deposit the amount under protest and to file a suit.

8. The learned counsel for the respondent supported the order passed by the learned Single Judge and submitted that it being clearly an allegation based upon alleged breach of contract, the appellants are not entitled at their whims to determine the amount and to proceed with its recovery. The learned counsel also submitted with reference to the order Annex.12 that the Chief Conservator of Forest failed to determine the questions he was required to determine and the recovery proceedings were wholly without jurisdiction and that the applications before the Collector and the Board of Revenue were rejected as not maintainable, hence there is no suppression of any fact which could be material to the merits of the case.

9. We have given our thoughtful consideration to the rival submissions and perused the entire record.

10. The undisputed facts of the present case make it evident that contract in question was for about an year and so far the contractor petitioner is concerned, his keenness to obtain the contract is evidenced by the material on record. From the bid sheet (Annex.R/2) it appears that nine persons participated in the bids which started from an amount of Rs. 5000/- which were gradually raised by other bidders and the petitioner ultimately gave out highest bid of Rs. 51,100/-. The agreement Annex.1 executed on the same day of 22.2.1973 shows that amount of contract was to be paid in four installments of Rs. 12,775/- each

spread over an year. As against this, the petitioner deposited a sum of Rs. 25,550/-, representing two installments alongwith other amount of earnest money and sales tax, totaling to Rs. 29,627/- on that very day of 22.2.1973. It has also not been seriously disputed by the appellants that it was the seasonal business and the Tendu leaves were to be collected within a short span till arrival of Mansoon by about the end of months of June.

11. A party to the contract while making an offer takes into consideration various facts and factors and variation of a substantial part of consideration nullifies against the basic requirement of meeting of minds for conclusion of an agreement. For the contract of the present nature in which the seasonal months of March and April were of relevance, the appellants have not been able to show if they retained within themselves a right to issue sanction of the bid as per their convenience. On 22.2.1973, the petitioner has not only given the highest bid of Rs. 51,100/- but executed the agreement and deposited even half of the bid amount. Thereafter, according to the showings of the appellants themselves, for the first time, the government sanctioned the grant of contract only on 3.4.1973 and for the first time, sanction was allegedly sent to the petitioner on 5.4.1973 which according to the appellants was received by the petitioner on 7.4.1973 although the petitioner has denied receiving of any such acceptance. Without going into this dispute of fact, we are clearly of opinion that even if the acceptance was issued on 5.4.1973, a substantial and relevant period of contract had passed by, nullifying the very basis of the offer made by the petitioner.

12. Moreover, we have examined the acceptance dated 5.4.1973 and the alleged reminder dated 16.5.1973 and it is apparent that the appellants were clearly acting contrary to and beyond the record. In the alleged notice informing of sanction dated 5.4.1973 (Annex.R/3), the petitioner has been called upon to deposit first installment of Rs. 12,775/- and to obtain the possession. The sanction is incorrect on material particulars inasmuch as not one, but two installments had already been deposited by the petitioner. The letter dated 16.5.1973 (Annex.R/5) suffers from the same vice. The petitioner has been reminded that he has not deposited the amount of contract and the sales tax even until 5.5.1973 and not taken possession. The petitioner has been called upon to deposit the amount within there days but the amount deposited by the petitioner has been totally omitted from even a mention. It is difficult to believe that the so-called acceptance refers to the offer made by the petitioner. We are further of opinion that the appellants were not entitled to act in an arbitrary manner in the matter of award of contract also and could not have kept the petitioner waiting for an abnormally long time after 22.2.1973, when in the meantime, the season has commenced. In our opinion, the so-called sanction made by the respondents could only amount to a counter offer and the petitioner having not accepted the same, no concluded contract came into existence between the parties so as to invest the appellant with any right to recover any amount in case of any breach of contract.

13. Apart from the aforesaid, even if it be assumed for the sake of arguments that a concluded contract came into existence between the parties because of putting into communication the acceptance letter (Annex.R/3), we are clearly of opinion that the appellants are not entitled to recover any amount from the petitioner on the assumed breach of contract, it is clear on the fact of record that in the present case, the petitioner has been disputing any breach on his part. Any entitlement of the appellants to recover money by way of damages would arise only upon proof of the essential fact of breach of contract by the petitioner. The appellants, a party to the contract, are not entitled to assume a breach of contract upon the petitioner and are not entitled to recover any amount on the basis of the assumed breach of contract. On a plain reading the words of the agreement, it is clear that right of the appellant to recover the damages would have arisen only after the breach of conditions was established. When a party to the contract disputes committing any breach of conditions, in our opinion, there is always required an adjudication by an independent body on the factum of breach before a right to recover the damages on account of such breach could be pressed.

14. In the present case, although the Chief Conservator of Forest was invested with powers to decide upon any question or difference, it is found from the order dated 9.12.1985 (Annex.12) that the appeal submitted by the petitioner has been disallowed with a wholly cryptic, cursory and non-speaking order by saying that the grounds raised were not legal and logical and therefore the appeal was dismissed. The order Annex.12 could least be termed as an expression of any adjudication by the concerned authority.

15. The learned Addl. Advocate General has placed strong reliance on Section 85 of the Rajasthan Forest Act which reads as under:-

"85. Recovery of penalties due under bond,-When any person in accordance with any provision of this Act, or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act or covenants by any bond or instrument that he or that he and his servants and agents, will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in Section 74 of the Indian contract Act, 1872 be recovered from him in case of such breach, as if it were an arrear of land revenue."

16. On a plain reading of Section 85, it is evident that when a sum is mentioned in any instrument as the amount payable in case of breach of conditions, the same could be recovered as arrears of land revenue notwithstanding Section 74 of the Indian Contract Act.

17. It may be pointed out that so far Section 74 of the Contract Act is concerned, its effect and operation is that even if a sum is named in the agreement as payable on breach, the party complaining of breach by the other may not be

entitled to the entire of that sum but would be entitled to a reasonable compensation subject to the maximum as stated in the agreement and what would be the reasonable compensation would depend upon circumstances of each case. However, it is always for the party complaining of breach to prove the damage suffered by him, although such proof may be direct or circumstantial and need not possess the quality of arithmetical exactitude. Such party, in given case may even establish that sum mentioned in the agreement answers the requirement of reasonable compensation and the court may grant the entire sum named in the agreement in case of breach as compensation. However, if the court comes to the conclusion that the amount fixed in the agreement was "in terrorem" or unconscionable or extravagant, the court may award such sum as may appear to be reasonable. In determining the reasonableness of the compensation, its proportion to the injury caused is a relevant factor. The other relevant factor being whether the burden evenly and equitably falls on both parties of the contract. These principles have been summarised by a Division Bench of this Court in *Badhava Singh and Anr. v. Charan Singh and Anr.* AIR 1955 Raj 87.

18. Viewed in the light of the aforesaid principles emanating from Section 74 of the Contract Act, when read in the context of Section 85 of the Rajasthan Forest Act, in our opinion, the requirement for the complaining party i.e. the government of establishing the sum named in the contract to be reasonable compensation and its proportion to the injury might have been done away with, and therefore, the sum mentioned in the agreement itself would be taken to be the reasonable compensation. However, the right and entitlement to receive such sum as a reasonable compensation could arise only in case of breach having been established.

19. Exclusion of Section 74 of the Indian Contract Act only means that in case of breaking of a contract, the liability of the party who has broken the contract would not be restricted to "reasonable compensation" as envisaged by Section 74. Obviously therefore, in case of breach of contract, the appellants would be entitled to recover the amount named in the contract but the applicability of Section 85 itself pre-supposes an established factum of such breach. When the breach itself is in dispute, the appellants cannot rely upon Section 85 nor could recover an amount merely for the same having been stated in the contract to be recoverable in case of a breach. Doing away with the requirement of Section 74 does not dispense with the requirement of establishing the breach by the contractor in the first place. The appellants are not entitled to presume a breach and proceed with the recovery as arrears of land revenue. The attempt on the part of appellants to do away with the adjudication of the question of breach remains illegal and without adjudication of the question of breach, the intended recovery remains wholly unauthorised. We are, therefore, of opinion that learned Single Judge was right in observing that without adjudication of the question of breach of contract, the attempted recovery under Annex.13 remains illegal and the same has rightly been quashed.

20. So far the concealment of the facts is concerned, it not doubt appears from the record that the petitioner approached the Collector on 6.9.1977 when he was called upon to make payment of the remaining amount under the contract. However, the Collector found that the application filed by the petitioner was not maintainable under any law, yet according to the Collector, the proceedings of the Forest Department were called by her on the administrative side for verification of the facts. The Collector observed that prima facie it appeared that the Forest Department was proceedings under the contract and therefore no administrative order was required form the Collector. The petitioner approached the Board of Revenue against the order passed by the Collector but the learned Member of the Board of Revenue was also of the opinion that the application filed by the petitioner was not maintainable and dismissed the same by the order dated 25.10.1983. These facts have of course not been stated by the petitioner in the writ petition but on the comprehension of all the facts of the present case, we are of opinion that this omission on the part of the petitioner is neither of any significance nor of any relevance.

21. Suppression of a material fact definitely disentitles a petitioner from obtaining any relief in the writ jurisdiction of this Court. Any attempt to abuse the process of the Court has always been viewed with considerable disfavour. But then, the omission ought to be of the nature of suppression of a fact and the suppression again ought to be of a material fact, the test being to see had the fact been not suppressed, it would have had effect on the adjudication on merits by this Court.

22. In the facts and circumstances of the present case where by the petitioner has submitted the writ petition after issuance of recovery notice which was issued immediately after passing of the order by the Chief Conservator of Forest on 9.12.1985 and when the writ petition was entertained and allowed on merits, we find no ground to non-suit the petitioner at this stage of appeal for not stating the fact of rejection of his prayers by the Collector and the Board of Revenue as not maintainable. In our opinion, the omission does not partake the character of suppression of a material fact.

23. So far the contention regarding availability of the remedy of civil suit is concerned, we are of the opinion that when the action of the respondents was challenged as being wholly illegal and without jurisdiction, the availability of the remedy of filing the suit for cancellation of the certificate of recovery cannot be pressed as a ground to deny writ jurisdiction of this Court. Secondly, in the present case, the impugned notice (annex.13) was issued on 26.12.1985 and the petitioner submitted the writ petition immediately thereafter on 7.1.1986 and the petition was admitted on 20.1.1986 and was allowed by the impugned order on 28.11.1995. The objection regarding availability of alternative remedy cannot be countenanced at this stage of the appeal.

24. We are, therefore, clearly of opinion that the writ petition has rightly been allowed and the recovery notice Annex. 13 has rightly been quashed. The

present appeal deserves to be dismissed. However, so far the amount deposited by the petitioner Rs. 29,627/- is concerned, it appears that the petitioner himself has given up his claim for this amount and rightly so as the petitioner who was also equally required to take appropriate civil action for recovery of the amount, failed to do so within limitation. However, we find no jurisdiction in the order passed by the learned Single Judge directing this amount to be diverted to the Chief Minister's welfare fund. When the petitioner has already given up his right to recover the amount, no purpose was to be achieved by diverting the amount from the Forest Department of the government to the Chief Minister's fund. The directions by the learned Single Judge to that extent deserve to be modified with the clarification the the petitioner would not make any claim for recovery of the said amount from the government.

25. The appeal is, therefore, dismissed subject to aforesaid clarification. There shall be no order as to costs.