
(1984) 07 RAJ CK 0037
In the Rajasthan High Court
Case No : Civil First Appeal No. 98 of 1972

State of Rajasthan

APPELLANT

Vs

Firm Jaimal Singh and Co.

RESPONDENT

Date of Decision : 16-07-1984

Acts Referred:

Evidence Act, 1872 — Section 114, 16

Citation : (1984) WLN 295

Hon'ble Judges : Shyam Sunder Byas, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.S. Byas, J.—This is a defendant's appeal from the judgment and decree of the learned Additional District Judge, Ganganagar dated February 7, 1972 whereby the plaintiff's suit for the recovery of a sum of Rs. 29153 18 was decreed with pendente lite and future interest at the rate of Rupees 6 per cent per annum.

2. As per averments made in the plaint, the plaintiff is a registered partnership firm. An agreement was made between the parties whereunder the plaintiff was to carry out the excavation work from R.D. 210 to R.D. 212-1/2 in Rajasthan Canal at the rate of Rs. 39.35 per thousand cubic feet. The agreement was later on reduced into writing on March 5, 1965 which is Ex. A.38. The work was to be completed within 12 months from the date the plaintiff was directed to commence it. The plaintiff was directed by the Engineer Incharge to commence the work on March 9, 1965. Thus, the work was to be completed on or before March 9, 1966. Subsequently, the Engineer Incharge extended this date of completion from March 9, 1966 to December 15, 1966. The plaintiff excavated 11,000,00 cubic feet of earth upto October 13, 1966 and only 20,0000 cubic feet of earth was to be excavated to complete the entire work under the contract. All of a sudden, on February 13, 1966, the Executive Engineer deployed departmental machinery to clear the bed of pilot channel. On February 1966, the plaintiff was carrying on the work with full strength and had deployed 50 camels,

carts, 5 donkeys, 100 basket-labourers and many other skilled and unskilled labourers. Had he been allowed to clear and excavate the bed of pilot channel, he would have completed it long before March 8, 1966 it was alleged that the Executive Engineer deployed the departmental machinery to clear the bed of pilot channel without any information or prior notice to the plaintiff This resulted in huge financial loss to the plaintiff. When the plaintiff submitted the final bill for Rs. 56,9.6.50 it wait not paid to him by the Executive Engineer on the ground that the department had to spend Rs. 55,172,50 in clearing the bed and excavation of the pilot channel. The grievance of the plaintiff was that the aforesaid amount was wrongly deducted from his final bill. At the most, the defendant was entitled to deduct a sum of Rs. 26,590.74 which he would have got for the work done by the department. The deduction Rs. 30,325.74 was wholly wrong and unreasonable. The plaintiff served a notice on the defendant asking for the payment of the aforesaid amount of Rs. 30325.74 But the attempt proved abortive. The plaintiff, therefore, instituted a suit for the recovery of Rs. 312355.50 (Rs. 30325.74 as principal and the rest as interest) against the defendant in the Court of the District Judge, Ganganagar. The suit came for trial before the learned Additional District Judge, Ganganagar. The suit was contested by the defendant. The agreement, the rate and time of the agreement as alleged by the plaintiff were admitted but the other material averments were denied., It was, however, admitted that the date of completing the work was extended upto December 15, 1966 on the plaintiff as he could not complete the work within the stipulated time. It was averred that the speed at which the plaintiff was carrying on the work was too slow to complete the work within the extended time (December 15, 1966). The plaintiff was informed again and again to employ more employees and gear up the work. But that brought no effective result. On December 12, 1965, the plaintiff was directed the excavate the bed of the pilot channel in 20 feet width. The plaintiff paid no attention. Again, on December 18, 1965 the plaintiff was reminded to excavate the bed of the pilot channel but that too brought do results Ultimately on January 8, 1966, the plaintiff was in formed that since he had failed to perform be work of excavation of n e bed of the pilot channel this work was being tooled by trie department any deploying machines. He was also informed that the expenses incurred in carrying out this work and deploying the machines would be recovered from him The plaintiff even then did not commence the work of excavation of the bed of pilot channel. Per forte, the department tock up the aforesaid work in its hand on February 1, 1966 and deployed the machines, In carrying out this, work is excavation of the bed of the pilot chattel the department had to incur the expenses of Rs. 55172.50. The plaintiff was liable top y this amount to the defendant As such, the of re aid amount of Rs, 551 250 was deducted from the final bill of the plaintiff. The liability to pay interest was denied. Special costs were the claimed. On the pleading of the parties, the learned Judge raided three issues. One of them related to interest and the other to the special costs. The main issue was issue No. 1 which reads as under:

(1) whether the defendant has correctly deducted sum of Rs. 3032524 as per averments in para No. 9 of the written statement.

3. Both the parties adduced evidence. On the conclusion of trial, the learned Judge recorded his finding on issue No. 1 as under:

(i) the department had spent a sum of Rs. 55,172.50 in the excavation of the bed of the pilot channel:

(ii) the work of the excavation of the bed of the pilot channel was carried out by the defendant without any prior information or notice to the plaintiff and

(iii) the defendant could deduct only a sum of Rs. 26560.74 from the plaintiff's bill. The deduction of Rs. 28581.64 was wrong and this amount could not be deducted from the plaintiff's final bill.

4. The trial Judge, therefore, decreed the plaintiff's suit for the recovery of a sum of Rs. 28581.74 as principal and Rs. 571.64 by way of interest thereon that is, for a total amount of Rs. 29153.38. Aggrieved against the said judgment and decree, the State has come up in appeal.

5. I have heard the learned Counsel for the parties and gone through the case file carefully.

6. In assailing the judgment and decree, the first contention raised by the learned Counsel for the state is that the finding that the plaintiff was not informed before hand or that no notice was served on him before the work of excavating the bed of pilot channel was taken up by the department, is wholly erroneous. It was argued that the notice was sent to the plaintiff by registered post with Acknowledgment Due (A.D.). Though the A.D. could not be produced by the defendant, it was not of much material consequence. There is a presumption in law that when a letter is sent by registered A.D. at the correct address, reaches to the addressee. The Court below crept into an error in not raising this presumption and refusing to raise presumption on unsound reasons. If the work was done by the department after notice or information to the plaintiff, the whole amount which the department had to spend in the work could be realised from the plaintiff. My attention was pointedly drawn to letters Ex. A.8, A.9, A.10 and A.12, EX. 11 is the postal receipt. In reply, the learned Counsel appearing for the plaintiff submitted that there is no evidence to show that the aforesaid letters were at all dispatched and posted in the letter box. Unless the evidence is there to that effect, no presumption against the plaintiff can be raised that these letters reached him it was also argued that the address of the plaintiff given in these letters is not correct and such they could never reach the plaintiff. A presumption of due service or delivery of the letter can be raised only when there is evidence to show that the letters were despatched and posted. Since there is no evidence to prove these facts the Court below rightly declined to draw the presumption against the plaintiff that these letters or notices were delivered to the plaintiff or reached his hand. I have taken the respective submissions into

consideration.

7. Letter Ex. A 8 purports to have been issued by the Assistant Engineer to the plaintiff. It is dated December 12, 1965. By Ex A.8 the plaintiff was directed to excavate the bed of the pilot channel. It is also mentioned therein that the plaintiff had not carried out this work despite his being required to do so. Ex. A.9 dated December 18, 1965 has been addressed to the plaintiff by the Executive Engineer directing him to complete the earth work of the bed of the pilot channel as desired by the Assistant Engineer. Letter Ex. A.10 Dated January 10, 1966 has been addressed to the plaintiff by the Executive Engineer stating therein the despite repeated instructions to him to excavate the central portion of the pilot channel, the plaintiff had failed to excavate the same. The department w?, therefore, putting up the departmental machines to get the aforesaid work done and that the costs of deploying the machines would be recovered From him. Ex A 12 dated February 14, 1966 is again a letter from the Executive Engineer to the plaintiff informing him that since he had not excavated the bed portion of the pilot channel, the department was deputing the persons to get the excavation completed. Thus, this correspondence took place between December 2, 1965 to February 14, 1956. If these letter addressed by the Assistant Engineer and the Executive Engineer to the plaintiff reached his hand, it must be held that the Work of excavating the bed of the pilot channel was carried out by the department it after proper information and notice to the plaintiff and, therefore, the defendant is entitled to deduct tie amount spent in deploying the machines from the plaintiff's final bill.

8. The difficulty is that there is no evidence to show that these four letters ever reached the plaintiff or were delivered to him. The despatch clerk and the dispatch register, which could have furnished a valuable piece of evidence, were not produced by the defendant for the reasons best known to its officers. Letters Ex. A.8, A.9, A.10 and A.12 do not show in what manner they were despatched whether they were delivered by hand to the plaintiff or were posted to be delivered to him. None of the witnesses examined by the defendant stated that these letters were dispatched by post. As such, there is genuine difficulty in accepting the contention of the defendant that these letters reached the plaintiff or were delivered to him.

9. There is again a big difficulty in respect of postal receipt Ex. A.11, Ex. A.11 is the postal receipt issued to the defendant by the post Office. It bears the date of January 17, 1966, as its seal impression of the Post Office shows Now, none of the letters Ex. A.8, Ex. A.9 Ex. A.10 or Ex. A.12 bears the date near about of January 17, 196. Ex. A.8 is dated December 2, 1965, Ex. A.9 is dated December 18, 1955 Ex. A.10(which has been mainly relied upon by the defendants counsel) is dated January 18, 1966 and Ex. A.12 is dated February 14, 1966. Letter Ex. A.10 could not be sent under receipt Ex. A.11 for the simple reason that Ex. A.11, as referred to above, bears the seal of dated January 17, 1966 While letter Ex. A.10 is dated January 18, 1966. It is, therefore, a mystery not cleared up and

explained by the defendant as to what letter was sent to the plaintiff under postal receipt Ex. A.11.

10. There is then another big hurdle in the defendant's pleas. Letters Ex. A.8, A.9, A.10 and A.12 were sent on different addresses of the plaintiff. Ex. A.10. and Ex. A.12 were sent on Suratgarh Junction address while the other two sent on the address of R.D. 200 to 212500. The defendant letters were correct.

11. It would be appropriate here to have a look into the agreement Ex. A.38. There is no dispute about its execution between the parties. In Ex. A.38, the address of the plaintiff has been given as "C/o Chaudary Jiwanram, Hanumangarh Town" The defendant could have been absolved from his liability of giving the correct address if letters Ex. A.8, A.9 A.10 and A.12 were sent or dispatched to the plaintiff on his aforesaid address of hanumangarh town. There is no evidence in the defendant's side to show that the plaintiff had later on change it address for correspondence or communication. In the normal course, therefore, these letters should have been sent to it on its address given by in Ex. A.38. If these letters would have been dispatched on the above address of the plaintiff at Hanumangarh town, probably a presumption could have been raised that they were correctly addressed and, therefore, reached the plaintiff. But since these letters were not addressed to the plaintiff on the address given in Ex. A.38, no presumption that they reached its hand can be raised or drawn.

12. Section 16 of the Evidence Act lays a foundation for the presumption which the Court may raise from the course of business when proved. Illustration (f) of Section 114 of the Evidence Act lays down that the Court may presume that the common course of business has been followed in a particular case. The matter has been further clarified in respect of this in a illustration (f) that where question arises whether the letter was respect of this an addressee, it should be shown to have bin posted. Thus, where a letter has been correctly addressed and has been posted, a presumption may be raised, though it is not necessary to raise the presumption that the letter had reached the addresses. This illustration has been made applicable to postal business. But before the Court raises an inference two things must be proved namely, (1) it was correctly addressed and (2) it was dispatched i.e. posted. In the instant case, the plaintiff's partner Jaimalsingh (PW.1) testified on oath that letter Ex. A.8, A.9, A.10 and A.12, were not received by him. It was, therefore, obligatory or the defendant to produce in evidence the despatch register, the despatch clerk and the person who posted these letters. But that was net done. It has been also discussed above that these letter were not correctlly addressed. Therefore, the Court below rightly declined to raise the presumption that these letters were received by the plaintiff The approach of the Court below is not erroneous and requires no correction.

13. Now, Clause 32 of the agreement Ex. A.38 specifically lays down that for any reason the work can b withdrawn from the contractor or he can be directed that the work should not be executed in part or in whole This Clause further lays down that before this is dose, a notice in writting to that effect requiring the

contractor not to execute the portion of the work specified ii the notice or withdrawing the work from him must be given to him. The defendant, therefore, could withdraw the work or direct the plaintiff not to carry out the work only when a notice in writing was served on him. The existence of contingencies mentioned in Clause 32 of Ex A 38 depend on the notice in writing. In other words, prior notice in writing is the core of Clause 2 of agreement Ex. A.38. In the instant case, the defendant, as discussed above, has fails to prove that nonce in writing, as required by the terms of the Clause 32, was served on the plaintiff such, the defendant's deploying the machines could not be made at the cost of the plaintiff.

14. It was next argued by the learned Counsel for the appellant that the dispute between the parties is not covered by Clause 32 out is covered by Clauses 13 and 13(b) of Ex. A.38. There is no force in the submission. Clause 18 relates to alteration in specifications and design during the progress of work which do not invalidate the contracts. It further speaks of tie extention of time in consequence of alteration and rates for work not in esteate or schedule of rates of the Government. A bare reading of Clause 13 makes the position clear that it has no relevancy or bearing on the dispute in the instant case. Clause 3 relates to the action when whole of security deposited is forfeited. This clause has three be causeses, a (b) and (c). Sub-clause (b) of Clause 3 empowers the department to employ labour paid be the Public Work Department and to supply materials to carry out the work, etc. In the instant case, the defendant had not proceeded under this Sub-clause (b). The defendant has not explained as to how the whole security amount deposited by the plaintiff can be forfeited under Clause 3. Therefore, I find no force in the contention of the learned Counsel that the case is covered by Clauses 3 and 13 of the agreement Ex. A 38.

15. No other contention was raised. The learned Judge of the trial court rightly held that a sum of Rs. 25590.74 could be lawfully deducted from the plaintiff's final bill which was the cost of the excavation of the bed of the pilot channel. Nothing over and above this amount of Rs. 26590.74 could be deducted from the plaintiff's final bill by the defendant. The defendant's act of deducting a sum of Re. 55172-50 from the plaintiff's final bill was not legal. The plaintiff was, therefore, entitled to recover a sum of Rs. 28581.64 from the defendant.

16. For the reasons stated above, I find no force in this appeal and dismiss the same with costs.