
(2014) 01 RAJ CK 0149
In the Rajasthan High Court
Case No : Civil First Appeal No. 39 of 1988

The Ganganagar Sugar Mills Ltd. and Another	APPELLANT
Vs	
M/s. Momanchand Phoolchand Kotabazi	RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 73 74

Citation : (2015) 4 WLN 376

Hon'ble Judges : Arun Bhansali, J

Bench : Single Bench

Advocate : B.K. Bhatnagar, for the Appellant; R.K. Singhal, for the Respondent

Final Decision : Partly Allowed

Judgement

Arun Bhansali, J.—This first appeal u/s 96 CPC is directed against judgment and decree dated 17.10.1987 passed by Additional District Judge No. 2, Sriganganagar, whereby the suit filed by the plaintiff-respondent was decreed for a sum of Rs. 13,999.40 P. and the counter claim preferred by the appellant for a sum of Rs. 54,379.46 P. has been rejected. The facts in brief may be noticed thus: the plaintiff a partnership firm is a commission agent and is involved in supply of "Mahua Flowers". The parties appellant & respondent entered into an agreement dated 05.05.1972, whereby the plaintiff was required to supply "Mahua Flowers" to the tune of 25000 quintals between the date of agreement and 15.06.1972. The supply under the Contract having come to an end, the plaintiff-respondent filed a suit for recovery of Rs. 57,320.51 P. under various heads.

2. A written statement was filed by the appellant-defendant disputing the claim; seeking set-off under various heads and a counter claim seeking recovery of penalty of Rs. 54,379.46 P. based on the stipulation in the Contract.

3. After framing issues, parties led evidence and after hearing, the trial court

upheld the claim of the plaintiff to the extent of Rs. 13,999.40 P. being a sum of Rs. 7,999.29 P. towards cost of Flowers; Rs. 1090.11 P. towards interest and Rs. 5,000/- towards security deposits; while arriving at the said sum set-off to the extent claimed by the appellant-defendant was allowed.

4. While dealing with the issue of counter claim under Issue No. 6, the trial court came to the conclusion that the defendant had failed to prove loss on account of delayed supply, the goods were accepted without any objection, Railway Wagons were not available during the said period and, consequently, rejected the counter claim.

5. It is contended by learned counsel for the appellant that rejection of the counter claim by the trial court is ex-facie illegal and against the terms of agreement as contained in Exhibit-A/2 as under the said agreement in case of any non-fulfillment of the condition of the Contract, the penalty as indicated in the agreement was to be paid by the supplier. Admittedly, the goods were supplied beyond the period stipulated in the agreement and, therefore, the imposition of penalty was automatic and, consequently, the trial court was not justified in rejecting the counter claim.

6. Per contra, learned counsel for the respondent submitted that from the record, it is ex-facie clear that it was not the case of the appellant that they have suffered any loss on account of such delayed supply and in fact they had not initiated any action for recovery of the said penalty amount and the counter claim was filed only as a counter blast to the suit filed by the plaintiff and, therefore, the trial court was justified in rejecting the counter claim. It was further submitted that in any case, the appellants are not entitled for the compensation claimed, as the same is wholly unreasonable and the facts indicated by the trial court have to be taken into consideration while deciding the claim for penalty.

7. I have considered the rival submissions.

8. Clause 4 and 5 of the agreement dated 05.05.1972 entered into between the parties (Exhibit-A/2) reads as under:--

(4) The delivery shall be started immediately from the date of this agreement and is to be completed by 15th June 1972. However, in case of delay the extension shall be considered by the Director Incharge and his decision will be binding.

(5) In the case of non-fulfillment of all or any of the condition of the contract by the supplier, penalty at the rate of Rs. 1/- per day per Rs. 1000/- over the cost of the total indented supplies or 25% of the total cost, whichever is less, shall be levied and will be recovered either out of the dues of the supplier or from the security deposit or will be recoverable through any other source or manner as dues of the Company.

9. The above clauses clearly stipulate that the delivery was required to be started

by the supplier from the dated of agreement and the same was to be completed by 15.06.1972 and in case of delay, the extension was to be considered by the Director Incharge. Clause 5 of the agreement provided that in case of non-fulfillment of all or any of the condition of the contract by the supplier, penalty at the rate of Rs. 1/- per day per Rs. 1000/- over the cost of the total indented supplies or 25% of the total cost, whichever is less, shall be levied and will be recovered either out of the dues of the supplier or from the security deposit.

10. There is no dispute between the parties either on the terms of the agreement and the fact that the goods were supplied last upto 29.09.1972 i.e. about 31/2 months beyond the stipulated period of supply. The trial court in the impugned judgment though recorded the finding that there was breach of condition No. 4, however, it came to the conclusion that as the said delayed supply did not cause any loss to the appellant, the supply was accepted without any objection and as the Railway Wagons were not available, the appellants were not entitled for award of any penalty.

11. Section 73 and 74 of the Indian Contract Act, 1872 ("the Act") reads thus:--

73. Compensation for loss or damage caused by breach of contract.--When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.--When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.--In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for.--[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.--A stipulation for increased interest from the date of default may be

a stipulation by way of penalty.]

Explanation.--When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.--A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

12. While the provision of Section 73 deals with the compensation for loss or damage caused by breach of the Contract in a case where there is no stipulation in the Contract; Section 74 deals with compensation for breach of the Contract where penalty is stipulated in the Contract itself. While u/s 73, it is a pre-requisite that the claimant should suffer loss or damage by such breach, u/s 74, the actual damage or loss is not required to be proved to receive the compensation. However, Section 74, provides for award of reasonable compensation not exceeding the amount so named.

13. In view of the provisions of Section 74 of the Act and the fact that penalty is specifically stipulated in Clause 15 of the agreement (Exhibit-A/2) (supra), the basis given by the trial court for refusal of penalty is against express provision of Section 74 and, therefore, the same cannot be sustained.

14. However, the reasons recorded by the court for rejecting the claim of penalty can well be considered for the purpose of determining the reasonable compensation by this Court.

15. The most outstanding feature of the present case is that the goods were supplied upto 29.09.1972 and the appellant being well within its right to impose penalty did not pass any order imposing penalty and/or adjusting the amount outstanding towards the said penalty. The suit was filed by the plaintiff on 11.01.1975 and alongwith the written statement, the counter claim seeking recovery of penalty was filed on 26.05.1975, which is a clear indication of the fact that for good about three years the appellant did not exercise its right to impose penalty under the agreement and as rightly submitted by the learned counsel for the respondent, the counter claim was raised as a counter blast to the suit filed by the plaintiff. There is further substance in the plea raised by the respondent that there is no evidence on record to indicate any loss; further there is nothing available on record to indicate that the appellants had at any stage during the period from 15.06.1972 to 29.09.1972 raised objection regarding the delayed supply, as apparently it was aware of non-availability of the Railway Wagons as indicated in the letter dated 13.06.1972 written by the Secretary, Government of Rajasthan to the Divisional Superintendent, Central Railway, Jhansi to make available Railway Wagons for supply of "Mahua Flowers".

16. In view of the above, it cannot be said that the appellant would be entitled to the maximum amount of penalty/compensation as stipulated in the agreement. The phrase "reasonable compensation" in Section 74 read with the illustrations contained therein gives discretion to the Court in awarding reasonable compensation and the only restriction is that the Court cannot decree damages exceeding the amount agreed upon by the parties.

17. In view of the fact and circumstances noticed hereinbefore, wherein though under the terms of agreement, the appellant is entitled for penalty on account of delayed supplies made by the plaintiff, it cannot be said that it is entitled to the penalty as stipulated in the agreement and the ends of justice in the present case would be met if the appellant is awarded a sum of Rs. 15,000/- as compensation, which would be a reasonable amount keeping in view the stipulation in the agreement and the facts, which has come on record as noticed hereinbefore. The appellant would be further entitled to interest @ 6% per annum on the said amount from the date of filing the counter claim i.e. 26.05.1975 till the date of payment.

18. No submission, other than those noted hereinbefore, was made by either of the parties.

19. Accordingly, the appeal is partly allowed, the judgment & decree passed by the trial court is modified to the extent that the counter claim of the appellant is partly decreed, the appellant would be entitled to a sum of Rs. 15,000/- alongwith interest @ 6% per annum from the date of filing the counter claim i.e. 26.05.1975 till actual payment. No costs.