

(1998) 08 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 10 of 1993

The Himachal Pradesh State Forest Corporation Ltd. and
Another

APPELLANT

Vs

Gurcharan Dass Sekhri

RESPONDENT

Date of Decision : 03-08-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1 , Order 7 Rule 11, Order 8 Rule 6,
Order 8 Rule 6A

Citation : (1999) 1 ShimLC 98

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Neel Kamal, for the Appellant; Kuldip Singh, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—The present suit for the recovery of Rs. 9,08,971/has been filed by the Himachal Pradesh State Forest Corporation Ltd. and its Divisional Manager, Chamba, hereinafter referred to as the Plaintiffs, on the following averments:

2. The Plaintiffs through advertisement dated 9.2.1991 invited short term tenders for the extraction of resin and its carriage to roadside depots. The Defendant submitted his tender in respect of Lot No. 6/91 by quoting the rate of Rs. 329/- per quintal for extraction of resin including crop setting and its carriage up to roadside depot. The rate quoted by the Defendant being the lowest was accepted by the Plaintiffs on 28.2.1991. The necessary agreement came to be executed between the parties on 30.3.1991. A sum of Rs. 20,000/- was deposited by the Defendant as security. As per the agreement the Defendant was to extract minimum resin yield of 785.056 quintals by 30.11.1991 from 24,533 blazes.

3. The agreement provided for a fixed time schedule for taking various steps by the Defendant for the purpose of resin extraction. It was also specifically

provided that on the failure of the Defendant to extract the minimum quantity of resin yield of 785.056 quintals by the stipulated date of 30.11.1991, he would be liable to pay compensation to the Plaintiffs at the prevalent factory rate of resin per quintal. The shortfall up to 10% in the resin yield in the discretion of the Managing Director or the Director concerned could be waived.

4. The Defendant failed to carry out the work of extraction properly inspite of repeated notices/reminders issued to him by the Plaintiffs. As a result only 262.40 quintals of resin could be extracted by the Defendant by the stipulated date, as against the minimum prescribed quantity of 785.056 quintals. The Plaintiffs thus suffered loss to the extent of 522.656 quintals of resin. The prevalent rate of resin at the relevant time was Rs. 1,515/per quintal. The total loss in terms of money comes to Rs. 7,91,824/, which the Defendant is liable to make good in terms of Clause 39 of the agreement. Since the Defendant failed to pay the said amount inspite of repeated demands, the Plaintiffs have claimed interest on such amount at the rate of 18% per annum, amounting to Rs. 1,17,147/- calculated up to 20.9.1992. The Plaintiffs have thus filed the suit for recovery of Rs. 9,08,971/- against the Defendant.

5. The Defendant, while resisting the suit, admitted having taken the work of extraction of resin of lot No. 6/91 vide agreement dated 30.3.1991. He, however, pleaded that being a Class-C registered contractor, as per the rules and practice of the Plaintiffs, he could not have been granted a work exceeding Rs. 1,00,000/-. Since, the agreement dated 30.3.1991 exceeds the said limit, the same was null and void. The Defendant admitted that by the due date he could extract resin only to the extent of 267.54 quintals. He denied that the shortfall was due to any negligence or laxity on his part. He pleaded that the officials of the Plaintiffs from the very beginning started showing laxity in performing their part of the agreement inasmuch as the necessary equipments, such as, tools, lips, tins, cans, acid drums, etc. which were to be supplied by the Plaintiffs free-of-cost to the Defendant in terms of Clause 13 of the agreement, were not supplied by them in time, inspite of repeated requests made by the Defendant in this regard. Besides, the Plaintiffs were duly informed that rill method for extraction of resin could not be applied to 4,221 trees since resin had already been extracted from such trees. In addition the Plaintiffs were also informed that resin could not be extracted from about 4,779 trees which were located in four jungles, forming part of lot No. 6/91, since resin had been extracted in three jungles and the fourth jungle was not accessible on account of steep hilly terrain. The Defendant had been approaching the Plaintiffs for deleting these 9,000 trees from the lot. Though the Plaintiffs had been assuring that the matter was under consideration and a decision would be taken, however, no decision was taken/communicated to the Defendant within the period fixed for extraction of resin. The request of the Defendant for exclusion of another 600 trees since the same were either partly or extensively damaged due to fire or other natural calamities was also not considered by the Plaintiffs. The Defendants, due to the laxity on the part of the Plaintiffs and their officials could only extract resin from 9,360

trees. The shortfall in the resin extracted, therefore, was not due to any negligence on the part of the Defendant and he is not liable within the meaning of Clause 39 of the agreement.

6. By way of a counter-claim, the Defendant has sought to recover a sum of Rs. 1,74,426.86p from the Plaintiffs, as under:

(i) Supply of 267.54 quintals of resin Rs. 88,020.66p @ Rs. 329/- per quintal

(ii) Refund of security amount Rs. 20,000.00p

(iii) Advances made to labour which could Rs. 40,000.00p not be recouped through work or otherwise. ----- Total Rs. 1,74,426.86p

Though no separate written statement was filed by the Plaintiffs to the counter-claim raised by the Defendant, the Plaintiffs in their replication while reiterating the averments made in the plaint, have denied the counterclaim of the Defendant. They, however, admitted that a sum of Rs. 88,020.66 paise being the cost of the resin extracted and supplied by the Defendant has been withheld by them. It was pleaded that due to the loss suffered by the Plaintiffs, the Defendant was not entitled to claim the said amount.

7. On the pleadings of the parties, the following issues were framed, on 11.11.1993:

1. Whether the loss incurred by the Plaintiff accrued due to the negligence and laxity of the Defendant? OPP

2. Whether the Defendant is competent to file the counter-claim? OPD

3. Whether the Defendant failed to comply with his part of the agreement? OPP

4. Whether the suit has been filed by the competent person? OPP

5. Whether the Defendant was Class "C" registered contractor? If so, its effect? OPD

6. Whether the agreement between the Plaintiff and Defendant is void as alleged in paras 4 and 5 in the written statement? OPD

7. Whether the Plaintiffs failed to perform their part of contract as alleged in para 6 of the written statement? If so, its effect? OPD

8. Whether about 9,600 trees were liable to be deleted from the contract as alleged in para 6 of the written statement? If so, its effect? OPD

9. Whether the Defendant is entitled to recover Rs. 1,74,426 86, as alleged in para 14 of the written statement? OPD

10. To what amount is the Plaintiff entitled to recover from the Defendant? OPP

11. Relief.

8. I have heard the learned Counsel for the parties and have also gone through the record of the case. My findings on the above issues are as under:

Issues No. 1, 3, 7 and 8.

9. All the above four issues being inter-linked and inter-connected are being taken up and disposed of together.

10. Admittedly, the work of extraction of resin in respect of Lot No 6/91 was awarded to the Defendant, vide agreement dated 30.3.1991 (Ex. PW 1/C). There is no dispute that the agreement Ex. PW 1/C, inter alia. stipulated, as under:

(a) the agreement was to remain in force from 30.3.1991 to 30.11.1991:

(b) the time schedule fixed therein was as under:

(i) Setting up of crop from 30.3.1991 to 15.4.1991;

(ii) Tapping period up to 15.11.1991;

(iii) Scrapping and final collection from the trees by 30.11.1991;

(c) the period of carriage of resin to the roadside depot beyond 30.11.1991 may be extended up to 31.1.1992 by the Divisional Manager and beyond that date by the Director concerned for reasons to be recorded in writing;

(d) deposit of Rs. 20,000/- as security by the Defendant;

(e) resin was to be extracted from 24,533 blazes falling in sixteen forests, as detailed in Annexure-II to the agreement;

(f) the minimum quantity of resin to be extracted was 32 quintals per 1,000 blazes. In other words, the total minimum resin yield was fixed at 785.056 quintals;

(g) the Defendant was to be paid for setting up of crop, extraction of resin and its carriage up to roadside depot at the rate of Rs. 329/- per quintal;

(h) the lips, tins, pots, nails and other soldering material was to be supplied by the Plaintiffs free-of-cost;

(i) in case the Defendant failed to extract the minimum resin yield of 785.056 quintals, a compensation at prevailed factory rate was to be recovered from him;

(j) shortfall in the extraction of resin up to 10% was liable to be waived in the discretion of the Divisional Manager; and

(k) the Divisional Manager had the right to make alternative arrangement for tapping and disposal of resin at the risk and cost of the Defendant after issue of seven days notice, if in his opinion the work was not being executed in a thorough and earnest manner and in such event, the amount of security was also liable to be forfeited.

There is also no dispute that as against the minimum resin yield of 785.056 quintals the Defendant could extract and supply only 267.54 quintals of resin.

The question, thus, which falls for determination is whether the shortfall is attributable to the acts of the Plaintiffs or that of the Defendant?

11. While the Plaintiffs have averred that the shortfall in resin yield was due to the negligence and laxity on the part of the Defendant in the execution of work, the Defendant has given the following causes for the short fall:

(a) failure on the part of the Plaintiffs to supply the necessary materials, such, as lips, tins, pots, nails, etc. in time inspite of repeated requests made in this regard by the Defendant;

(b) rill method for extraction of resin which was specified to be employed, could not be employed in respect of 4,221 trees;

(c) in respect of another 4,779 trees, falling in four forests, resin could not be extracted, since from the trees falling three forests resin had already been extracted and the fourth forest was not accessible on account of steep hilly terrain;

(d) as many as 600 trees were found damaged either by fire or by other natural calamity and as such extraction of resin therefrom was not possible.

PW 1 Shri R.L. Gupta, the then Divisional Manager of the Plaintiffs at Chamba and who had entered into the agreement, Ex. PW 1/C with the Defendant, has admitted that in the agreement Ex. PW 1/C, only the number of blazes were mentioned and that the number of trees were not specified. He has also admitted that vide letter Ex. DB dated 17.5.1991 the Defendant had requested for excluding 4221 blazes since resin could not be extracted there from. He has also admitted the receipt of letter Ex. DC from the Defendant on this subject. He has gone to say that he had recommended for deletion of 4221 blazes from the agreement as requested by the Defendant.

PW 2 Udham Singh at the relevant time was posted as Assistant Manager, Chamba. He has admitted that PW 1 had asked him to take necessary steps for deletion of 4221 blazes. He had submitted the report in this regard to PW 1. This witness has also admitted that an oral complaint was made to him by the Defendant that tapping was not possible in respect of another 4,779 trees and that he had visited the spot and after such visit he had submitted the written report to PW 1. He, however, could not state as to in respect of how many trees tapping was not found possible by him.

12. The evidence led by the Plaintiffs themselves shows that the Defendant had approached for deletion of 9,000 blazes from the agreement, since extraction of resin was not possible. PW 1 had even recommended for the deletion of 4,221 blazes from the agreement. PW 2, after having visited the spot and after having carried out the inspection had submitted a report to PW 1 pointing out the trees

where tapping was not possible. Though PW 2 could not orally state the number of such trees, according to the Defendant tapping was not possible in respect of 4,779 trees. The Plaintiffs have withheld the best evidence in the form of report submitted by PW 2 to PW 1. Therefore, an adverse inference will have to be drawn against them. The only inference which can be so drawn is that tapping was not possible in respect of another 4,779 trees as claimed by the Defendant.

13. No action appears to have been taken by the Plaintiffs for deletion of these 9,000 blazes from the agreement inspite of recommendations made by PW 1 in respect of 4,221 blazes and the report made by PW2 in respect of another 4,779 blazes. Nor there is anything on the record to show that the request of the Defendant was considered by the competent authority and rejected and if so on what grounds.

14. Clause 50 of the agreement specifically provides that any dispute/difference or question which may at any time arise between the parties shall be referred to the Managing Director/Director concerned whose decision shall be final and binding on the parties.

15. Therefore, in terms of the abovesaid Clause 50, the question/dispute as to deletion of trees numbering 9000 was required to be referred by PW 1 to the Managing Director or the Director concerned. Failure on the part of PW 1 to do so or failure on the part of the Managing Director/Director concerned to decide the dispute/question would not bind the Defendant with the liability for the shortfall in the resin yield.

16. Insofar as deletion of another 600 trees alleged to be damaged by fire and other natural calamity, are concerned, no evidence has been led by the Defendant. So much so that the Defendant himself while appearing as DW 1 has not stated even a single word on this aspect.

17. Exs. DW 1/B-1 to DW 1/B-5 and Ex DA are the copies of letters addressed by the Defendant to the Plaintiffs wherein a request has been made for the timely and proper supply of the necessary material such as lips, pots, nails, etc. and containing a complaint that due to non-supply of such material the labour was sitting idle and the work was suffering.

18. Nothing has come on the record to show that the Plaintiffs have been making timely and proper supply of the requisite materials so as to enable the Defendant to execute the work properly in terms of the agreement.

19. The evidence coming on record proves beyond any shadow of doubt that the Plaintiffs themselves were lax and negligent and they had failed to perform their part of the agreement. The Defendant cannot be blamed for the shortfall in the resin yield. All the four issues are, therefore, decided in favour of the Defendant and against the Plaintiffs.

Issue No. 4

20. During the course of arguments, the learned Counsel for the Defendant has readily conceded the present issue, which is accordingly decided in favour of the Plaintiffs.

Issues No. 5 and 6

21. There is no evidence to show that the Defendant was a Class "C contractor at the relevant time and that as per the rules and practice of the Plaintiffs, he was not competent to enter into an agreement exceeding rupees one lac. Therefore, the agreement Ex. PW 1/C cannot be held to be void. Both the issues are decided against the Defendant.

Issue No. 10

22. In view of the findings recorded under issues No. 1,3,7 and 8, above that the loss in resin yield was not on account of any laxity and negligence on the part of the Defendant, the Plaintiffs are not entitled to recover any amount from the Defendant. The issue is decided against the Plaintiffs.

Issues No. 2 and 9

23. The Defendant has set up a counter-claim to the extent of Rs. 1,74,426.66 paise under Order 8, Rule 6-A, Code of Civil Procedure, vide his written statement dated 25.7.1993.

Rule 6-A of Order 8, Code of Civil Procedure, which deals with counterclaim by the Defendant, reads:

6-A. Counter-claim by Defendant.-(1) A Defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the Plaintiff, any right or claim in respect of a cause of action accruing to the Defendant against the Plaintiff either before or after the filing of the suit but before the Defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The Plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the Defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

Sub-rule (4) of Rule 64, quoted above, provides that the counterclaim is to be treated as a plaint and is to be governed by the rules applicable to plaints.

Rule 1 of Order 7, CPC provides for particulars which are required to be stated in the plaint. The provisions contained in Rule 1 of Order 7, Code of Civil Procedure, have been held to be imperative in *Hans Raj Kalra v. Krishan Kalra and Ors.* AIR 1977 NOC 267 (Delhi).

A bare perusal of the written statement filed by the Defendant raising the counter-claim shows that the necessary particulars required to be stated under Order 7, Rule 1, Code of Civil Procedure, have not been pleaded therein. On the failure of the Defendant to comply with the imperative provisions his counter-claim is liable to be rejected under Order 7, Rule 11, Code of Civil Procedure.

To the similar effect, it has been held by a Division Bench of this Court, of which I was a member, in *The Managing Director, H.P. State Forest Corporation and Anr. v. Ghinno Ram and Ors.* R.F.A. No. 83 of 1991 decided on 11.6.1998).

There is yet another aspect of the case. The proviso to sub-rule 6A, Order 8, Code of Civil Procedure, provides that the counter-claim shall not exceed the pecuniary limits of jurisdiction of the Court. In other words, the counter-claim must be within the pecuniary limits of jurisdiction of the Court.

In the year 1993, when the counter-claim to the extent of Rs. 1,74,426.86P was raised by the Defendant, this Court had the pecuniary jurisdiction only in respect of original suits value of which exceeded rupees two lacs. The pecuniary jurisdiction in respect of original suits value of which did not exceed rupees two lacs was vested in Subordinate Judges.

Therefore, the counter-claim preferred by the Defendant is not maintainable in this Court as not being within the pecuniary limits of jurisdiction of this Court. The two issues are decided against the Defendants.

Relief.

As a result of the above findings while the suit of the Plaintiffs is dismissed, the counter-claim preferred by the Defendant is rejected under Order 7, Rule 11, Code of Civil Procedure. On the facts and in the circumstances of the case, the parties are left to bear their own costs.