
(1967) 09 MAD CK 0012
In the Madras High Court
Case No : Second Appeal No. 1332 of 1963

The State of Madras	Vs	APPELLANT
The Rohtas Industries Limited		RESPONDENT

Date of Decision : 19-09-1967

Acts Referred:

Constitution of India, 1950 — Article 299

Citation : (1969) ILR (Mad) 705

Hon'ble Judges : Natesan, J

Bench : Single Bench

Advocate : G. Ramanujam, Government Pleader, for the Appellant; M.S. Venkatarama Ayyar, for K.R. Venkatarama Sarma, for the Respondent

Final Decision : Dismissed

Judgement

Natesan, J.—The State of Madras has preferred this second appeal from the judgment of the Additional Judge, City Civil Court on appeal

from the judgment of the IV Assistant City Civil Judge, Madras, the decision on appeal going against the State.

2. The suit was filed by the Plaintiff, Rohtas Industries Ltd., against the State for the recovery of a sum of Rs. 1,514 with interest and costs. The

Plaintiff, a limited company engaged in the manufacture of paper, cement, etc. at Dalmia Nagar in Bihar State, claimed under this action, return of a

sum of Rs. 1,000 deposited as security amount and a sum of Rs. 300 deposited along with a tender which the Plaintiff made in terms of the

provisions as to the submission of the tender. The tender was for the purchase and removal of waste paper accumulations in Government offices

and press cutting accumulations in Government Press, Madras and its branches for the year 1955-56. On 10th June 1955, the Controller of

Stationery and Printing, Madras, called for the tenders. Clause 2 of the tender provided that the tenders must be accompanied by a deposit of Rs.

300 which should be paid in the Reserve Bank of India and the relative chalan should be enclosed with the tender. Clause 4, an important clause,

in the tender notice provided that if a tenderer withdrew his tender before settlement, his tender deposit would be forfeited to Government. Clause

5, equally important, said that in the case of unsuccessful tenderers, the tender deposit would be returned to them. Clause 6 which has been the

subject-matter of construction by the Courts below may better be set out fully, It runs thus:

The successful tenderer will be required to execute an agreement for the faithful performance of the contract within 7 days from the date on which

the acceptance of his tender is intimated to him and to deposit a sum of Rs. 1,000 in the shape of post office savings bank pass book as security

deposit. The amount should be pledged to the Controller of Stationery and Printing, Madras, for the faithful performance of the contract. A sum of

Rs. 1.80 in cash towards stamp duty for the agreement to be executed will have to be paid by the contractor.

3. Under Clause 8, the Contractor will have to make his own arrangements to collect the waste paper accumulations in various Government offices

in Madras Stat(c) both in the city and mofussal within 15 days from the date of receipt of intimation from the officer concerned. The cost of waste

paper was payable to the officer from whose office the waste paper or the press cuttings were collected at the time of taking delivery. There is no

dispute that the Plaintiff became the successful tenderer and his tender was accepted by the Government. Exhibit B-6 is the order of the

Government wherein it is stated that the Controller of Stationery and Printing who had called for tenders recommended to the Government, for

acceptance, the tender of the Plaintiff for the purchase and clearance of waste paper. The rates quoted are shown. Clause 3 of this order, dated

18th October 1955 provides inter alia,

The company should pay in advance the entire cost of waste paper and press cuttings to the head of the concerned office before actual removal,

together with the sales tax and also pay in addition to the Controller of Stationery and Printing, Madras, a security deposit of Rs. 1,000 in respect

of all Government offices.

4. The agreement, it is stated, was to be in force from 1st April 1955 to 31st March 1956. It is also an admitted fact that on the acceptance of his

tender in terms of Clause 6, the Plaintiff provided the deposit of Rs. 1,000 and a sum of Rs. 1.80 in cash for stamp duty on the agreement to be

executed. But the agreement was not executed despite repeated requests by the Plaintiff. It is seen, from the judgments of the Courts below, that

on several occasions, the Plaintiff called upon the State, of course, through the Controller of Stationery and Printing, to send the agreement referred

to in Clause 6 of exhibit A-5 and that the reply was always to the effect that the matter was under consideration. Under exhibit A-50, dated 23rd

December 1955, the Plaintiff wrote to the Controller of Stationery and Printing referring to the delay in sending a copy of the agreement and stating

that the Plaintiff did not know where it stood and what its obligations were under the contract. In exhibit A-52, dated 21st December 1955, it is

stated by the Controller that the draft agreement had been submitted to the Government for approval and that it would be sent in due course. But it

is common ground that no agreement eventually came to be executed. It is seen that the Plaintiff had also been repeatedly requesting the

Government to intimate the various offices where from he could get these accumulations. Ultimately, nothing transpiring by his correspondence, on

6th January 1956, the Plaintiff withdrew his tender and refused to carry out any more work. The Plaintiff had removed certain quantity of waste

paper, but there is no dispute that these were paid for. It is seen that it was after 6th January 1956, the Government authorities began to intimate

the Plaintiff of the accumulations of stocks.

5. The Courts below took the view that there was a concluded contract between the parties and that the Plaintiff had no justification for rescinding

the contract on 6th January 1956. Two grounds were relied upon by the Plaintiff for rescinding the contract (i) failure on the part of the Controller

of Stationery and Printing to give the Plaintiff a list of the offices from which it was required to clear the waste paper and (ii) failure to execute the

agreement provided for in exhibit A-5 in spite of repeated requests. So far as the first ground is concerned, I am in entire agreement with the

Courts below that it is not a substantial ground for withdrawing from the

contract. The second ground requires careful consideration.

6. The contention of the Plaintiff has been that there was no valid contract between the parties and that, in those circumstances, he was entitled to a

refund of the two sums of Rs. 300 and Rs. 1,000. The State conceded to the Plaintiff's having refund of Rs. 300 the tender deposit. As regards

the sum of Rs. 1,000, the State's contention was that it was entitled to forfeit it as there was breach of contract on the part of the Plaintiff. The trial

Court accepted this defence of the State and granted a decree in favour of the Plaintiff for the sum of Rs. 300 in respect of which there was

concession by the State. On appeal, the Additional Judge has decreed the claim of the Plaintiff for this sum of Rs. 1,000 also. He would also

uphold the validity of the contract between the Plaintiff and the Defendant. But in the learned Judge's view, the Defendant would be entitled to

appropriate the sum of Rs. 1,000 only to the extent, the Defendant had been damnified by the breach of contract by the Plaintiff. He found that

there was no proof of any damages suffered by the Defendant. He, therefore, held that no deduction could be made from the security deposit or

any adjustment made for damages and that the Plaintiff was entitled to return of the entire amount of Rs. 1,000.

7. In this second appeal before me, it is contended for the State, that the learned Additional Judge erred in his view that an entirety of the amount

of Rs. 1,000 could not be forfeited, having held that the breach of contract was not on the part of the Defendant as alleged by the Plaintiff, but that

it was the Plaintiff who broke the contract. It is not the case of the State before me that they have sustained any damages. This has been found

against. With reference to the present contentions of the State there are two aspects of the tender notice, exhibit A-5, which have to be

considered. First in regard to the sum of Rs. 300, the deposit that had to accompany any tender, there is specific provision for the forfeiture of the

deposit to the Government if the tenderer withdrew the tender before settlement. There is also the provision that in the case of an unsuccessful

tenderer, the tender deposit would be returned. Nothing is said in this agreement as to what should happen to this tender deposit if the contract

proceeded forward and the tender was accepted. All that we find is provision for a further deposit of a sum of Rs. 1,000. This need not

necessarily be by way of cash. So far as the tender deposit is concerned, the deposit is to be made in the Reserve Bank of India and the relative chalan sent with the tender. As regards the deposit of the sum of Rs. 1,000 for the faithful performance of the contract, it might be in the shape of post office savings bank pass book ; the amount is to be pledged to the Controller of Stationery and Printing, Madras for the faithful performance of the contract. There is absolutely no provision for forfeiture of the amount and it is difficult to imply such a provision as the tender notice refers to the amount being pledged with the Controller. The legal incidents of a pledge are well-known. Admittedly even a savings bank pass book may be pledged, for the due performance of the promise. In the case of a pledge, on default by the promisor, the pledgee's right is to sell the pledged thing for any amount that may be due. The surplus would go to the promisor. The pledged object cannot be forfeited by the pledgee. The pledgee is given only a power of sale. In the present case, actual cash appears to have been deposited, but that cannot make any difference in principle for inferring the true character and purpose of the deposit. Only there need be no sale on default, to convert the pledged article into cash by sale, for appropriation towards money due on account of the default. The intention is clear; the amount is given as security for the faithful performance of the contract and would be available to satisfy any damages that may be suffered by the State, in default of faithful performance of the contract. On my reading of this agreement, it would not be open to the State to forfeit the amount even if the State has not suffered any damages. Though the subsequent correspondence may not be of any use in interpreting the agreement, the learned Additional Judge refers to a letter, Exhibit A-93, written by the Controller of Stationery and Printing to the Plaintiff wherein it is stated that the Government has sustained a loss of Rs. 750 on account of the non-fulfilment of the contract by the Plaintiff and that if the Plaintiff failed to remit the sum of Rs. 750 within a week, the tender deposit would be forfeited.

8. Learned Counsel for the State would contend that a right to forfeit the amount on breach of the contract, could be implied. As authority for the position, he refers me to a decision in Mohammad Dalil Khan Vs. State of Hyderabad now Andhra Pradesh, . In that case, the Plaintiff, a

contractor, entered into contract with the Government for taking some construction work and deposited certain amount of earnest money and

certain amounts as further security returnable upon the completion of the work. The contract not having been completed within time, the

Government cancelled the contract and forfeited the deposit. On the legality of the forfeiture being questioned, it was observed at page 220:

As discussed above, the earnest money and the further security deposit being a guarantee for the due performance of the contract, if the contract

goes off due to the fault of the contractor, the Government in our opinion, would be entitled to forfeit the amount even in the absence of an express

agreement. In instant case, the contract has not gone through and it was cancelled.

9. Learned Counsel argues on the basis of this judgment that in the circumstances of this case it could be inferred that the deposit could be

forfeited. To see whether there is a right to forfeit, it is said, the nature of the deposit has to be examined. Learned Counsel contends that it is a

deposit here for faithful performance of the contract. Mr. M. S. Venkatarama Ayyar, learned Counsel appearing for the Plaintiff would distinguish

this decision pointing out that there was provision for deposit of earnest money in that case and a further security was also treated as earnest.

Learned Counsel contends that in fact in the cited case the entire amount was regarded as earnest, the incidents of which money are well-

established. My attention is drawn to the following observation of the learned Judge in that case:

From the above discussion, it follows that the deposit is a guarantee for the performance of the contract, and until the contract is performed the

earnest money remains a security or earnest for the performance of the contract. The moment the contract is performed it becomes a part of the

price or purchase money. But it is liable to be forfeited if the contract does not go through due to the fault of the contractor.

10. Here there is no question of any purchase price. The Plaintiff has to pay every time he takes the waste paper from the office concerned. It is

merely a deposit made for the faithful performance of the contract. It is referred to as being pledged, and the necessary inference cannot be

brushed aside. It is not contended that it is not returnable when the contract has been faithfully performed. The submission in the circumstances, for

the Respondent, that the only possible inference, is that this amount is retained by the State as against any damages that it may suffer by reason of

any default on the part of the Plaintiff appears to me to be sound. In support of this argument, my attention was drawn to a passage in Indian

Contract Act by Pollock and Mulla, eighth edition at page 499. The learned editors remark:

Monies are often deposited as security for the performance of a contract, without such monies being earnest money. In such a case there may be a

forfeiture clause or not. Where there is no forfeiture clause, the party committing a breach of the contract is liable only to pay damages and is

entitled to the return of the remainder of the monies deposited.

11. Two cases are cited under this proposition; Mayson v. Clouet (1924) A. C. 980 and Public Works Commissioner v. Hills (1906) A.C 368. It

is admitted by Counsel that the proposition as such in so many words is not laid down in the judgments. It may be that the learned authors,

evidently, inferred that this must be the true position having regard to the discussion of general principles in those two cases.

12. Mr. M. S. Venkatarama Ayyar, learned Counsel for the Plaintiff also referred to the decision in R.M.K. Venkataperumal Naidu Vs. The

Thiruppuvanam Panchayat Board, Thiruppuvanam, . In that case, the Plaintiff agreed to construct a bus stand for the Defendant and subsequently

deposited a sum of money with the Defendant for the due performance of that contract within the time allowed. There was nothing to show that the

amount of the deposit would be forfeited in case of the Plaintiff's failure to perform the contract. The Plaintiff brought a suit for return of the deposit

even though he failed to carry out the contract. The learned Judge, Govinda Menon J., after discussing the case-law relating to earnest money and

Rattamma v. Krishnamurthi (1927) 54 M.L.J. 40 observed:

From this decision it is clear that there should be an agreement of forfeiture in default, and, such a thing cannot be implied from the fact of mere

failure to perform the contract. It is clear from the correspondence that there is no clause of forfeiture in case of failure to perform the contract.

Certainly if so advised the Defendant is at liberty to file a suit for damages against the Plaintiff for the non-performance of the contract. But the fact

that they have a remedy of filing a suit for specific performance or damages

would not entitle them to keep in hand the money paid as advance without a clause of forfeiture.

13. This case comes nearest to the case now on hand. That was also a case where a deposit had been made for due performance of the contract

by a contractor. It was not a case of sale where earnest money was paid in that when the contract went forward it become part of the price. The

learned Judge says that there should be an agreement of forfeiture in default and such an agreement could not be merely implied. Having regard to

all the circumstances of the case on hand I should prefer to follow the principles of this judgment in preference to the judgment in Mohd. Dalil

Khan v. State of Andh. Pra. AIR 1983 A.P. 216.

14. Mr. M. S. Venkatarama Ayyar contends also that in fact there is no valid contract between the Plaintiff and the State. Learned Counsel refers

to Article 299 of the Constitution of India and points out that admittedly no formal contract had been entered into between the parties. The tender

notice contemplates an agreement to be entered into between the parties* The Plaintiff had deposited a sum of Rs. 1.80 towards stamp duty for

the agreement. A successful tenderer is required to execute an agreement for the faithful performance of the contract and it is against the agreement

that the deposit of Rs. 1,000 in the shape of post office savings bank pass book has to be made. The Plaintiff had repeatedly asked the Controller

of Stationery and Printing to bring about the agreement. On this part of the argument, Mr. Venkatarama Ayyar drew my attention to a statement of

the law in Indian Contract Act by Pollock and Mulla eighth edition, page 54. It is therein stated:

Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the

proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is

signed, or some other act is done. This is really a case of acceptance with an added condition, but of such special importance as to call for

separate mention.

15. Learned Counsel contends that here was a contract to be entered into with the State and if the contract does not comply with the requirements

of Article 299 of the Constitution, it might not be possible for the Plaintiff, if the

occasion required, to enforce it. Learned Counsel submits that, therefore, it was quite an essential pre-requisite in the instant case for an enforceable contract to come into existence that there must be an agreement as contemplated in the tender notice. It is a condition precedent for a valid contract to come into existence that it must comply with the requirements of Article 299 of the Constitution. My attention is drawn by learned Counsel to some of the cases in this regard. In *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, it is observed at page 119:

It is in the interest of the public that the question whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation ; and that is why the Legislature appears to have made a provision that the contract must be in writing and must on its face show that it is executed for and on behalf of the head of the State and in the manner prescribed.... It is true that in some cases, hardship may result to a person not conversant with the law who enters into a contract in a form other than the one prescribed by law. It also happens that the Government contracts are sometimes made in disregard of the forms prescribed ; but that would not in our judgment be a ground for holding that departure from a provision which is mandatory and at the same time statutory may be permitted.

16. Learned Counsel appearing for the State submits that if the requirements of Article 299 of the Constitution could be found satisfied in the correspondence relating to the contract, then that would be sufficient to satisfy the requirements of the Article. True, that is so. A division Bench of this Court in *Bajam v. Indian Union* ILR (1966) 2 Mad. 44 at page 48 states the position thus:

It is, therefore, well settled now that, while the requirements of Article 299, whose terms are identical with those of Section 175 (3) (of the Government of India Act), are mandatory and should be complied with in order that an agreement entered into by a private party with the Central or State Government in the exercise of their executive power be enforceable it is not necessary that there should be drawn up a formal agreement as such, but there could be a valid contract entered into by correspondence provided the two requirements, pointed out by the Supreme Court in *Karamashi Jethabai v. State of Bombay* (1) are complied with.

17. In *Karamshi Jethabai v. State of Bombay* (1964) 6 S.C.R. 984 Subba Rao J., as he then was of the Supreme Court, observed at page 999:

This section [Section 175 (3) Government of India Act] laid down two conditions for the validity of such a contract, namely, (i) it should be

expressed to be made by the Governor of the Province, and (ii) it should be executed on behalf of the Governor by such persons and in such

manner as he might direct or authorize.

17. It was found in that case that the contract by correspondence did not satisfy the requirements. Learned Counsel for the State is not able to

point out anything in the correspondence in this case to satisfy the two requirements of Article 299 of the Constitution. This point for the plaintiff, it

cannot be said, is taken for the first time in this Court. It was manifestly and in specific terms taken at any rate before the learned Additional Judge.

The learned Judge disposed of the argument with a reasoning which the learned Counsel appearing for the State finds it difficult to even adopt. The

reasoning so palpably untenable that it is better I set it out in his own language:

I must also refer to an argument advanced by the learned Counsel for the Plaintiff that there has been no valid contract between the parties in as

much as the contract has not been entered into according to the provisions of the Constitution. I do not think that this argument can have any

substance. If the Plaintiff's agreement was with the Controller of Stationery and Printing, the Plaintiff had no cause of action against the Defendant

which is the State Government. Both parties, therefore understood, rightly in my opinion, that it was the Defendant who was the contracting party

and that the Controller of Stationery was acting on behalf of the Defendant. If it were otherwise, the Plaintiff will have to be non-suited.

18. It is not necessary for me to comment on this reasoning of the learned Additional Judge. It wholly misses the point; an answer is avoided.

Clearly there is no enforceable contract in this case. If the contract goes, then on that ground, the Plaintiff would be entitled to the return of the sum

of Rs. 1,000. It follows, therefore, there is no case for varying the decree of the Additional Judge, City Civil Court.

19. In the result the second appeal fails and is dismissed with costs. No leave.