

(1991) 04 DEL CK 0017

In the Delhi High Court

Case No : Regular First Appeal No's. 448 and 449 of 1989

Union of India

APPELLANT

Vs

Kailash Chand Gian Chand Jain

RESPONDENT

Date of Decision : 16-04-1991

Acts Referred:

Citation : (1991) 2 ARBLR 378 : (1991) 44 DLT 744

Hon'ble Judges : Dalveer Bhandari, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : K.L. Arya and S.K. Mahajan, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) Both these appeals can be disposed of by this judgment as parties are same and issues similar. The respondent as a plaintiff filed two suits against Union of India through the General Manager, Northern Railway, New Delhi. The plaintiff is a contractor. The plaintiff was awarded two different contracts for execution of certain work of the defendant. In the one suit (pertaining to R.F.A. 448/89) the plaintiff sued for recovery of Rs. 99,885.00 . This amount comprised of Rs. 90,635.00 being the amount due to the plaintiff towards security deposit after completion of the contract and Rs.9,250.00 as interest on the above amount at the rate of 18%p.a. from 22.6.1982 till the date of institution of the suit. In the second suit (pertaining to R.F.A .449/89) the suit of the plaintiff was for recovery of Rs. 79,756.10 which comprised Rs. 56,430.00 towards refund of security deposit and Rs. 14,780 9^ being the amount under the seventh running bill and Rs. 8,545.20 as interest at the rate of 18% p.a. from the date the aforesaid amounts became due till date of filing of the suit. Then there was a third contract also between the parties which the defendant-Union of India (now the appellant before us) claimed to have terminated and on that account raised a claim of over Rs. 2 lakhs against the plaintiff, and thus raised a plea withholding the amounts of security deposit and of the seventh running bill (in the second suit).

(2) Earlier the plaintiff filed the two suits under Order 37 of the CPC but unconditional leave to defend having been granted to the defendant, these suits were tried as ordinary suits. On the pleadings of the parties, following issues were framed :-

1. Whether the plaintiff is duly registered under the Partnership Act and the suit has been filed by a registered partner ?
2. Whether notice u/S. 80 CPC was served by the plaintiff before filing the present suit ?
3. Whether the defendant is entitled to withhold the amount of security deposit 1
4. Whether the plaintiff is entitled to charge increase ? If so, at what rate and for what period?
5. To what amount, if any, is the plaintiff?
6. Relief

(3) Issues in both the suits were similar inasmuch as there was no dispute about the amount due to the plaintiff as with held by the defendant. In support of its case the plaintiff examined Mr. Gain Chand Jain, one of its partners. The defendant in defense examined Mr. M.P. Goyal, Assistant Superintendent in its office. When the final arguments were to be heard in the suits counsel for the plaintiff made a statement that he had instructions that arbitration proceedings between the parties were still going on with respect " to the third contract and that the suits might be stayed sine die. This was on November 25, 1985. Both the suits were accordingly stayed. After the conclusion of the proceedings relating to third contract filed under. Section 20 of the Arbitration Act, the award was given and it so happened that the arbitrator not only rejected the claim of the defendant-Union of India but also awarded an amount of Rs. 3.591.00 to the plaintiff. Then the plaintiff moved two different applications for revival of the suits. It was also recorded that immediately after the award was given in the third contract the principal amounts subject matter of these two suits were paid by the Union of India to the plaintiff. The trial Court on November 10, 1987 recorded that though the principal amounts had been paid. the counsel for the plaintiff contended that plaintiff was entitled to costs and interest as well, as claimed in the suits but the counsel for the defendant contended that the plaintiff had received the payment in full and final .settlement of its claim and nothing more was due. The Court the framed then following issues:

1. Whether the defendants are justified in withholding the amount and after the award the plaintiff having received the amount whether it is in full and final settlement of the claim? If not, to what effect ?
2. Whether the plaintiff is entitled to interest and the costs ?
3. Relief.

(4) Again the issues are similar in both the suits. Again the parties led evidence. Both the witnesses who had been examined earlier were recalled for further examination. This having been done and after hearing the arguments the trial Court pronounced judgments decreeing both the suits. Main controversy between the parties revolves around Clauses 52 and 52-A of the General Conditions of Contract applicable to the contracts between the parties. These conditions which have been duly set out in the written statement are :

52. WITHHOLDING and lien in respect of sums claimed Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Railway shall be entitled to "withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid the Railway shall be entitled to withhold the said cash Security deposit or the security; if any, furnished as the case may be and also have a lien over the same pending finalisation or adjudication of any such claim in the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Railway shall be entitled to withhold and have a lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable to the contractor under the same contract or any other contract with this or any other Railway or any other Department of the Central Government pending finalisation or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained the lien referred to above by the Railway will be kept withheld or retained as such by the Railway till the claim arising out of or under the contract is determined by the contractor (if the contract is governed by the arbitration clause) or by the competent Court as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company the Railway shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company, as the case may be, whether in his individual capacity or otherwise.

52-A. Lien in respect of claims in other contracts: Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Railway against any claim of this or any other Railway or any other Department of the Central Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with this or any other Railway or any other Department of the Central Government.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Railway will be kept withheld or retained as such by the Railway till the claim arising out of or under any other contract is

either mutually settled or determined by the contractor; if the other contract is governed by arbitration clause or by the competent Court as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as to the contractor."

(5) The trial Court held that there was no evidence on record as to when these two clauses were inserted, whether before entering into of the contracts between the parties or afterwards, and held that since there was no evidence on this led by the defendant-union of India on whom the burden of the first issues lay, the defendant could not withhold the payment. The trial Court also referred to a full bench decision of this Court in Mohan Meakin Breweries Limited Vs. Union of India and Others, . It appears, however, that attention of the trial Court was not drawn to a decision of the Supreme Court in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . The trial Court, Therefore, observed that the Union of India could not withhold the amounts. On this basis the trial Court also held that the plaintiff was entitled to interest on the amounts wrongly withheld by the defendant and then referred to the statement of Gian Chand Jain saying that plaintiff was entitled to interest at the rate of 18% per annum which the trial Court said had not been rebutted by the defendant. The Court also observed that the market rate or the Bank rate, as the case might be, was 18% per annum. Both the issues were, thus, held in favor of the plaintiff. The defendant has now come up in appeal.

(6) In these appeals the defendant-appellant also filed two separate applications under Order 41 Rule 27 and Section 151 of the Code that the General Conditions of Contract containing clauses 52 and 52-A, which were added to these General Conditions of Contract by correction slip No. 6 dated 17.5.1977, be allowed to be proved in evidence. We do not feel it necessary to refer to these applications as we find that the fact that clauses 52 and 52-A form part of the General Conditions of Contract as far back in May 1977. This is so as when in the written statement reference was made to these two clauses, in the replications the plaintiff did not deny the existence of these clauses as applicable to the contract between the parties and the only plea raised was that these clauses were unconscionable and were against public policy. No issue has been framed if these clauses contained conditions which were unconscionable or against public policy. This was perhaps so as the plaintiff did not give any particulars as to why it was saying so. Before us it was also not disputed that these clauses 52 and 52-A form part of the General Conditions of Contract between the parties respecting the subject contracts.

(7) These two clauses 52 and 52 A are some what same as clause 18 in the General Conditions of Contract in the contracts with the Government of India through the Director General of Supplies and Disposals. This clause 18 is as under : (reproduced from para 3 of H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others,) :

"18.Recovery of Sums Due: Whenever any claim for the payment of-a sum of money arises out of or under "the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Govern mentor any person contracting through the Secretary. If such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due...."

The Supreme Court held that it was of the opinion that this clause gave wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter might become due to the contractor under other contracts. It further observed as under : -

"CLAUSE18 of the standard form of contract earlier was slightly differently worded and it read whenever under this contract any sum of money is recoverable from and payable by the contractor. But this formula was deliberately and advisedly altered when the present standard form was introduced and instead the words whenever any claim for payment of a sum of money arises were substituted and this change in phraseology indicated that in order to attract the applicability of the present Clause 18. it was not necessary that there should be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact whether such sum of money was presently due and payable or not...."

(8) We may, however, note that the Supreme Court was dealing with the provisions of Section 41 of the Arbitration Act and so was also the full bench of this Court in Mohan Meakin's case. Thus, considering the clauses 52 and 52-A it is apparent that the defendant could withhold the amount mentioned in the two suits because of its claim of over Rs. 2 lakhs under the third contract, and further no interest or damages were to be payable to the plaintiff even if the claim of the defendant was negatived. Now when the award in the third contract was given disallowing the claim of the defendant and awarding certain amounts to The plaintiff, the defendant immediately paid up the principal amounts involved in these to suits to the plaintiff. Thus, once it is held that the defendant was justified in withholding the amounts due to the plaintiff under the two contracts, further question of the plaintiff having received the amounts in full and final settlement of its claim would not arise for any further consideration. Nevertheless the trial Court was right in coming to the conclusion that that there was nothing on the record to show that the amounts received by the plaintiff

were in full and final settlement of its claim towards interest and costs in the two suits. Again in view of clauses 52 and 52-A aforesaid the plaintiff was not entitled to any interest. Also it may be noticed that Mr. Gian Chand Jain (Public Witness -1) in his statement said that there was no contract with the railways that on the amount withheld the railways would pay any interest. On his bare statement that 18% was the bank rate, the Court awarded interest at this rate to the plaintiff. The trial Court, it appears, ignored the provisions of the Interest Act, 1978, which Act was in force as from 1981. Since under the agreement the plaintiff is not entitled to any interest, it is unnecessary to examine the provisions of this Act. Now as the plaintiff was not entitled to the principal amount as well as interest, he was also not entitled to any costs. There is no issue if the amounts in question were wrongfully or illegally withheld by the defendant. In fact the defendant did so under the agreement between the parties. Mr. Mahajan, learned counsel for the defendant, however referred to a decision of the Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , to contend that Clauses 52 and 52-A should be struck down being illegal and void u/s 23 of the Contract Act. As noted above, no issue was raised on this question and it is too late in the day to contend that these clauses are unconscionable after the contracts had been executed. We would, Therefore, allow the appeals and would set aside the impugned judgments and decrees in both the appeals. In the circumstances however, will direct that parties shall bear their own costs throughout.