(1976) 01 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Civil Suit No. 14 of 1968

Union of India APPELLANT

Vs

Sardar Singh Sawhney RESPONDENT

Date of Decision : 27-01-1976

Acts Referred:

Jammu and Kashmir Limitation Act, 1995 — Article 145, 49A, 86, 14

Citation : (1976) JKLR 188 : (1976) KashLJ 237

Hon'ble Judges : Mian Jalal-Ud-Din, J

Bench : Single Bench

Advocate : R.P.Bakshi, H.L.Bhagotra, A.D.Singh, Advocates appearing for the Parties

Judgement

(1) This is the plaintiff's suit for recovery of Rs. 40756. 22 against the defendant with the following averments:

(2) The defendant, it is alleged, is an army contractor. He entered into three contracts on 2821957 with the plaintiff through GOC XV Corps for

supply of meat on hoof and meat dressed at Udhampur and Akhnoor and meat on hoof at Samba for the period of 1st April 1957 to 30th of

September 1957 vide CD No. 2, CD No. 3 and CD

No. 4 of 195758 respectively. According to the terms and conditions of these contracts the defendant had to maintain the reserve of live stock

representing 14 days requirements of meat and to tender supplies in accordance with ACC specifications and special conditions attached thereto

for the aforesaid period at the delivery points at Akhnoor, Udhampur and Samba. Except for a few days the defendant, failed and neglected to

carry out his contractual obligations and to meet the demands placed on him by the concerned operating officers under the aforesaid contracts for the supply of meet on hoof and dressed meat referred to above. The defendant also failed to build up and maintain the requisite reserve of live

stock and ensure regular day to day supplies to troops and according to the terms of the contracts. Written and verbal warnings given to the

defendant had no effect on him. On account of persistent failure and neglect of the defendant to comply with the demands of the contracts, the

concerned operating officers were compelled to purchase and procure the supplies at the risk and expense of the defendant. Because of the failure

of the defendant to carry out the contractual obligations the contracts were rescinded on 27th of May 1957 and purchases were made at the

expenses of the defendant to recover the said excess cost and incidental charges from him. Because of the default of the defendant the plaintiff had

to incur lot of extra costs and incidental charges which after adjustment of bills and securities of the defendant comes to Rs. 40756.22 p. This

amount the plaintiff claims from the defendant. It is further averred that the defendant apprehending the steps for recovery of extra costs and

incidental charges incurred would be taken against him filed a suit in the court of the Munsiff Jammu on 16557 for mandatory injunction restraining

the plaintiff from adjusting or deducting extra costs and incidental charges on account of risk purchase made by the concerned officers on failure of

the defendant to meet their demands from the bills of the defendant. The suit was ultimately dismissed on 31.1258. Thereafter the defendant again

sued the plaintiff in forma pauperis on 18th December 1P59 in the High Court for recovery of Rs. 59376 /9/6 in respect of the aforesaid contracts.

The application was, however, dismissed in the year 1960 on the ground that the defendant was not a pauper and this decision was affirmed on

11121961 by a Division Bench of the High Court in an appeal under the letters patent. A notice in respect of the payment of Rs. 40756. 00 on

account of extra costs and incidental charges for risk purchases made by the plaintiff at his risk and expenses was given to him, but this did not

invoke any favourable response from the defendant and he did not make the payment. Hence the suit.

(3) The defendant in his written statement has pleaded that the suit is barred by time. The plaint does not disclose as to how the suit amount has

been arrived at therefore the suit is not maintainable. The execution of the contracts is admitted. The terms of the contracts are also admitted, but it is pleaded that the defendant was always keeping the reserve complete but the operating officers in collusion with some interested persons who

had failed to secure the contracts wrongfully and arbitrarily rejected drastically the animals in the defendant's reserve supplies. However, even full

time of 30 days for completing the reserve was not allowed to the defendant by the officers and they prematurely began to put the defendant on

risk purchase by securing the supplies from another party. The defendant lodged a strong protest with the D. D. ST XV Corps. These actions of

the officers completely shattered the arrangements of the defendant which made it absolutely impossible for him to function. It is denied that any

concessions were afforded to the defendant. It is also denied that the defendant failed to discharge his contractual obligations. There was no failure

or negligence on the part of the defendant to comply with the demands of the operating officers. The attitude and the conduct of the plaintiff's

officers was not helpful and the funds blocked by the authorities amounting to lakhs of rupees including securities and bills left the defendant

absolutely destitute and helpless. Even the 50% payment agreed to be released to the defendant was not so far released. The entire responsibility

for all this lay on the authorities. The recision of the contract was wholly malafide, unauthorised and ultravires of the agreement and not made by a

competent officer. Risk purchases were not made according to the demands and due credit of the balance was not afforded to the defendant.

Purchases were made in excess of the demands and requirements of the purchases were not made honestly. The defendant was not therefore liable

to be burdened with the excess costs and incidental charges. Further, it is pleaded that the plaintiff has not given any details of the amount sued for.

No credit of the bills and securities has been afforded. The institution of the two suits one for injunction against the plaintiff and the other for the

recovery of the money due to the defendant and their dismissal is admitted. But it is pleaded that the pendency of these proceedings would not

save limitation as there was nothing to prevent the plaintiff from bringing the present suit in time. The defendant has claimed a set off for an amount

of Rs. 393761/60 from the plaintiff for the supplies and securities and interests etc etc. in respect of the contract in question and other contracts.

The defendant has claimed a decree for this amount.

(5) On pleadings of the parties the following issues were raised in the case on 4th of June 1964.

1. Did the defendant make regular supplies of dressed meat and meat on hoof in terms of his contract and did he build up the requisite reserves of

meat on hoof within the stipulated period and otherwise carry out his obligations under the contract ? O. P. D.

2. Did the officers operating upon the contract wrongfully, arbitrarily and dishonestly reject the supplies and the reserves set up by the plaintiff in

collusion with some other persons in order to put the defendant to loss ? O. P. D.

3. Was the contract wrongfully and without any justification rescinded by the authority concerned ? O. P. D.

4. For what amount were the risk purchases made by the officers operating on the contract and were these risk purchases made at proper prices,

and is the defendant liable for these risk purchases ? O. P. P.

5. Is the plaintiff entitled to extension in limitation on account of the suit for injunction instituted by the defendant in the court of the Munsiff First

Class Jammu and his subsequent suit in forma pauperis in the High Court which were decided against the defendant ? O. P. P.

6. Is the suit of the plaintiff within time ? O. P. P.

7. Has the suit been filed by a competent person. O. P. P.

8. Is the defendant entitled to recover a sum of Rs. 3,93761.60 from the plaintiff ? O. P. D.

9. Can the defendant get a decree for this sum without payment of court fee on the same? O. P. D.

(6) Issue No 7 and 9 were treated as preliminary issues and were directed to be tried first.

(7) Thereafter the defendant remained absent. On 21864 exparte proceedings were taken against him and statements of two witnesses namely

Brigadier N. B. Tandon and Major Harbans Singh were recorded in the absence of the defendant. On 291264 exparte proceedings taken against

the defendant were set aside and the case was posted for the examination of Brigadier Narain Singh P. W. which was recorded on 4165. Issue no

7 and 9 were on concession decided against the defendant on 26566 About issue No. 9 the Court observed that the defendant should pay court

fees on the amount he claims by way of set off and the defendant was asked to produce his evidence on the remaining issues. On 251166 the

defendant deposited the court fee and the plaintiff filed his replication to the set off. In the replication he denied the claim of the defendant by way

of set off. He denied all the allegations made by the defendant in his written statement and reiterated the position he took in his plaint. The plaintiff

further averred that the claim of the defendant by way of set off was vague, unfounded and barred by time and that he was also estopped from

claiming the said amount by virtue of section 1 and Order 2 R2 of the Code of Civil Procedure The defendant was not entitled to recover the

amount of his bills and securities adjusted against the costs of his risk purchases and incidental charges incurred by the plaintiff. The defendant

examined about 18 witnesses on his side besides his own self.

(8) I have heard the learned counsel for the parties at length.

(9) Issue No. 4 is the material issue in the case. There is, however, no evidence available on the plaintiff's side in respect of this issue. The plaintiff

examined 3 witnesses in all namely; Brigadier N. B. Tondon, Major Harbans Singh and Brigadier Narain Singh; The statements of the first two

witnesses namely Brigadier N. B. Tondon and Major Harbans Singh were recorded at a time when there were exparte proceedings against the

defendant. Later on when exparte proceedings were set aside these two witnesses were not called for fresh examination or crossexamination. It is

conceded that the statement of these two witnesses recorded earlier in absentia of the defendant cannot constitute legal evidence in as much as the

depositions made by them cannot be read against the defendant. It is curious to find that the plaintiff's officers who were incharge of the

prosecution of the case did not seriously prosecute the case. Not only that the two witnesses were not produced later on but even after the

defendant closed his evidence and the plaintiff was given further chance to produce his witnesses these officers did not care to file the list of

witnesses or furnish particulars of the witnesses. The trial of the case was protracted and it lingered on because of the folly of the plaintiff's officers

to produce witnesses in the case. The responsibility of this must squarely lie on these officers of the plaintiff. Thus excluding the statements of

Brigadier N. B. Tondon and Major Harbans Singh we have the solitary statement of Brigadier Narain Singh; but his evidence is of no consequence as it has got no bearing on the subject matter of issue No. 4. There is no evidence available as to for what amount were the risk purchases made

by the officers operating on the contracts and also whether these purchases made at proper price. Also there is no evidence to make the defendant

liable for the risk purchases. The result is that this material issue is decided against the plaintiff.

(10) Issue No. 5 which relates to question of Limitation must also be decided against the plaintiff in as much as the suit has been brought after the

expiry of the statutory period prescribed for such kind of suit. The suit of the plaintiff is founded on breach of contract by the defendant. The

plaintiff's case is that because the defendant did not perform his obligation under the contract therefore the plaintiff was forced to make purchases

from other quarters and therefore under the contracts whatever risk purchases were made by the officers operating on the contract for those the

defendant is liable. The suit of the plaintiff, therefore, clearly comes within the purview of Art, 86 of the Jammu and Kashmir Limitation Act which

provides three years time for a suit for compensation for the breach of contract express or implied not in writing registered and not herein

specifically provided for. Time is to run from the date when the contract is broken. The plaintiff's case cannot fall within Art. 149 as urged by his

counsel, This Article was introduced in the Act by Act. No. 11 of 1965 i. e. the time when the suit had already been instituted and therefore can

have no retrospective application.

(11) In the case before us the contract was rescinded on 20th May 1975 and the suit was instituted on 25563. There is no evidence to show when

the risk purchases were made and when the bills payable to the defendant were adjusted against the risk purchases and incidental charges. The

fact that the defendant had earlier brought a suit for injunction against the plaintiff or that he had brought a suit in forma pauperis for the recovery of

the sums due to him cannot save limitation because the plaintiff cannot take the benefit of the time spent by him in those proceedings. It is only the

party prosecuting the case diligently in a court of law that can under the conditions mentioned in Sec. 14 of the Limitation Act claim the benefit of

that Section and can claim the exclusion of the time spent by him in prosecuting the case. That indeed is not the case before us. The mere filing of the two suits by the defendant could not by themselves have prevented the plaintiff from filing the present suit. Therefore on that score as well the

claim of the plaintiff is not saved. The case of the plaintiff being governed by Art. 86 of the Limitation Act which provides 3 years limitation is

therefore barred.

(12) In view of my finding on issue No. 4 there is no necessity to go into issue Nos. 1 to 3. Assuming that these issues are decided against the

defendant even then the plaintiff had to prove the subject matter of issue No. 4 on which hinges the fate of the case.

(13) The result is that the suit of the plaintiff fails on both counts and the same is hereby dismissed with costs.

(14) The counter claim of the defendant must also be dismissed on the ground that it is beyond time. According to the learned counsel for the

defendant the case of the defendant comes within the purview of Article 145. This Article reads as under :

Description of suit Period of Time from which

Limitation period beings to run.

145. Against a de Thirty The date of the

pository or pawnee years deposit or pawn,

to recover movable

property deposited

or pawned,

(15) The argument, is founded on the plea that the security money of the defendant was by way of trust with the plaintiff, Therefore the same being

in the nature of trust is governed by Article 145 which prescribes time of 30 years. In my view this argument is not well founded in as much as the

security money cannot be treated as a deposit with the plaintiff. The claim of set off pleaded by the defendant is in respect of holding of the security

money and other bills payable by the plaintiff to the defendant.

(16) In my view the claim falls within Article 86 of the Jammu and Kashmir Limitation Act as it is founded on breach of contract and is for

compensation in consequences of breach or recession of the said contract. True, that the expression 'movable property' occurring in Article 145

includes money also as there is nothing to indicate that the word 'money' is not comprehended in the expression 'movable property' occurring in the

Article 145, and in this view of mine I am supported by the observations made in a Division Bench Authority of Patna High Court reported as

1962 Patna 372 at para 16. But this in itself will not make Article 145 applicable because the earnest money that has been deposited by the

defendant with the plaintiff does not make the plaintiff a depository or pawnece within the meaning of Article 14^. The true construction that can be

placed on the word 'depository' in Article 145 is that the movable property held by the depository must be in the nature of entrustment. There

should be no condition attached to it for the performance of an ancillary act. Thus where money is deposited for the performance of an act and the

amount deposited is in the nature of security many for the performance of that act the deposit, it is manifest, is not returnable until the contract is

performed and therefore it cannot partake of a deposit or trust within the meaning of Article 145. In order to bring the claim under Article 145 time

must run from the very date of deposit. But where the return of deposit is contingent on the happening of a specified event or on the performance

of a contract time for the refund of the amount deposited will run from the date when the specified contingency happens or the contract is

performed. In this view of mine I am fortified by the observations made in AIR 1960 Bombay 404. I, however, do not subscribe to the view

propounded by the learned Single Judge of Andhra Pradesh High Court reported as AIR 1966 A. P. 218 that security money is a deposit and

therefore Art. 145 will apply. I respectfully differ from the same.

(17) In the instant case return of the deposit could not be claimed by the defendant unless he performed the contract. Therefore it will make Article

l(5 inapplicable. It is as well so because the set off claimed is not only in respect of the security money but also for the payment of other bills due to

the defendant which have not been paid to him. Therefore the case of the plaintiff falls within the purview of Article 86 which provides three years

limitation. As stated above the contract was rescinded on 5th of May 1957. The defendant should have brought an action for claiming the refund of

deposit as also the amount of unpaid bills to him within three years from recession of the contract or from the date of nonpayment of bills

respectively . He in the first instance, brought a suit for injunction which was dismissed. Later on a suit in forma pauperis for the recovery of Rs.

392760.00 was brought by him in the High Court. His application was dismissed by the Single Judge and the order was confirmed on appeal on

131261. Thereafter he kept quiet and did not pay the court fees. Now in the suit brought by the plaintiff he has pleaded set oft' for the same

amount. He paid court fees on 25th of November'66. All this shows that the claim which he has made is beyond three years and is therefore

barred by limitation. His claim is also barred under Order 2 R. 2 of the Code of Civil Procedure.

(18) For the gore going reasons I would, without adverting to the factual aspect of his claim, dismiss his claim of set off as being time barred.

(19) The result is that both the suit of the plaintiff and the set off claimed by the defendant are hereby dismissed. The parties will be entitled to costs

according to their success and failure.

