
(1970) 08 DEL CK 0003
In the Delhi High Court
Case No : F.A.F.O. No. 120-D of 1961

Union of India

APPELLANT

Vs

Tribhuwan Das Lalji Patel

RESPONDENT

Date of Decision : 06-08-1970

Acts Referred:

Citation : AIR 1971 Delhi 120

Hon'ble Judges : Prakash Narain, J

Bench : Single Bench

Advocate : Brijbans Kishore and J.P. Gupta, for the Appellant; A.B. Saharia, for the Respondent

Judgement

1. This appeal is directed against the order of Shri N. C. Gupta, Sub Judge 1st Class, Delhi whereby the objections filed by M/s. Tribhuwan Das Lalji Patel to an award made by Shri Ram Labhaya were accepted and the award was not made a rule of the Court.

2. The facts leading up to the award were that a contract for the supply of Indian Teak Sleepers of specified sizes at a specified rate was entered into between the Union of India and M/s. Tribhuwan Das Lalji Patel of Bhavnagar. The contracted goods had to be supplied to the Union of India on monthly basis from June, 1952 onwards and the total quantity was to be supplied by 31st December 1952. The contract entered into by the Union of India was subject to its Supply Department's general conditions of contract contained in a printed booklet known as form W.S.B. 133. These general conditions, inter alia, contained an arbitration clause under which in case of a dispute between the parties and differences arising between them the same were to be referred to the arbitration of two arbitrators, one to be appointed by each of the contracting parties and in case of disagreement to an umpire for his adjudication. Disputes did arise between the parties as to the claim of damages of Union of India arising out of the alleged non-supply of the contracted goods by the other party. The arbitrators did not agree among themselves and so the matter was referred to

Shri Ram Labhaya, Umpire, who made his award on 21st November, 1960. By this award the Government's claim for damages were upheld to the extent of Rs.18,320/-. On the award being filed in Court the Contractor filed objections against it and contended that the award is liable to be set aside as it suffered from an error apparent on the face of it. The trial Court agreeing with the contention set aside the award and dismissed the application of Union of India for making the award a rule of the Court. Aggrieved, the Union of India has preferred this appeal.

3. Mr. Brijbans Kishore, the learned counsel for the appellant, has urged that on a reading of Clause 11 (3) of the conditions of contract it would be clear that irrespective of whether the Government suffered any loss or not on account of the contractor's failure to supply the contracted goods, the Government was entitled to damages. He further contended that the award was justified in terms of illustration (a) u/s 73 of the Contract Act. The learned counsel for respondent on the other hand, contended that when admittedly the Government suffered no loss or damage, the umpire could not award damages as damages can only be awarded provided there is a loss.

4. Clause 11 (3) of the condition of contract reads as under:-

"Failure and Termination, Should the contractor fail to deliver the stores or any consignment thereof within the period prescribed for such delivery the Secretary, Department of Supply shall be entitled at his option either:-

(a) to recover from the contractor as "liquidated damage, and not by way of penalty, a sum of 2% of the price of any stores which the contractor has failed to deliver as aforesaid; for each month or part of a month during which the delivery of such stores may be in arrears.

(b) to purchase elsewhere, without notice to the contractor on the account and at the risk of the contractor, the stores not delivered or others of a similar description (where others exactly complying with the particulars are not in the opinion of the Secretary, Department of Supply which shall be final, readily procurable) without cancelling the contract in respect of the consignment not yet due for delivery, or

(c) to cancel the contract

In the event of action being taken under (b) or (c) above the contractor shall be liable for any loss which the purchaser may sustain on that account but the contractor shall not be entitled to any gain on repurchases made against default"

Under this clause it is apparent that if the Contractor fails to deliver the stores or part of the stores, the Government becomes entitled at its option either to recover as liquidated damages a sum of 2 per cent. of the price of the stores not supplied or if they are supplied late; or to purchase the stores not supplied or short supplied from anywhere else at the risk and expense of the contractor and claim any excess price paid by the Government; or to cancel the contract. In

case there is risk purchase or cancellation of contract the contractor is liable for any loss which the purchaser or the Government may sustain. But the contractor will not be entitled to payment of any gain made by the Government on repurchase. Thus, it is apparent that the Government can recover only loss sustained by it and cannot claim damages from the contractor if no loss is sustained. Mr. Brijbans Kishore urged that in the proviso to Clause 11 (3) read above the word "shall" has been used to fix the liability of the contractor but the word "may" has been used with regard to any loss that may be sustained by the Government and this would tend to mean that irrespective of the loss there is a liability on the contractor to pay damages. I cannot agree to this interpretation of the clause as a very reading of the proviso would show that the contractor's liability to reimburse the Government exists only if there is any loss.

5-6. Mr. Brijbans Kishore strongly relied on illustration (a) given u/s 73 of the Contract Act and urged that this illustration amplifies the legislative intent contained in Section 73 as opposed to Section 74 of the Contract Act and irrespective of any loss compensation has to be paid by the person who breaks the contract in the sum equivalent to the price which falls short of the price at which the other party might have obtained the goods whether the same were obtained or not. In support of his contention he first relied on a decision of the Madhya Bharat High Court in Vishwanath v. Amarlal Air 1957 Madh Bha 190. It was held by Dixit, J. that :

"In a suit for damages for breach of a contract for sale of goods it is not necessary for the plaintiff to prove that he purchased the goods from other sources at a price exceeding the contract price and sustained a loss. The fact that a buyer sustained no actual loss from the seller's failure to deliver the goods is no ground for awarding nominal damages to the buyer. The buyer is entitled as indicated by illustration (a) to Section 73, Contract Act, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quantity at the time when they ought to have been delivered".

The learned Judge came to the above conclusion primarily on the basis of the decision of the Privy Council in AIR 1932 196 (Privy Council) . To my kind the decision of the judicial committee could be constructed by Mr. Brijbans Kishore. In the case before the Privy Council the facts were as under:-

A contract was entered into on 9-11-1912 for the sale of 200 mds. of new crop Java indigo seed at R. 22./- per maund excluding bags, f.o.r., Purnea, railway station, delivery to be made in April 1920 between the parties. The plaintiff had given Rs.1,000/- as earnest money. The defendant failed to make the deliveries as stipulated. The question that arose for determination was what estimated damages and with reference to which date the defendants were liable to pay the plaintiff. After determining the date of breach their Lordships of the Privy Council observed as under:-

".....On the basis of the date of 30th April 1920, it is now necessary to consider how the damages are to be estimated. If there was an available market for the goods at the date of breach the damages must be based on the difference between that market price and the contract price, a contract of resale becomes immaterial, because if there was a market, the law presumes that the buyer can minimize his damages by procuring substituted goods in the market, so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. Hence the difference of price, if the market price exceeds the contract price, is the sole damage in general recoverable"

From the above quoted observations it is sought to be argued that the question of market price was immaterial and no repurchase is required to be proved. In my view, the observations of the Privy Council were made only in the context of fixing the quantum of damages and does not lay down the proposition that irrespective of whether there was any loss or not damages must still be paid. In fact, a reading of Section 73 of the Contract Act makes this obvious. Illustration (a) to Section 73, Contract Act, has to be construed in the light of the statutory provision so as to harmonise with the principles laid down in the section and not to enlarge the scope of the section by imputing to the statute something what is not stated therein. It is specifically provided in the second clause of Section 73 that that compensation is not to be given for any remote or indirect loss or damage. If even indirect loss or damage is excluded it cannot be conceived how compensation can be awarded when there has been no loss or damage. The decision in *Ismail Sait and Sons v. Wilson and Co.* Air 1919 Mad 1053, also, in my opinion, suffers from the same fallacy. I am in respectful disagreement with the rule laid down in the *Madhya Bharat* and the *Madras* decisions.

7. To my mind the principle is well settled that the measure of damages, normally, in case of breach of contract for sale of goods, is a difference between the contract price and the market price on the date of the breach. It is, however, open to the parties to the contract, to create for themselves any special rights and obligations that they may please, such as providing therein measure of damages in case of breach of contract and specifically exclude the conditions which law generally attaches to contract of sale of goods. In fact Section 62 of the Sale of Goods Act is a statutory recognition of this right in the parties. As was observed by Bench of the Andhra Pradesh High Court in *Dhulipudi Namayya v. Union of India* Air 1958 Andh Pra 533:

"It is well settled that courts will give damages for breach of contract only by way of compensation or loss suffered and not by way of punishment"

The same rule was laid down by a Bench of Bombay High Court in *Sitaram Bindraban Vs. Chiranjilal Brijlal and Others*, , and by a Bench of the Patna High Court in *Jado Prasad v. Jamuna Prasad* Air 1946 Pat 263. In the last noted case it was observed that

"under the terms of Section 73 the compensation is not to be given for any

remote or indirect loss or damage sustained by reason of the breach of contract. The section does not give any cause of action unless and until the damage is actually suffered"

I am in respectful agreement with the observations contained in the decision of Judo Prasad's case Air 1946 Pat 263. If the contrary view was to be taken the provision of Section 73 will become nugatory and a party would be penalised through the other party has suffered no loss. Mr. Brijbans Kishore frankly conceded that Section 74 was not attracted in this case and so I need not comment upon that aspect of the case relied upon by the lower Court.

8. In this view of the matter, though for a different reason, I uphold the decision of the trial Court and dismiss this appeal with costs.

9. Appeal dismissed.