

(1985) 05 AHC CK 0057
In the Allahabad High Court
Case No : Second Appeal No. 926 of 1983

U.P. State Electricity Board, Lucknow

APPELLANT

Vs

Ram Barai Prasad and Another

RESPONDENT

Date of Decision : 13-05-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 10, 41
Transfer of Property Act, 1882 — Section 5, 6

Citation : AIR 1985 All 265

Hon'ble Judges : A. Banerji, J

Bench : Single Bench

Advocate : Sudhir Chandra, for the Appellant; K.K. Misra, V.K.S. Chaudhary and V.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

A. Banerji, J.—This is a second appeal by the plaintiff Rambarai Prasad and another. They filed Suit No. 307 of 1981 in the court of Munsif City, Azamgarh for the relief of declaration that the plaintiffs were entitled to the extension of time limit to lift coal ash under the terms of the agreement dated 23-3-1980 until the remaining 226090 cubic feet of coal ash was lifted, and also prayed for a prohibitory injunction restraining the defendant State Electricity Board from interfering with or creating any hindrance in lifting the aforesaid coal ash. The suit was decreed by the trial court and an appeal filed by the appellant State Electricity Board was dismissed with costs by the judgment dated 11th March, 1983 and the judgment and decree of the trial court were confirmed. The plaintiff respondents were allowed a month's time to remove the remaining quantity of coal ash subject to the payment of price to the appellant as agreed upon under the contract. The appellate court further directed that in case the State Electricity Board evaded receiving the price it is open to the plaintiffs to deposit the same and to remove the coal ash under the directions of the trial court. It is against the above decree that the present appeal has been filed by the State Electricity

Board.

2. Before I refer to the question raised in this appeal, it would be relevant to set down the undisputed facts. The State Electricity Board has a power station at Maunath Bhanjan, district Azamgarh. Certain amount of coal ash is produced by the power station in the course of producing thermal power. This coal ash is disposed of periodically by sale to intending purchasers. The plaintiffs entered into an agreement with the U. P. State Electricity Board to lift coal ash of 6,00,000 cubic feet between 23-3-1980 and 22-3-1981. It was further stipulated that the plaintiffs would lift the entire quantity of 6 lacs cubic feet of coal ash within the above period but not beyond the stipulated period. It appears that during this period they lifted 373910 cubic feet of coal ash. They had still to lift the balance amount of 226090 cubic feet of coal ash when the period expired. The plaintiffs obviously wanted to lift the remaining amount of coal ash but they were not allowed to do so. The plaintiffs alleged that they were prevented from lifting or taking away coal ash during the period of one year by the defendants and their officers who created impediments in doing so. This resulted in lesser amount being lifted by the plaintiff. The plaintiffs' prayer to the defendant to extend the time for lifting the remaining amount of coal ash was not acceded to by the defendant on the ground that the time limit had expired and according to the contract no lifting was permissible after the expiry of the time. The plaintiffs thereupon filed the present suit with the reliefs mentioned above. It may be mentioned here that after the suit had been filed the court below permitted the plaintiffs to lift coal ash but between 7th and 10th April, 1983 another 17809 cubic feet coal ash had been lifted by the plaintiffs. They claimed that they had still to lift another 226090 cubic feet of coal ash.

3. The defendant State Electricity Board took a plea that the contract stipulated the lifting of coal ash within a period of one year and the date had also been clearly fixed under the agreement. The agreement further stipulated that they could not lift any amount of coal ash beyond the stipulated period. Their plea was that the contract had come to an end and the plaintiffs were (not?) entitled to any of the reliefs claimed for. It was further pleaded that they did not have any right under the agreement to lift the remaining amount of coal ash. They denied that any obstacle had been created by the defendants or their officers. It was further pleaded that the suit filed by the plaintiffs was not maintainable.

4. Shri Sudhir Chandra, learned counsel for the defendant appellant, State Electricity Board, raised twofold argument. Firstly, the suit of the plaintiffs was barred by Sections 14 and 41 of the Specific Relief Act, hereinafter referred to as the Act, inasmuch as no injunction could be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. Secondly, the finding on the point that obstruction was created by the defendant was not warranted as not a single instance was given. The finding that the defendant did not permit the plaintiffs to work upon the contract was contrary to fact and law and was not sustainable.

5. Mr. V.K.S. Chaudhary, learned counsel for the respondents urged that the first point now raised by the learned counsel for the appellant was not raised or urged in the courts below. It could not be permitted to be raised in this appeal. The second question was obviously a question of fact and could not be agitated in second appeal. His further contention was that the suit was maintainable. It was a suit for extension of time only and was not barred by the provisions of Section 41 of the Act.

6. Learned counsel further contended that after the due execution of the contract by the parties for the sale of the goods, viz., coal ash, the plaintiffs had acquired a right in the coal ash. It became "potential property" and passed to the buyer as soon as it was available i.e. when it was taken out of a boiler and placed in the dumps. The coal ash became the property of the plaintiffs but remained in the custody of the defendant Board and its servants. The status of the defendant Board was that of a trustee and a suit could always lie against a trustee for breach of trust. Learned counsel further argued that the State Electricity Board is a "State" under Article 12 of the Constitution of India and it is not open to it to discriminate or act arbitrarily to deprive the plaintiffs of the goods. Lastly, it was urged that the defendant Board could not take advantage of its own wrong to deprive the plaintiffs of the goods contracted for sale.

7. While issuing notice on the stay application this court passed an order on 4-5-1983, after hearing learned counsel for the parties, permitting the respondents to lift 208281 cubic feet of coal ash from the site provided they deposit Rs. 1040500/- within a month from the date of the order. It was made clear that in case the amount was not deposited the plaintiffs would not be entitled to lift the coal ash. The amount was to be deposited in the trial court and was not to be disbursed to any party until final orders in the second appeal. In case the appeal was allowed, then the entire amount in deposit was payable to the appellants. In case the appeal was dismissed, the State Electricity Board would be entitled to receive the balance amount after deducting the price of coal ash at the rate of Rs. 255/- per 100 cubic feet. These calculations were made on the basis that price of the coal ash had risen appreciably and almost doubled than the contracted rate of Rs. 255/- per 100 cubic feet as agreed upon on 23-3-1980. A month's time was granted to the respondents to remove the coal ash. The amount was not deposited but extension of time was prayed for and granted from time to time. The matter again came up before this Court on 1-9-1983. It was pointed out in the counter-affidavit filed to the application dated 20-5-1983 that the total amount of coal ash available at the site of the power house was not more than 8,000 cubic feet. The earlier order of 4-5-1983 was passed on the assumption that the requisite amount of coal ash was available on the spot. However it transpired from the affidavit of S.K. Misra, an officer of the appellant, that not more than 8,000 cubic feet of coal ash was on the site. This statement of fact was denied by the plaintiff-respondents and a prayer was made that an Advocate Commissioner be appointed to go to the spot and report. Sri S. P. Mehrotra, Advocate was appointed an Advocate

Commissioner. In an elaborate report he pointed out that the total quantity of coal ash available was 33673 cubic feet. Objections have been filed to the above report by learned counsel for the parties. The factual position is that the amount of coal ash available at the spot is not adequate. Consequently, the lifting of the coal ash whatever is available on the spot, has also remained in abeyance. In the circumstances the appeal was heard at the request of the learned counsel for the parties on the merits.

8. The first point to be considered is whether the suit as filed by the plaintiffs is maintainable or is barred under the provisions of Sections 14 and 41 of the Act. The relevant provisions of Section 14(1) on which reliance has been placed by learned counsel for the appellant, are quoted below :

"14. Contracts not specifically enforceable.-- (1) The following contracts cannot be specifically enforced, namely --

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b).....

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise."

Reference may be made to Section 41(e) of the Act on which reliance was placed to urge that injunction could not be granted at all by the court in the present case. Section 41(e) of the Act reads as follows : --

"41 Injunction when refused.-- An injunction cannot be granted--

(a) to (d).....

(e) to prevent the breach of a contract the performance of which would not be specifically enforced."

9. The contention of the learned counsel for the appellants was that Section 41(e) specifically barred the grant of a relief of injunction in a case where it is meant to prevent the breach of a contract, the performance of which cannot be specifically enforced. It was urged that in the present case the contract is for performance viz., removal of coal ash within a time limit and is not one which can be enforced. It was also urged that in such a contract compensation in money is an adequate relief and that would bar the giving of a relief u/s 41 of the Act. Learned counsel added that even if there was some failure or lapses at the instance of the defendant in plaintiffs' removal of the coal ash the plaintiffs could sue for compensation but their prayer for relief could not be specifically enforced. An argument was raised that coal ash would only be available provided the boiler was fired with coal and the resultant ash was collected and moved to the dumps for removal by the contractor. It would require a continuous duty

which would cast additional duty on the Board and as such the contract became specifically unenforceable.

10. The arguments on the face of it appear attractive but these arguments were never raised in the court below. The pleas on which these arguments were based were not even raised in the written statement. They are being taken here in this court for the first time. Learned counsel for the plaintiff respondents Mr. V. K. S. Chaudhary vehemently urged that the appellant should not be permitted to raise these points. I think the points can be adequately answered by having a reference to other provisions in the Act.

11. One of the pleas taken on behalf of the appellant was that no relief as prayed can be granted in view of the provisions of Section 41 of the Act but the plaintiffs could sue for compensation if the plaintiffs felt that they had not been allowed to lift the coal ash by the defendant Board. Obviously, the relief of compensation had not been asked for in the plaint. It can only be asked for at this stage provided the plaint is permitted to be amended. A question arises whether such a permission be given at this stage. It is well settled that amendment to the plaint can be permitted at any stage of the suit but it is also well settled that it is discretionary. The Court will normally not grant a relief which could have been asked for in the plaint and nothing prevented the plaintiffs from asking the same and where the plaintiff was not prevented by any circumstances from asking for. As seen above, the occasion for asking for compensation in the suit did not arise in the courts below. The point has arisen because the defendants have now taken up the plea of the suit being barred by Section 41 of the Act. It is the defendants' plea that the plaintiffs could seek relief for compensation. The plaintiffs had asked for extension of time to lift the coal ash principally because the plaintiffs were prevented by the servants and agents of the defendants Board from lifting the same. There was no occasion, therefore, for asking such a relief. Should such an amendment be permitted at this stage and in the circumstances mentioned above? In the case of *Rukhmabai v. Laxminarayan* AIR 1960 SC 335 their Lordships were considering the proviso to Section 42 of the Specific Relief Act, 1877. The court observed that though further relief was available but had not been asked for; it should not be allowed for it should have been raised at the earlier stage. Their Lordships noticed that "in the plaint the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court and, therefore, the plaintiff should have asked for a permanent injunction restraining the appellant from interfering with his possession. The appellant had not taken this plea in the written statement nor was there any issue in respect thereof. The judgment of the learned District Judge did not disclose that the appellant raised any such plea. Then their Lordships observed (Para 30) :--

"For the first time the plea based on Section 42 of the Specific Relief Act was raised before the High Court and even then the argument advanced was that the consequential relief should have been one for partition; the High Court rejected

the contention on the ground that the plaintiff, being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the other members of the family. It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act. In the circumstance we are not justified in allowing the appellant to raise the plea before us."

12. The above view expressed by their Lordships is fully applicable in the present case too. The defendant has raised this plea now in the Second Appeal. Had it been raised in the trial court, the plaintiffs would have been justified in praying for amending their plaint and the court would have framed an issue on the point and the parties would have got an opportunity of leading evidence on the question. To direct the plaintiffs now at this stage to amend the plaint would be, in my opinion, neither fair nor just, in the circumstances of the case. A long period has gone by and it is not certain what evidence can be led on the point. It is not certain whether any reliable evidence can be led on the point now. I, therefore, see no reason to accept the contention of the learned counsel for the appellant on the point that the plaintiffs should seek relief for compensation in this case.

13. I may now refer to another aspect of the case. Section 10 of the Act and in particular the Explanation thereto is very material. The property (coal ash) being held by the defendant Board, in this case, as a trustee, was argued by the learned counsel for the respondents. This proposition comes under Clause (ii)(b) of the Explanation to Section 10 of the Act. Apart from the above, the provisions of Clause (ii)(a) of the Explanation are also material. Section 10 reads as follows : --

"10. Cases in which specific performance of contract enforceable.-- Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced : --

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation :-- Unless and until the contrary is proved, the court shall presume :--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is sold by the defendant as the agent or trustee of the plaintiff."

Section 10 provides the general rule that the specific performance of any contract may, in the discretion of the Court, be enforced except as otherwise provided in the Chapter. The Explanation, however, provides an exception to the above rule. It says that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer movable " property can be relieved by compensation in money except in the cases contained in Clauses (a) and (b) that follow. Clause (a) refers to property which is not an ordinary article of commerce, or the property is of special value or interest to the plaintiff, or the property consists of goods which are not easily obtainable in the market.

14. Coal ash is a type of property which is not easily available in the market. It is a waste product, which is available when coal fired boiler is used. Bulk supply of coal ash is available only where there is a Thermal Power Station. In other words, Thermal Power Station using coal to fire its boiler, usually produces substantial quantity of coal ash. Otherwise, it is generally not available in bulk. As such coal ash is not available everywhere. Coal ash thus also comes within the term "where the property is not an ordinary article of commerce." As seen above, it is not easily or ordinarily available item for sale or purchase. It is available in specific areas where coal is used for firing a boiler. In my opinion, Clause (ii)(a) of the Explanation to Section 10 of the Act is fully attracted in the case of coal ash. Consequently, if there is a breach of a contract to transfer coal ash, the plaintiffs cannot be compensated in money in respect thereof. In other words, compensation in money is not an adequate relief to relieve a breach of contract. This would be, therefore, an adequate answer to the argument that the plaintiff can be adequately compensated in money.

15. I may now refer to Clause (b) in the Explanation. It reads : --

"(b) where the property is sold by the defendant as the agent or trustee of the plaintiff."

If the defendant holds the property as the agent or trustee of the plaintiffs, even then the compensation in money is not an adequate relief to relieve the defendant of the breach of contract. A question arises whether the defendant held the coal ash in his capacity as a trustee on behalf of the plaintiffs. Learned counsel for the respondent argued that he did so as a trustee, for the contracted coal ash was potential property. Undoubtedly, the plaintiffs contracted to buy 6 lacs cubic feet of coal ash between 23-3-1980 and 22-3-1981. This amount of

coal ash was not ready for delivery. The contract shows that as and when coal ash becomes available for removal, it was to be removed by the plaintiffs and the time limit fixed for the purpose was one year. If it was all ready and available when the contract was entered into there was no question of granting a year's time to remove the same. What happens in the normal course in a Thermal Power Station is that coal ash gets accumulated daily as the power station consumes coal for firing its boiler. That coal ash can only be removed after it has cooled down. It is then removed to the dumps from where the contractor is supposed to take them away on payment. In such a contract the entire goods may not be in existence or available at the time of the contract but would materialise from time to time within the stipulated period of the contract. Nevertheless it was a contract for the sale of 6 lakhs cubic feet of coal ash, which is more or less specific goods and a natural produce (waste product in a Thermal Power Station). It was, therefore, a contract for, what is termed as a potential property, A property which is not in existence on the day of the contract but would be available in due course of time becomes potential property and a sale in respect of such a property is established by contract. The title in such property passes unto the purchaser although it is held by the seller in the capacity of a trustee. The doctrine of "potential existence" came in for interpretation in the United States of America in the case of O'Hare v. Peacock Dairies, Cal App 79 P. 2d 433, 440, and it was laid down :--

"Things which are the natural product or the expected increase of something already belonging to a seller have a potential existence and may be the subject of a sale."

16. In an English case of Reeves v. Barlow (1884) 12 QBD 436, it was laid down that the distinction seems to be based on the ground that the goods having a potential existence are more or less specific goods; there is no difficulty as to their identification, as the things out of which they grown are clearly identified,

17. I am, therefore, of the view that the coal ash in the present case was in the nature of potential goods and that it would be fully covered under Clause (ii) (b) of the Explanation to Section 10 of the Act. Consequently, a suit for compensation would not be an adequate relief in respect thereof;

18. It would thus be evident that the provisions of Section 41 of the Act would not be a bar in seeking a relief in the present case. The plaintiffs had asked for two reliefs. First, for extension of time to lift the coal ash and secondly, for a prohibitory injunction restraining the Board from interfering with their lifting the remaining coal ash, I am of the view that the plaintiffs were entitled to both the reliefs in the circumstances of the case.

19. There is a clear finding in this case that the servants of the defendant Board had interfered with the lifting of the coal ash within the period of one year by the plaintiffs. Learned counsel for the appellant sought to challenge this finding but the finding of fact arrived at by the court below is not liable to challenge in this

second appeal. Nothing could be shown that the above finding was vitiated by any error of law. The finding that the servant of the defendant Board had interfered with the plaintiff's lifting of the coal ash must, therefore, stand.

20. Learned counsel for the appellant vehemently contended that the price of the coal ash had gone up substantially meanwhile and it is the difference in the price which has actuated the plaintiffs to file the suit. It is not necessary for this court to go into this question as to what has moved them to file the suit but from the facts, as seen above it is clear that the plaintiffs were prevented from lifting the coal ash within the currency of the contract and they had no other option but to file the present suit. As seen above, the plaintiffs could not be compensated in money for the loss suffered by them. The only option, therefore, available is to decree the suit so that the plaintiffs may lift the remaining coal ash. It is admitted before me during the course of hearing that the Thermal Power Station is in operation and this means that coal ash is being produced at present. For the reasons indicated above, all the contentions raised on behalf of the appellant fail and the judgment and decree of the court below must be affirmed.

21. In the result, therefore, the appeal fails and is dismissed with costs. The plaintiff-respondents are granted a month's time from the date of service on the appellants a copy of the judgment to reverse (sic) the remaining amount of the coal ash subject to payment by its price to the appellants as agreed upon in the contract.