

Man Singh Vs. Khazan Singh

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Court : Rajasthan

Decided On : Oct-10-1960

Reported in : AIR1961Raj277

Judge : C.B. Bhargava, J.

Acts : [Contract Act, 1872](#) - Sections 56 and 57; Rajasthan Removal of Trees (Regulation) Ordinance, 1949

Appeal No. : First Appeal No. 69 of 1955

Appellant : Man Singh

Respondent : Khazan Singh

Advocate for Def. : B.D. Sharma, Adv.

Advocate for Pet/Ap. : P.C. Bhandari, Adv.

Judgement :

C.B. Bhargava, J.

1. This is an appeal by the defendant against the judgment and decree of the learned Senior Civil Judge, Gangapur dated 25th July, 1955 decreeing the plaintiff's suit for a sum of Rs. 2500/- with proportionate costs and interest pendente lite and future at 6 per cent p. a.

2. The suit was filed for recovery of Rs. 5100/- on the ground that the defendant gave to the plaintiff a contract for cutting Babool trees from lands belonging to Thikana Akra for a period of three years in lieu of Rs. 2500/-. The terms of the contract were reduced to writing and are contained in the patta Ex. 4 dated 10th July, 1948. It was for the period commencing from 7th July, 1948 to 7th July, 1951. Rs. 2500/- were to be paid to the defendant in the following manner:

Rs. 1000/- at the commencement of the contract

Rs. 1000/- on 7th July, 1949.

Rs. 500/- on 7th January, 1950. In case the amounts were not paid on the stipulated dates plaintiff was to pay interest at the rate of 12 per cent p.a. from the date of default.

3. Plaintiff's case was that he had paid Rs. 1000/- on 7th July, 1948, Rs. 1000/- on 14th August, 1949 and Rs. 200/- on 24th May, 1950 and credit for Rs. 110/- was to be given for 'Loom Patri' (leaves of the Babool trees); but before the expiry of the term of the contract an Ordinance prohibiting the cutting of trees without licence came into force on 21st June, 1949. Thereafter he requested the defendant to obtain the required permission but the defendant declined to do so and asked the plaintiff to obtain the same and agreed to pay whatever expenses were incurred by the plaintiff in that connection.

Plaintiff accordingly applied for permission which was refused by the Government on 29th May, 1953 (Ex. 7) and spent Rs. 300/- which he is also entitled to recover from the defendant as per his agreement. He further claimed Rs. 1200/- as interest on the amount advanced by him to the defendant. A further claim for Rs. 1290/- was made in respect of the profits which the plaintiff might have made if he had cut the trees for full three years. Thus the suit was filed for recovery of Rs. 5100/- against the defendant.

The defendant admitted the contract and also the receipt of Rs. 1000/- on 7th July, 1948. However, the receipt of other items was denied by him and further denied his liability to pay any amount for the expenses incurred by the plaintiff in obtaining

permission from the authorities concerned, or for the amount of interest or profits which the plaintiff had claimed. He raised a specific plea in the written statement that the plaintiff under the contract had cut the trees and was therefore, not entitled to recover any money from the defendant.

Substantially the plaintiff's case was that there had been a frustration of the contract as after its circumstances came into existence which made its further performance impossible. Cutting of trees without licence became unlawful under the provisions of the Rajasthan Removal of Trees (Regulation) Ordinance (No. 8 of 1949) (hereinafter called the Ordinance). Section 4 of the Ordinance provided with regard to the cutting of trees by the land holder and tenants. Section 5 provided that:

'Except as provided in Section 4 no trees shall be removed except under and in accordance with a licence'

and these licences were to be obtained on an application to the Sub-Divisional Officer Or other officer of equal status having jurisdiction for the issue of a licence in that behalf. Contravention of the provisions of this Ordinance were made punishable under Section 6 of the Ordinance. The learned Senior Civil Judge framed the following issues:

1. Is the suit within limitation?
2. Is the patta Ex. 4 inadmissible in evidence?
3. Whether the plaintiff in addition to the payment of Rs. 1000/- dated 7-7-48 has paid Rs. 1000/- to the defendant on 14th August, 1949 and Rs. 200/- on 24-5-50 and whether he could get Rs. 110/- for Loom Patri. Whether the plaintiff can recover the total sum of Rs. 2310/- from the defendant?
4. Whether the plaintiff has spent the sum of Rs. 300/- in prosecuting the application for obtaining the licence to cut the trees and whether he can get this amount from the defendant?

5. Whether the plaintiff can get Rs. 1200/- as interest at Re. 1/- per cent mensum from the defendant?
6. Whether the plaintiff can get Rs. 1290/- as profits from the defendant?
7. Is the Rajasthan Government a necessary party to the suit?
8. What will be the relief?

4. Issues Nos. 1 and 2 were found in favour of the plaintiff. On issue No. 3 the finding was that the plaintiff had paid Rs. 1000/- on 14th August, 1949 and Rs. 200/- on 24th May, 1950 to the defendant. As regards Rs. 110/- the finding was against the plaintiff. Issue No. 4 was found in favour of the plaintiff. Issues Nos. 5 and 8 were found against the plaintiff. Issue No. 7 was found against the defendant. As a result of these findings the plaintiff's suit for recovery of Rs. 2500/- was decreed against the defendant. Against this part of the decree the defendant has come in appeal and the plaintiff has also filed cross-objections with regard to Rs. 1200/- claimed by him as interest on the amount paid by him to the defendant.

5. Learned counsel for the appellant has contended that the provisions of Sections 56 and 65 of the Contract Act are not applicable in this case. In the alternative his contention is that as the contract had been partly performed and the plaintiff had taken advantage under it he is not entitled to the refund of the amounts paid by him to the defendant. In this connection he has urged that the contract remained in force till 21st June, 1949 and during this period the plaintiff had cut the trees and taken advantage under the contract and unless he shows that the advantage taken by him is not to the extent of the moneys advanced by him he is not entitled to any relief in this case.

With regard to the payment of Rs. 1000/-, Rs. 200/- and Rs. 300/- his contention is that the payment of the first two items has not been proved and with regard to third item the contention is that the agreement on which the claim is founded has not been proved and at any rate the evidence on record is not sufficient to show that the plaintiff had incurred Rs. 300/- for obtaining a licence for cutting trees.

6. The first question that arises for determination is whether after the coming into force of the Ordinance which required the obtaining of licence as a necessary condition for cutting trees, the performance of the contract in question became impossible. Section 56 runs thus:

'An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.'

7. Under the first clause the contract from its very inception is impossible of performance while under the second clause the contract at the time it is made is quite valid but subsequently by reason of some supervening event becomes impossible or unlawful. Therefore, Section 50 applies also to cases where a 'contract has become impossible of performance on account of some subsequent event which was not under the contemplation of the parties at the time they entered into it.

Whether the contract had become impossible of performance can be determined with reference to the terms of the contract and the supervening circumstances. If the supervening circumstances are such which were within the contemplation of the parties at the time of the contract or which could reasonably be within their contemplation it would take the case out of the purview of Section 56. The true scope and effect of Section 56 has been explained by their Lordships of the Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.*, AIR 1954 SC 44.

Learned counsel's contention is that the plaintiff is not entitled to the recovery of amounts paid by him before the performance of the contract became impossible which in this case happened on 29th May, 1953 when the plaintiff's application for licence was finally refused by the Government. In this connection he has referred to *Chandler v. Webster*, 1904-1 KB 493, *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, 1943 AC 32 and *V. R. Lakshmanan Chettiar v. S. K. Kamarajendara Kadirveluswami*, AIR 1955 Mad 606.

8. In England prior to the decision in *Fibrosa's* case, 1943 AC 32 the view which prevailed and was taken in *Chandler's* case, 1904-1 KB 493 was that the parties to the frustrated contract are relieved from their further obligation under it and any amounts advanced before frustration are not recoverable and the loss arising from frustration or the contract must lie where it falls. This view was overruled in *Fibrosa's* case, 1943 AC 32. In that case the respondents, as English Company, agreed in July, 1939, to sell and to deliver within three or four months certain machinery to a Polish Company in Gdynia. The contract price was 4,800, of which 1,600 was payable in advance.

Great Britain declared war on Germany on September 3rd and on September 23rd the Germans occupied Gdynia. The contract was therefore, frustrated. On September 7th the London agent of the Polish company requested the return of 1,000 which had been paid in July to the respondents. The request was refused on the ground that 'considerable work' had already been done on the machinery.' The House of Lords held in these circumstances that the amount was recoverable in quasi-contract. After the decision of this case as it did not remove every hardship, there came in England an Act known as Law Reform (Frustrated Contracts) Act, 1943. Section 1(2) provided in substance that:

'All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom (the sums were paid, and, in the case of sums so payable, cease to be so payable.'

Section 1(3) provided that

'where a contract has become impossible of performance or been otherwise frustrated and has in consequence been discharged, then, if one contracting party has obtained a valuable benefit before the time of discharge by reason of anything done in performance of the contract by the other party, there shall be recoverable from the party so benefited such sum as the Court considers just.'

It will thus appear from the provisions of this Act that the sums paid before the frustrated event, are now also recoverable. These English cases do not therefore, help the appellant in any way. In the present case the contract when it was made was enforceable and the parties could not have contemplated the contingency which subsequently happened i.e., the prohibition of the cutting of trees under the Ordinance. To such circumstances the provisions of Section 56 Clause (2) squarely apply and under the provisions of Section 65 of the Contract Act the party who has taken advantage under the contract is bound to restore it or to make compensation for it to the person from whom he received.

Mr. Bhandari however, contends that there was a partial performance of the contract from 7th July, 1948 to 21st June, 1949 till the Ordinance came into force and therefore, the plaintiff cannot claim any sum which is paid to the defendant. In this connection as mentioned, above he has relied upon V. R. Lakshmanan Chettiar's case, AIR 1955 Mad 606. The facts of that case were that under an agreement between A and B, A obtained a licence from B for cutting trees from B's forest for the purpose of manufacturing coal.

A agreed to pay a certain rate per bag of coal removed and paid up a certain sum as an advance towards which the price of the bags was to be adjusted. Afterwards A was prohibited by a notice under Madras Act 18 of 1946 from the Collector, from felling the trees without previous permission. A applied for such permission but it was refused. A thereupon, sued B for refund of the balance of advance paid to B after deducting the price of the bags of coal removed from the forest. The learned Judge on these facts held that

'as the contract had been performed in part the principle of compensation on account of frustration of contract could not come in aid and Section 65 Contract Act could not be invoked also for refund of the balance.'

The learned Judge in coming to the conclusion placed reliance on the observations made by the various Law Lords at pages 46, 49, 51, 52 and 56 in Fibrosa's case, 1943 AC 32 and Sankaran v. District Board, Malabar, AIR 1934 Mad 85, President District Board South Kanara v. Santhappa Naick, AIR 1925 Mad 907, and Secy. of State v. Tatya Saheb, AIR 1932 Bom 386.

9. I have already given the facts of Fibrosa's case, 1943 A C 32 and it is to be noted that the suit for the refund of 1000 which had been paid was decreed in that case. In Sankaran's case, AIR 1934 Mad 85 the District Board had sued the licencees of the toll-gates for the balance of the rents. On behalf of the licencees it was contended that because of heavy floods the bridge had broken down resulting in the suspension of the traffic and therefore, the contract became incapable of performance.

The learned Judges in that case found on a consideration of the terms of the contract that the destruction of the bridge by floods was not such an event which could not have been foreseen and it was observed that a temporary suspension of traffic owing to the breakdown of bridge must therefore, clearly fall among the risks contemplated by the parties. Further in that case the contract by the destruction of the bridge had not become completely inexecutable.

The contractors continued to discharge their functions upto the end of the year. Even during the period when the bridges were down the evidence showed that certain amount of traffic was paying the toll. In such circumstances it cannot be said that the principle of frustration was applicable to the facts of that case because in the first instance the supervening event was such as must have been within the contemplation of the parties and secondly the contract had not become impossible of performance,

In President of District Board, South Kanara's case, AIR 1925 Mad 907, the plaintiffs purchased from a District Board the right to collect tolls at certain toll gates. Owing to a Government Ordinance the traffic of food grains was stopped and plaintiffs suffered loss. The traffic of food grains was not the only traffic that passed the toll gates. It was held in these circumstances that

'when a portion of the contract becomes Incapable of performance, the contract does not become void or unenforceable.'

This was again not a case of frustration of contract. In AIR 1932 Bom 386 the facts were that the money was paid to a person under the Land Acquisition proceedings which were started by the Government under a mistake. It was held that

'the money paid by the Government to the claimant under the order of the Court in land acquisition proceedings cannot be recovered on the ground that the property acquired belonged to Government and that proceedings for land acquisition were started by Government through mistake in ignorance of its own title'.

This case has, therefore, no application to the facts of this case. All the cases which were relied upon by the learned Judge in S. K. Kamarajendara's case, AIR 1955 Mad 606 have no application to the facts of this case and if I may say so with respect that in that case the supervening event was such which must have been foreseen by the contracting parties at the time as the Madras Act (Act No. 18 of 1846) which prohibited the cutting of the trees without the permission of the Collector, was already in force.

In my opinion this case also is not helpful to the appellant. The case in point is Govindram Seksaria A fiirm v. Edward Radbone, AIR 1948 PC 56. In that case 'A, a Gernman Company, entered into a contract for sale of certain machinerie with B, goods to be delivered c.i.f. at Bombay. In pursuance of the contract a greater part of the machinery was delivered to B in Bombay in 1939. The invoice value of this part of the machinery delivered represented approximately nine-tenths of the total contract price. As against this the vendor had received certain payments towards the contract price. On the outbreak of war in 1939, the contract could not be completed and, therefore, it became void within the meaning of Section 65. Therefore, vendor A sued vendee B for recovery of a certain sum of money as compensation for advantage received under contract being the difference between the value of the goods received by B under the contract and the amount which had been paid to him by B. The defendant denied that he had received any advantage under the contract but on the contrary alleged that the plaintiff had received an 'advantage ' It was held that :

'Under Section 65 each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale and the plaintiff could not recover any sum unless he proved that the value of the 'advantage' which B had received under the contract i.e., of the machinery which had been delivered to B was greater than the sum received by him under the contract.'

This case clearly lays down the principle that if after the execution of the contract the performance of the contract becomes impossible by any supervening event then each party is bound to restore to the other any advantage which he had taken under the contract. In this case A had supplied machinery to B while B had made a part payment towards it. Applying the principles underlying Sections 56 and 35 of the Contract Act to the facts of this case it is clear that if the plaintiff could not get licence for cutting trees from the Government the contract became impossible of performance and each party became bound to restore the benefit which he had taken under it. The plaintiff's suit for refund of the amounts paid was, therefore, maintainable.

10. The next question is whether the finding regarding the payment of Rs. 1000/- on 14th August, 1949 and Rs. 200/- on 24th May, 1950, is incorrect. (After discussion of evidence His Lordship held that the finding of the learned Senior Civil Judge in this regard too was correct.)

11. The last item for which a decree has been passed in favour of the plaintiff is of Rs. 300/-. The allegation of the plaintiff in this regard in the plaint is quite vague and so is the evidence. It was not stated in the plaint as to when the agreement regarding the payment of the expenses for obtaining the licence was made with the defendant. It is generally said that after the coming into force of the Ordinance he asked the defendant to obtain a licence for him.

Thereupon he told him that he should himself obtain the licence and the necessary expenses incurred by the defendant would be paid. Obviously this amount was not paid under the contract. It was an independent contract and as I have observed above the allegations are not definite. I am therefore, unable to hold that there was an agreement between the parties that the expenses incurred by the plaintiff for

obtaining licence would be paid by the defendant.

As regards the amount spent I find that besides the evidence of Dwarka Prasad to whom Rs. 100/-are said to have been paid no other witness has been produced to corroborate the plaintiffs statement. Even if I were to hold that the defendant had agreed to bear these expenses the plaintiff would not be entitled to get more than Rs. 110/-which he had paid to Shri Dwarka Prasad and his clerk. For the aforesaid reasons the plaintiff is not entitled to get Rs. 300/- from the defendant.

In view of these findings the plaintiff is entitled to get Rs. 2200/- from the defendant. But before any relief could be granted to him it was incumbent upon him to show that on his part he had not taken any advantage under the contract. As stated earlier the contract was capable of performance till 21st June, 1949 i.e., for a period of about 11 1/2 months. It was not alleged in the plaint that during this period the plaintiff had not cut any trees.

In paragraph 14 of the written statement it was stated by the defendant that as the plaintiff had cut the trees he was not entitled to any relief. Whether the trees had been cut by the plaintiff during this period had an important bearing on the case. Under Section 65 each party who has taken advantage under the contract is bound to restore it to the other from whom he had taken that advantage

It is not only the defendant who has received the money from the plaintiff but the plaintiff also is bound to restore the advantage if he has taken any under the contract. In the Privy Council case, AIR 1948 PC 56 referred to above the plaintiff's suit was dismissed as the plaintiff failed to prove that the machinery delivered was worth more than the sum he had received under the contract.

In the present case it was not alleged in the plaint that the plaintiff had not cut any trees or that he had not taken any advantage under the contract. In the written statement the point specifically raised was that the plaintiff had cut trees and was therefore, not entitled to any relief. No issue was framed on this point by the trial court although to some of the plaintiff's witnesses in cross-examination questions about the cutting of trees were put

Defendant also examined two witnesses in proof of this fact and the learned Senior Civil Judge has given a finding that till the coming into force of the ordinance the plaintiff had not cut any trees from the theka lands, but I find it difficult to accept that finding on the present state of evidence, Plaintiff has not shown any reason as to why he had not exercised his rights under the contract for a period of 11 1/2 months.

Apparently there seems to be no reason why he did not cut any trees until the prohibition came. As there was no issue framed by the court below on this point the parties had no fair chance of leading evidence on this point and I cannot accept the finding given by the learned Senior Civil Judge without a full trial on this point. I consider it proper that an issue on this question be referred to the trial court for trial. The following issue is, therefore, framed :

'Whether the plaintiff had cut any trees from the Theka lands. If so what is the amount of benefit he has taken under the contract?'

The parties will be entitled to adduce evidence in proof of this issue and the learned Senior Civil-Judge after taking evidence of the parties will record his finding which along with the evidence should be returned to this Court by 15th December, 1960. The case will be put up for hearing after the evidence and the finding on the new issue is received.

12. As to the cross-objections, learned counsel for the respondent does not wish to press them.

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