

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

OSA NO.7 Of 1999.

Reserved on : 8/12/2006.

Date of decision: 29th December, 2006.

Ram Singh.

Vs.

.....Appellant

H.P. State Forest Corporation Ltd and another.

..... Respondents.

Coram

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting?

For the appellant: Mr. R.K. Sharma, Advocate.

For the respondents: Mr. Neel Kamal Sood, Advocate.

Surinder Singh, J :

1. The instant original side appeal has been filed by the appellant feeling aggrieved and dissatisfied by the judgment and decree passed by the Learned Single Judge in Civil Suit No.18 of 1990 dated 31st July, 1998, whereby the suit filed by the respondents was decreed.

2. In brief, the facts giving rise to the instant appeal are that the respondents (hereinafter called the plaintiffs) had filed a suit for recovery against the appellant (hereinafter called the defendant) to the tune of Rs.11,24,282/-, on the ground that the tender notices were invited by the plaintiffs for various Khad floating, stacking and carriage of timber from the launching depot in Chanju Nullaha to be collected at the road side depot Bhaled in respect of Lot No.3/82-84-(Saphan) Churah Forest Division.

Whether reporters of local Papers may be allowed to see the judgment?

3. It is the admitted case of the parties that tender of the defendant at the rate of Rs.11.75 per scant was approved and accepted by the plaintiffs. Thus, an agreement was executed inter se the parties on 24.10.1986. The work of the delivery of launching depot was to be completed on 31st May, 1987 as per its size and species. It was the case of the plaintiffs that 18487 scants were delivered to the defendant for launching in the river, but only 16735 scants were delivered. Thus there was shortage of 392.143 cubic meters in volume and a loss percentage came to the tune of 22.19 percent. As per the agreement, the permissible loss of two percent was deducted and the defendant was liable for the loss of timber under transit at the rate of Rs.2100/- per cubic meter. Thus, the plaintiffs were alleged to have suffered the loss on account of the short delivery to the extent of Rs.7, 49,286/- which was recoverable from the defendant with interest at the rate of 18 per cent per annum w.e.f. 1.6.1987 onwards which interest comes to Rs.3,49,188/- and the plaintiffs also prayed for future interest at the same rate and further prayed for the recovery of Rs.1,97,000/- on account of work advanced w.e.f/ January, 1987 to June, 1987 and in all under the various heads indicated in para-15 of the plaint sought was filed for recovery of Rs.11,24,282/- with interest at the rate of 18 percent till its realization.

4. The defendant though admitted the execution of the agreement, but by his written statement offered the resistance to the claim alleged by the plaintiffs, on the grounds that he being an illiterate did not know the contents of the agreement, nor it was explained in Hindi. He also denied that 18487 scants were ever delivered to him for floating in the river, but according to him whatever timber were entrusted to him, the same was properly carried and the entire timber was stacked at its destination under the supervision of the plaintiffs. The loss as alleged to have

occurred was due to the snow fall, glaciers and heavy floods and further according to the defendant, most of the timber had become rotten and its counting was not possible. The agreement was with respect to the estimated timber with no exact and specified quantity. It has also been averred that the defendant had carried out the work satisfactorily, without any negligence on his part. Had there been any negligence, it was within the power of plaintiffs to impose a fine of Rs.1,000/- at the most. It was also the case of the defendant that during the floating of the timber in the river, there was constant supervision of the plaintiffs and he was not responsible for any loss. Inter-alia the point of limitation was also taken up in the preliminary objections and prayed for the dismissal of the suit.

5. On the pleadings of the parties, the learned Single Judge framed the following issues to resolve the controversy:

1. Whether the suit is within limitation? OPP.
2. Whether only an estimated number of scants and not the exact number, were put in Ghal for floating by the defendant as alleged? If so, its effect? OPD.
3. Whether the defendant was a Mate and his job was only to supply labour and he was not liable for any loss of timber as alleged? If so, its effect ? OPD.
4. Whether there was no valid agreement between the parties? OPD
5. To what amount the plaintiffs are entitled to recover from the defendant ? OPP.
- 5-A. Whether the loss of timber, if any, is on account of the floods, as alleged in the plaint ? OPP.
6. Relief.

6. In order to prove their case, plaintiffs examined Shri D.S. Saini, the then Divisional Manager (PW1), Shri P.L. Thakur, retired Divisional Manager (PW2), Shri Rajender Singh, Assistant Manager (PW3) and Shri S.K. Sharma, Divisional Manager (PW4). On the other hand, the

defendant examined himself as DW1 and also produced Shri Roshan Lal (DW2) and Shri Gian Chand (DW3). Upon hearing the parties and after having gone through the record, the learned Single Judge held the suit within limitation and decided issue No.1 in favour of the plaintiffs and further held that defendant could not prove that the loss of timber was due to flood etc, thus, the plaintiffs were entitled to recover the loss caused as calculated by them from the defendant, as per the agreement which was valid. However, the learned Judge did not agree with the contention raised by the defendant that he was made for supply of labour as alleged by him. Thus, the suit was decreed to the extent as claimed by the plaintiffs with simple interest at the rate of 9% per annum till its realization, provided the defendant pays an amount of Rs. 3 lacs within six months from the date of passing the decree and remaining amount in six monthly instalments, of equal amount spreading for a further period of two and half years. In case of single default or if the amount is not paid as specified above, the plaintiffs were held entitled to claim the entire decretal amount at once and also entitled to interest at the rate of 12% per annum from the date it became due till realization. The cost of the suit was quantified at Rs.15,000/- to be shared by the parties equally and the defendant was held liable for half of the share of the cost alongwith payment of Rs.3 lacs, as aforesaid.

7. Having felt aggrieved and dissatisfied by the impugned judgment and decree passed by the learned Single Judge, the instant appeal has been filed by the defendant, on the grounds that the learned Single Judge failed to appreciate the evidence properly and wrongly relied upon evidence of the plaintiffs. Further the learned Single Judge did also not appreciate the evidence of PW2 in the right perspective as the timber entrusted to the defendant was neither measured nor counted and it was

based upon the approximation, which was floated by him in the river under the supervision of plaintiffs properly. Thus, he was not responsible for any loss and further that connected suits were dismissed on limitation and the same point was involved in this case also. Therefore, appeal deserves to be accepted.

8. We have heard the learned counsel for the parties carefully and have reappraised the evidence on record.

9. Shri R.K. Sharma, learned counsel for the defendant has forcefully argued that point of limitation raised by the defendant was not properly appreciated by the learned Single Judge and further that the scants which were entrusted to the defendant were only on estimation without any measurement. The entire Ghal was floated by the defendant under the supervision of the plaintiffs and the entire timber was stacked at the end point. Deficiency, if any, was attributable to the natural calamities as proved on record. Therefore, the judgment and decree deserves to be set-aside.

10. On the other hand, Mr. Neel Kamal Sood, learned counsel for the plaintiffs has vehemently argued that the agreement dated 24.6.1987 inter se the parties stands admitted. There has been a reference of the scants to be transported in the agreement and even the receipt Ext.DW1/A with respect to timber entrusted to him was proved on record showing delivery of 18407 scants to the defendant for its floating. Since less scants were delivered back to the plaintiff, therefore, as per the terms and conditions of the agreement, defendant was liable to pay for the shortages as calculated. While supporting the impugned judgment and decree passed by the learned Single Judge, Shri Sood, prays for dismissal of the appeal.

11. To appreciate the rival contention of the parties, it shall be relevant to refer the oral as well as documentary evidence, in brief wherever it is necessary. Regarding limitation, we are of the opinion that the suit is within limitation for the reason that the agreement Ext.PW1/E was executed on 24.10.1986 and the work was required to be completed by 31.5.1987. The suit was filed on 23.1.1990 i.e. within 3 years. Therefore, the suit is held within limitation. Thus the finding on issue No.1 are hereby affirmed. On the evidence putforth we also affirm the findings on issue No.3 & 4 as the agreement in question is legal and a valid document and the defendant was not a labour supply mate as claimed by him. As far as other issues are concerned, the admitted facts are that the plaintiffs-Corporation had invited the tender (Ext.PW1/A) with respect to floating of timber of lot No.3/82-84 Churah in the year 1986-87. The approximate quantity of timber to be exported by floating was 18000 scants. The tender submitted by the defendant Ext.PW1/B was the lowest, as such, it was accepted and the defendant was informed about it vide letter Ext.PW1/D. Pursuant to that an agreement Ext.PW1/E was executed on 24th day of October, 1986. The security of Rs.10,000/- was also deposited by the defendant with the plaintiffs. The period of this agreement was w.e.f. 24.10.1986 to 31.5.1987. The time was essence of the agreement aforesaid and in case of making any default by the defendant in executing the work allotted to him, the liberty was given to the plaintiffs to cancel the indenture and confiscate all the sum/ dues, whatever were payable under it. Vide Annexure-I, the Khad floating work commenced with effect from 24.10.1986 which was to proceed down hill, upto confluence of Bhaled road side. The document Annexure-II shows that 18000 scants were entrusted to the defendant for its floating in the Khad upto the destination at the rate of Rs.11.75 per scant which also included the

catching at Bhaled and stacking as aforesaid. Ext. DW1/A is a letter whereby the defendant is alleged to have received 18487 scants, but it is surprising that this letter was only put to the defendant in his cross-examination to which the defendant as DW-1 has stated that he being illiterate did not know on what writing, his signatures were obtained. The onus to prove this document heavily lay upon the plaintiffs and it was incumbent upon the plaintiff to examine its scribe to prove its contents, merely marking this document as exhibit does not prove its contents. Therefore, this document can not be taken as a proof for handing over 18487 scants to the defendant as alleged. Thus, there is no consistency in the evidence of the plaintiffs. There has been variation regarding the number of scants and its volume. Therefore, in our opinion, the agreement and the other evidence discussed above also do not prove the exact number of timber and volume, delivered by the plaintiffs to the defendant for transporting it by river.

Now coming to the evidence of handing over the timber back to the appellants their case as pleaded was that the defendant had delivered less timber to them i.e. 16735 scants equal to 1374.859 cubic meters. The defendant as per the agreement was entitled to the benefit of deduction upto 2% in total volume. Thus the plaintiffs suffered a loss of 354 cubic meters. Now it is to be seen whether the plaintiffs have been able to prove their case by leading a cogent evidence with respect to the short delivery. Though some short fall has been admitted by the defendant but according to him it was owing to the natural calamities like floods, glaciers to which he substantiated in his statement as DW-1. In addition, PW-1 in the last para of his cross-examination has also stated that the short fall could be due to floods, even DWs 2 and 3 have corroborated this version. Mr. P.L. Thakur (PW2) has stated that Assistant Manager would

be in a better position to tell above the floods. Whereas PW3 Rajinder Singh Assistant Manager says he was not aware about it. Therefore, on the examination of the evidence of both the parties, the version propounded by the defendant becomes believable. It was the responsibility of the contractor all through to take the timber till its destination but if the loss is due to the natural calamities in that event the agreement does not saddle the contractor for any such loss. Further the loss, as claimed by the plaintiffs is also not proved as they have failed to establish when and by whom the copy of statement Ex.PW2/1 showing less delivery of the timber to the plaintiffs was prepared, not even a single word has been whispered by any of the witness that it was prepared in discharge of their official duty to draw the presumption under Section 114 of the Evidence Act. Further, the Ghal account Ex.PW-3/1 bears the date 20.3.1988. The work of Khad floating was required to be completed by 31.5.1987 as per the agreement Ex.PW-1/E, whereas, Ghal account aforesaid is sought to be proved by PW-2. P L Thakur who was posted there w.e.f. August, 1988 i.e. much after the completion of the work. It is also surprising to note that the plaintiffs have based its claim regarding shortage of timber on the basis of document Ext.PW2/1 which has been denied by the defendant. This was stated to have been prepared by the Assistant Manager Shri R.S. Panwar, as deposed by PW2 Shri P.L.Thakur. Neither Shri R.S. Panwar has been examined nor any record was produced before the learned Single Judge to prove the basis for preparing it and pin point that the entries made therein were correct. Even this was not put to the Divisional Manager (PW 4) to testify that the entries with respect to lot No.3-82/84 Churah were correct and based upon some official record maintained by the Forest Corporation. It is also not clear from this document when and on which date it was prepared by the plaintiffs.

However, this is the only document put forth in order to fasten the liability on the defendant which is falling short of the requisite standard of proof.

So, on the critical analysis and reappraisal of the evidence of the parties, we are not in agreement with the findings arrived at by the learned Single Judge to the effect that the defendant had delivered back 16855 scants to the plaintiffs as against 18487 at the terminating point, as handing and taking over were based purely upon the estimated quantity. If there had been any shortage it was attributable to the natural calamities as discussed above as the defendant has been able to prove his case by preponderance of probabilities. Therefore, the findings on Issue Nos.2, 5 and 5-A are reversed and we decide the same in favour of the defendant and against the plaintiffs.

No other point pressed.

Consequent upon the aforesaid findings and reasoning therefor, we hereby set aside the impugned judgment and decree passed by the learned Single Judge in Civil Suit No.18 of 1990, and the suit of the plaintiffs –Corporation stands dismissed. Accordingly, the appeal is allowed. The parties are left to bear their own costs.

(Deepak Gupta)
Judge

December 29th, 2006.
(Pds)

(Surinder Singh)
Judge.