

IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

Civil Suit No. 65 of 2001.

Judgment reserved on 17th March, 2008.

Date of Decision: 31st March, 2008.

Rajeev Chopra

.....Plaintiff.

Versus

The State of H.P. and others.

.....Defendants.

Coram

The Hon'ble Mr. Justice Dev Darshan Sud, Judge.

Whether approved for reporting?¹

For the Petitioner: Mr. J.S. Bhogal, Sr. Advocate, with Mr. Suneet Goel, Advocate.

For the Respondents: Ms. Ruma Kaushik, Addl. Advocate General.

Dev Darshan Sud, Judge.

The plaintiff has approached this court praying for a decree declaring the order dated 29.5.2000/14.6.2000 imposing compensation against the plaintiff for a sum of Rs. 13,49,176/- for delayed completion of the work, as being illegal and void. A decree for permanent prohibitory injunction restraining defendants from recovering this amount and costs of this suit has been prayed for.

¹ Whether Reporters of Local Papers may be allowed to see the judgment?

The plaintiff pleads that he is A-Class contractor enlisted with the Himachal Pradesh Public Works Department. He entered into a contract with defendant No.1 for construction of Nirman Bhawan at Shimla. Formal agreement in terms of Article 299 of the Constitution of India was entered into between the plaintiff and the defendant.

According to the case pleaded by the plaintiff, defendant No. 1 was duty bound to have provided the site, designs, drawings and instructions for the execution of the work. The plaintiff has urged that the defendants were in breach of the mandatory duties imposed upon it by the contract Ext. DW-2/A. So much so, even though the area where the construction was to be carried out was within the Municipal Limits of Shimla and the Shimla Planning area, permission under the H.P. Town and Country Planning Act was not granted to the defendant and the sanctioned site plan including the drawings for construction were not supplied to the plaintiff. It is averred that the contract was changed midstream and instead the nine storeys structure required by the agreement, only a five storeys building was required to be built. Although plaintiff had represented on these facts, the defendants without any authority and law and without just determination of facts, taking resort to Clause 2 of the contract, proceeded to impose the penalty which is illegal in law.

In the written statement, defendants have denied the allegations of the plaintiff. Usual preliminary objections regarding

the plaint lacks material facts and particulars and that the suit is not maintainable have been taken without in any manner enumerating or pleading those facts which, according to the defendant would be a bar in the way of the plaintiff seeking the reliefs as prayed for. The status of the plaintiff and execution of the agreement is admitted. However, other averments have been denied. The defendants pleaded that the work was awarded to the plaintiff on 2.5.1997 and the drawings, designs and site were handed over to him on 12.5.1997. All other averments are denied and a case is made out that it was the plaintiff who was lax in performing the conditions imposed upon him by the contract (Ext.DW-2/A) and for that reason, the resort was had to Clause 2 of the agreement for imposing compensation against the plaintiff.

On the pleadings of the parties, this court framed the following issues:-

1. Whether the defendants are guilty of breach of contract, as alleged. If so, its effect? ...OPP
2. Whether the compensation under clause (2) of the Contract Agreement has not been imposed by a competent authority, as stipulated under the Contract Agreement OPP
3. Whether the plaintiff is entitled to the relief of declaration and injunction? OPP
4. Whether the defendants are not entitled to recover the amount of compensation? OPP

5. Whether the decision to impose compensation is not a considered decision, under the contract agreement, as alleged. If so, its effect?OPP
6. Whether the plaint lacks material particulars and facts. If so, its effect?OPD.
7. Whether the suit is not maintainable for want of enforceable cause of action?OPD.
8. Whether the plaintiff failed to complete the work within time, under the contract agreement. If so, its effect? OPD.
9. Whether the amount of compensation levied by the authority is contractual obligation of the plaintiff. If so, its effect?OPD
10. Whether the plaintiff is estopped from filing the present suit by his own conduct and acts?OPD.
11. Relief.

At the outset, it may be relevant to observe that the objections regarding maintainability have been taken without pleading material facts. It was incumbent upon the defendants to have set out the material facts as required by Order 6 Rule 2 of the Code of Civil Procedure. Sweeping generalization without pleading and then proof cannot be allowed to burden the record of the case.

ISSUE NO.6: *Whether the plaint lacks material particulars facts. If so, its effect?OPD.*

This issue may be taken up for consideration first. There is no evidence on the record to show that plaint lacks material particulars. Reading of the plaint does not disclose any brevity or suppression of facts which would disentitle the plaintiff from instituting the present case. This issue is accordingly decided against the defendants.

ISSUE NO. 7: *Whether the suit is not maintainable for want of enforceable cause of action?OPD*

This issue can also be disposed of as there is no evidence on the record to show or suggest that the suit is not maintainable for the want of an enforceable cause of action. This issue is, therefore decided against the defendants.

ISSUE NO.10: *Whether the plaintiff is estopped from filing the present suit by his own conduct and acts?OPD*

On the question of estoppel, there is no evidence on the record to suggest or show that the plaintiff has committed any act or undertaken a course of conduct which would estop him from filing the present suit. This issue is accordingly decided against the defendants.

ISSUE NOS 1, 3, 4 & 5:

1. *Whether the defendants are guilty of breach of contract, as alleged. If so, its effect? ...OPP*
3. *Whether the plaintiff is entitled to the relief of declaration and injunction?OPP*
4. *Whether the defendants are not entitled to recover the amount of compensation?OPP*

5. *Whether the decision to impose compensation is not a considered decision, under the contract agreement, as alleged. If so, its effect?OPP*

These issues may be taken up for decision together.
The agreement Ext. DW-1/A is admitted by both the parties. The work was awarded to the plaintiff on 2.5.1997 (Ext. DW-2/A) in the following terms:-

“REGD/AD

HIMACHAL PRADESH
PUBLIC WORKS DEPARTMENT.

No. SD-III-AB-Tender/97-98/1512-18

Dated:2/5/97.

To

Shri Rajeev Chopra,
Govt. Contractor,
Ashirvad Cottage,
Salogra, District, Solan, (H.P)

Subject: Tender for the work C/o Nirman Bhawan at Shimla (Sh. C/o building portion site development and WS&SI).

Sir,

Your item rate tender dated 16.1.1997 and further negotiated on 2.4.1997 amounting to Rs. 2,44,45,015/- (rupees two crore forty four lacs forty five thousand and fifteen) only which works out 81,895% above for civil work and 74.898% above for WS&SI items respectively on HPSR 1987 and HPSR 1993 is hereby accepted subject to the following conditions:-

(i) Your letter No. nill dated 2.4.1997 confirming the negotiation and duly signed by the members of negotiation committee shall form part of an agreement.

(ii) You have further offered to allow deduction @ 2% (two percent) of gross value of every running bill till the work to the limit of 70% (seventy percent) of the awarded amount is completed and all the amount deducted thus shall remain with held with the department however the same (withheld amount) shall be released to you on pro-rata basis in each running bill thereafter till the gross value of executed work reaches the figure of awarded amount of Rs. 2,44,45,015/-

(iii) Proper time schedule be framed for completion of work within two years and same will form part of the contract agreement.

(iv) All the possible activities shall be started simultaneously on every floor so as to complete the work within stipulated period.

(v) The time allowed for the completion of the work is two years which will be reckoned from the fifteenth days of issue of award letter.

(vi) You are requested to attend this office within seven days from the receipt of this letter to sign the agreement.

(vii) It may be noted that no payment for the work done will be made unless the final agreement is signed by you.

(viii) You are requested to contact the Assistant Engineer, Shimla Sub –Division NO. V HP PWD Shimla -2 to get the layout for the work receive working drawings for procurement of stores for the execution of work and to seek further direction to commence the work.

Please acknowledge its receipt.

Yours faithfully,

(Er. Pardeep Chauhan)
Executive Engineer,
Shimla Division No. III,
HP PWD Shimla -3.

(For and on behalf of Governor of H.P)

Copy for information and necessary action:-

1. The Superintending Engineer, 4th Circle HP PWD Shimla-3 with reference to his letter No. SR-IV CTR. 18/97-1241 dated 28.4.97, 749-50 dt.17.4.1997.

2. The Assistant Engineer, Shimla Sub-Division No. V HP PWD Shimla -2 for information. The contractor may be given adequate direction to commence the work. He may issue cement register which may be kept at site of work. The following material will be issued to the contractor from PWD store at Nabha Shimla.

- | | | |
|-------|-----------------------------------|------------------|
| (i) | Cement per bag @ Rs. 115/- | Inclusive of |
| (ii) | Steel per M.T. @ Rs.16000/- | storage charges. |
| (iii) | C.G.I./PGI sheet per MT @ 25750/- | |
3. The agreement.
 4. The Drawing Branch.
 5. The Labour Commissioner H.P. Shimla
 6. The Income Tax Officer Shimla.

7. The Auditor Sub-Division NO. V.

Executive Engineer,
Shimla Division No. III
HPPWD Shimla -3.”

PW-1 Shri Prem Kumar Junior Engineer in the Divisional Office of Town and Country Planning, Kasumpti Shimla has stated that the area where the construction was to be carried out falls within the limits of Town and Country Planning area. He states on oath that the request for permission to construct was received from Executive Engineer defendant No. 2 on 11.11.1998. He further states that on 15.1.1998 a conditional No Objection Certificate for installation of water and electricity connection was granted to defendant No. 2. He is unable to state as to when revised plans have been received from defendant No. 2 but he is emphatic in stating that on the date when he was appearing as a witness, it was still under process.

PW-2 is Shri Dalip Singh Chauhan who was working as Assistant Engineer in HP P.W.D. Sub Division No. 5 Shimla. He states on oath that permission was required for construction from the Town and Country Planning and M.C. Shimla. The State Government accorded permission on 11.4.1997. A regular No Objection Certificate for water and electricity connection was obtained on 17.2.1999. He says that 9 storeys structure was revised to five storeys only and the last drawings were issued on 26.5.1999. These drawings were of design of RCC beam and cantilever sill. His deposition in chief may be noticed:-

“...Since the nine storeys structure was revised to five storeys structure only and last drawings about construction of those five storeys were issued on 26.5.1999. These last drawings related to design of RCC beam and cantilever over window sill level. Till the date of rescission of the work, I have not received structural drawings relating to the truss...”

He was reexamined as he had not brought part of the summoned record proving indents for issue of cement etc. His evidence establishes that number of bags of cement asked for has not been issued and there is shortage between the demand of the plaintiff and supply by the defendants for which no explanation is forthcoming. His cross-examination is not of much importance as nothing material has been elicited from him which would discredit his testimony. No question has been put to this witness with respect to the late issuance of drawings and non-issue of structural drawings relating to truss.

PW-3 is Shri D.D. Sharma, Junior Assistant Engineer. He states that he is working in the Office Superintending Engineer and that under Clause 2 of the agreement vide Ext. PW-3/A (letter dated 12.1.2000). The plaintiff was asked to explain as to why the compensation should not be levied upon him. According to him on 19.3.2000, plaintiff appeared and put forth his case. The minutes are Ext. PW-3/B.

The plaintiff has appeared as his own witness as PW-4. He reiterated his case as pleaded in the plaint. He admits that the

work was awarded to him in the year 1997 and it was to be completed in two years. He further states that Public Works Department was under an obligation to have supplied the raw material to him. The designs of the building supplied to him was such that it could not be built on the site and was redesigned by the Public Works Department. The number of storeys to be constructed was also altered. No permission and sanctioned plans from Municipal Corporation Shimla or Town and Country Planning Department were supplied to him. The strata was to be investigated by the Public Works Department which report was not communicated to him till date. In cross-examination he has denied that drawings were given to him on the date as alleged by the defendants or that the material was issued to him in time or payments as asked for were also made.

DW-1 Shri Sita Ram is Assistant Engineer in the H.P. P.W.D. He states that he was looking after the construction of the building from May, 1994 to August, 2001 as Junior Engineer. He further says that the plaintiff had not employed sufficient number of persons to complete the work. On several occasions he verbally asked the plaintiff to speed up the construction. In cross-examination he states that the department had necessary sanction from the Town and Country Planning Department and that the provisional NOC was granted to the Department by the Town and Country Planning Department on 5.5.1998. He admits that initially the building was approved for nine storeys and it was later on reduced to five. He

admits that truss designs were not given till about the year 2000. This is the entire evidence on record. No document showing the grant or the approved plans on which the permission was granted has been placed on the record of the case. Clause 2 of the Agreement reads:-

“CLAUSE 2.- The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as Compensation an amount equal to one percent of such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the tendered cost of the whole work as shown in the tender for every day that the work remains uncommenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month save for special job to complete one eighth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, three eighth of the work, of the work before one half of such time has elapsed and three-fourth of the work, before three fourth of such time as elapsed.

However, for special jobs, if a time schedule has been submitted by the Contractor and the same has

been accepted by Engineer-in-Charge, the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final), may decide on the said tendered cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent, on the tendered cost of the work as shown in the tender”

The evidence on the record shows that the plaintiff had been corresponding regularly with the defendants calling upon them to supply the details of drawings. Ext. PW-2/D was sent to the defendants on 31.12.1998 calling upon them to supply the details of the structural drawings etc. Again vide Ext. PW-2/E, the plaintiff has complained regarding non-supply of structural designs and architectural details etc. On 15.5.1999 vide Ext. PW-2/F the plaintiff has complained to the defendants that though he was awarded the work in May, 1997, only 1/4th of the required drawings etc. have been supplied to him. He enumerates the details required. To similar effect are the other communications sent by the plaintiff, namely, Ext. PW-2/G, Ext. PW-2/H and Ext. PW-2/J. Vide Ext. PW-2/M dated 29.5.2000, the Superintending Engineer 4th Circle, H.P.P.W.D. exercising his powers under clause 2 of the agreement,

determined the liability of Rs. 13,49,176/- as payable by the plaintiff. This was followed by show-cause notice Ext.PW-2/N dated 1.6.2000, for taking further action in terms of the agreement. The plaintiff had a notice dated 15.5.2001 Ext. PW-2/O issued to the defendants calling upon them to desist from making any recovery, failing which, he would be taking action against them in accordance with law. Ext.PW-3/B shows that on 19.4.2000, a meeting was held between the plaintiff and the defendants in the Office of Shri S. Chauhan, Superintending Engineer HPPWD 4th Circle, Shimla where he was present along with his counsel. Proceedings note that as many as seven objections were taken against the proposed action of imposition of the compensation against the plaintiff. The submissions made by the Executive Engineer were also noted. The testimony of PW-2 Dalip Singh also shows that in some cases less quantity cement was being issued than that which was demanded. There was nothing on the record to explain the short supply. This fact would also be relevant to adjudicate as to whether the construction work could or could not have been completed within time.

Learned counsel for the plaintiff submits that determination of compensation leviable has to be on a consideration of entire facts on the record and on a considered decision and not merely the opinion of the Superintending Engineer or anybody inferior to him. He submits that Hon'ble Supreme Court in

Vishwanath Sood v. Union of India and another AIR 1989 SC

952, considering the sale clause of the contract has held:-

“8.....Firstly the reference in the clause to the requirement that the work shall throughout the stipulated period of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid "in the event of the contractor failing to comply with" the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1 per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is

true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. As we see, it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause, 2 has to be decided only by the Superintending Engineer and no one else.”

(emphasis supplied)

He also placed reliance on the decision in **State of Karnataka v. Shree Rameshwara Rice Mills AIR 1987 SC 1359** holding that:-

“7.....Interest of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus

between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12.

He submits that vide Ext. PW-2/M, the defendants have levied the penalty straightaway without any adjudication unilaterally and in arbitrary manner. In **A. Mohammed Basheer v. State of Kerala and others (2003) 6 SCC 159**, the Supreme Court held that a finding of fact as to breach must be arrived at before damages are levied.

Lastly learned counsel for the plaintiff places reliance on a judgment of this court in **Executive Engineer, REC, Hamirpur vs M/s H.K. Sareen 1997 (2) S.L.C. 287**, following the decision of the Supreme court in Vishwanath's case (supra), the court held:-

“9. So far legal proposition regarding levy of compensation under clause 2 of the agreement by the Superintending Engineer being not arbitrable is concerned, the same is no more in dispute in the face of the findings of the apex Court in Vishwanath's case (supra). However, at this stage it has also to be seen that whether the Superintending Engineer is required to apply his mind or he has just to be a dittoing authority to whatever is put to him by his subordinates as in the present case by the Executive Engineer. The Superintending Engineer has been given very wide power of levying compensation in terms of clause 2 of

the agreement. In this context it may be appropriate to say that wider the power bigger the caution and a perusal of the action on the part of the Superintending Engineer while approving the note of the XEN levying penalty in the present case shows that there is neither any adjudicatory process nor the order shows the application of mind in any manner whatsoever by the Superintending Engineer. Only thing that has been done by the S.E. is approving the action of the Executive Engineer. This is neither in consonance with the principles of fair play nor it complies with the spirit of clause 2 and above all it also fails to meet the requirements of his action being in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. From this it can be further safely inferred that before levying penalty under clause 2 Superintending Engineer is not to just straight away approve the action of his subordinates as has been done in the present case, but he is also expected to at least hear the contractor and then adjudicate the matter after considering the respective pleas/contentions of the parties, which prima facie does not appear to have been done in the present case. So, in these circumstances, the submission of Mr. Sood that the claim of levy of compensation under clause 2 stood adjudicated and, therefore, release of earnest money on the part of the arbitrator while making award in respect of counter claim No. 2 of the defendant cannot be upheld and is accordingly rejected.”

The evidence on record establishes that drawings have not been supplied to the plaintiff within time. So much so, the Officer of the defendants PW-2 Shri Dalip Singh Chauhan, who is an Assistant Engineer himself states that no drawings of the truss have been received by him. The construction of the work was changed midstream by the Government by altering it from nine storeys to one of five storeys. There are complaints of the plaintiff that cements and other raw material etc. have not been supplied to him. In the meeting held, such minutes recorded in Ext. PW-3/B, the plaintiff, in the meeting held in the Chamber of the Superintending Engineer has made a number of submissions on pointing to the shortfalls in the performance of the duties imposed upon the defendants by the agreement Ext. DW-2/A. Yet, these have not been dealt with while compensation has been levied nor the method of levying such compensation has been placed on the record. The evidence of the defendants is far from satisfactory and does not at all establish the case of dereliction of obligations by the plaintiff for breach of any mandatory conditions. It was incumbent and mandatory upon the defendants to have considered the objections put forth by the plaintiff to have determined as to whether plaintiff was right or whether his objections were baseless. More importantly, the impact and effect of changing the structure from nine storeys to five storeys, and non supply of the truss drawings and designs which admittedly had not been received even on the date of recording of evidence, surely indicated that the

plaintiff was not to be blamed. There is no determination on the record of these facts. Assessment of damages as held by the Supreme Court requires a detailed consideration and not a whimsical opinion about the cause of damage. In these circumstances, no blame can be laid on the plaintiff. These issues are, therefore, decided in favour of the plaintiff and against the defendants.

ISSUE NOS. 2 & 9:

2. *Whether the compensation under clause (2) of the Contract Agreement has not been imposed by a competent authority, as stipulated under the Contract Agreement*OPP
9. *Whether the amount of compensation levied by the authority is contractual obligation of the plaintiff. If so, its effect?*OPD

The question as to whether compensation under Clause 2 has been imposed by the competent authority would be of no significance in view of the findings arrived at on issue Nos.1,3,4 and 5. These issues are therefore, decided in favour of the plaintiff and against the defendants.

ISSUE NO. 8. *Whether the plaintiff failed to complete the work within time, under the contract agreement. If so, its effect?*
..... OPD.

I have held on issue Nos. 1, 3,4 and 5 that the blame for not completing the work in time cannot be laid on the plaintiff as there was short supply of cement, building drawings had not been supplied to the plaintiff and the building plans had been changed

midstream. This issue is decided against the defendants. It is held that the plaintiff was not responsible for delaying the construction of the building. The suit of the plaintiff is accordingly decreed. Decree of mandatory injunction is issued against the defendants prohibiting and restraining them from recovering any amount as determined by Ext.PW-3/M.

31st March, 2008.
(cm)

(Dev Darshan Sud),
Judge.