

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**RSA No. 220 of 2008**

**Decided on: 30.6.2011**

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**Anil Kumar**

**...Appellant.**

**Versus**

**State of H.P. & others.**

**....Respondents.**

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**Coram**

**The Hon'ble Mr. Justice Kuldeep Singh, Judge.**

**Whether approved for reporting?<sup>1</sup> No**

**For the Appellant : Mr. J.S Bhogal Sr. Advocate with  
Mr. Tarunjeet Singh Bhogal,  
Advocate.**

**For the Respondents : Ms. Ruma Kaushik, Addl. A.G.  
with Mr. J.S. Rana, Asstt. A.G.**

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**Kuldeep Singh, Judge(oral)**

The appellant was plaintiff and is aggrieved by judgment and decree dated 27.12.2007 passed by Learned District Judge Kangra at Dharamshala in Civil Appeal No. 81-D/XIII/2006 partly reversing the judgment/decreed dated 17.3.2003 in civil suit No. 25 of 2002 passed by Learned Sub Judge(1) Dharamshala.

2. The facts in brief are that the appellant had filed a suit for declaration that plaintiff is entitled to the payment on account of escalated amount under clause 10-C of the agreement/contract No. 59 of 1991-1992 between appellant and respondent No. 3 with regard to the work of National Highway-20 along with interest at the rate of 18% per annum from 1.1.1996 till realisation. It has been alleged that respondents have arbitrarily and illegally

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<sup>1</sup> Whether reporters of Local Papers may be allowed to see the Judgment? Yes

withheld the amount of the appellant. In the suit mandatory injunction was also prayed directing the respondents to make the payment with interest.

3. The suit was contested by the respondents by filing written-statement in which preliminary objections of maintainability, estoppel, jurisdiction, valuation and limitation were taken. On merits, it was pleaded that appellant had worked as Contractor with the Department. The agreement was also admitted for the construction and improvement of narrow and low grade section of Pathankot-chakki-Mandi Highway(NH-20). It was also admitted that execution of work was started by the appellant. The clause 10 of the agreement deals with escalation of price of material and labour under which the contractor was entitled for reimbursement of the increased price of labour and material beyond 10% than the rates prevalent at the time of acceptance of the tender, if the said increase was on account of direct result of coming into force of any fresh law or statutory rules only in respect of labour engaged on the work, and for that purpose the contractor keeps such books of accounts. The said documents are necessary to show amount of such increase.

4. The respondents also pleaded that appellant had earlier moved an application before the Arbitrator preferring his claim under clause 10-C which was rejected on the ground that the same was not arbitrable and the award was made rule of the Court on 15.2.1999. The appellant is not entitled to claim under clause 10-C after the rejection of the claim by the arbitrator.

5. The replication was filed, the appellant reiterated the stand taken in the plaint and took the stand that suit is maintainable.

6. On the pleadings of the parties following issues were framed:

1. Whether the plaintiff is entitled to the payment of the escalated amount as admissible under clause 10-C of the agreement/contract No. 59 of 1991-1992, as alleged? OPP.
2. Whether the plaintiff is entitled for consequential relief of mandatory injunction, as prayed for? OPP
3. Whether the suit is not maintainable in the present form, as alleged? OPD.
4. Whether the suit is not maintainable in the present form, as alleged? OPP.
5. Whether the plaintiff is estopped from filing the present suit by his act and conduct, as alleged? OPD
6. Whether this Court has no jurisdiction to try the present suit, as alleged? OPD.
7. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction, as alleged, OPD
8. Relief.

Issue No. 1 was answered in affirmative and issues No. 2 to 7 were answered in negative and suit of the appellant was decreed on 17.3.2003 by learned Sub Judge.

7. The respondents had filed appeal against the judgment and decree dated 17.3.2003 which was partly allowed by learned District Judge on 27.12.2007. Hence, second appeal which has been admitted on the following substantial questions of law:

1. Whether the impugned decree is the result of complete misreading and misappreciation of the evidence on record particularly Ex. DW-1/A and Ex. PW-1/A and the statement of DW1?

2. Whether the learned first appellate court below was justified in decreeing the suit of the plaintiff for mandatory injunction without granting the relief of declaration?

8. I have heard learned counsel for the parties and have gone through the record. Mr. J.S Bhogal Sr. Advocate has submitted that lower appellate court has erred in not giving the declaration as prayed, the appellant is entitled to declaration as well as mandatory injunction. On behalf of respondents, it has been submitted that no fault can be found with the impugned judgment and decree. A prayer has been made for dismissal of the appeal.

9. Both the aforesaid substantial questions of law are taken up together collectively for determination. The letter dated 24.5.2007 Ex. PW-1/A is a direction to Executive Engineer to look into the matter and submit his report. Ex. PW1/A is not material for determining the real controversy between the parties. Ex. DW-1/A is the agreement between the parties. The parties have not disputed the execution of agreement. The learned counsel for the appellant has submitted that DW-1 Prakash Mishra had recommended the case of the appellant to the Superintendent Engineer. The suit of the appellant has been decreed for mandatory injunction, therefore, it cannot be said that lower appellate Court has misconstrued Ex. PW-1/A, Ex. DW-1/A

and the statement of DW-1 Prakash Mishra. The appellant has failed to substantiate the substantial question of law No. 1. Hence, the substantial question of law is decided against the appellant.

10. The learned counsel for the appellant has submitted that the lower appellate Court while granting the decree of mandatory injunction has not given declaration that appellant is entitled to the benefit of clause 10-C of the agreement Ex. DW-1/A. Once the lower appellate Court has given the decree of mandatory injunction in favour of the appellant with a direction to respondent No.2 to dispose of claim of the appellant under clause 10-C of the agreement Ex. DW-1/A in accordance with law, it is nothing but implicit declaration that appellant is entitled to consideration of his case by respondent No. 2 under clause 10-C of agreement Ex. DW-1/A.

11. The respondents have not filed any appeal, cross objections against the impugned judgment, decree. The impugned judgment and decree have attained finality against respondents, under these circumstances, the respondents cannot be heard to say that the claim of the appellant under clause 10-C cannot be considered in absence of declaration. Once decree of mandatory injunction is operating, the respondents are bound to consider the case of the appellant under clause 10-C of the agreement Ex. DW-1/A. In view of this, the decree of mandatory injunction passed by lower appellate Court cannot be faulted that declaration as prayed by appellant has not been given to the appellant separately as prayed by him in the plaint. The appellant has failed to make out any case on substantial question of law No. 2.

12. In view of above, the appeal is dismissed with the observations that respondents are bound to comply the mandatory injunction decree dated 27-12-2007 passed by learned lower appellate Court. No costs.

**June 30, 2011**  
(priti)

**( Kuldip Singh ),**  
**Judge.**