

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.84 of 2012

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1. Govt. of India, Union of India through General Manager E.C.R., Hajipur.
 2. D.R.M. (Divisional Railway Manager), Eastern Central Railway,
Sonepur Division, Sonepur.
 3. Divisional Commercial Manager, East Central Railway, Sonepur
Division, Sonepur.
 4. Assistant Divisional Commercial Manager, East Central Railway,
Sonepur Division, Sonepur.

.... Appellant/s

Versus

1. Ram Ekbal Rai S/O Late Bhimri Rai Village- Sirdilpur, Post Office & Police
Station- Patori, District- Samastipur.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Anil Singh

For the Respondent/s : Mr. Arun Kumar Rai

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

ORAL JUDGMENT

Date: 12-12-2017

1. This appeal has been filed by the defendants-appellants against the judgment and decree dated 28.10.2010 and 22.11.2010 respectively passed by the Civil Judge, Senior Division, Samastipur in Title suit no. 112/2003 by which and whereunder learned Subordinate Judge I decreed the above stated suit directing the defendants-appellants to pay Rs. 2, 08, 284/- with 5 ½ per cent interest to the plaintiff-respondent within three months from the aforesaid judgment.

2. Plaintiff-respondent filed Title suit no. 112/2003



against the defendants-appellants on 16.6.2003 along with a petition filed under section 80 sub-clause (2) of the CPC seeking leave of the court to file the aforesaid suit without giving notice under section 80 of the CPC. Learned court below granted the aforesaid leave on 17.6.2003 and subsequently, the suit was admitted for hearing.

3. The case of the plaintiff-respondent is that Divisional Railway Manager Commercial, Sonapur division vide his letter no. Sa se/536/bus/tempo stand Sahpur Patory, 2002 dated 30.5.2002 invited tenders for bus and tempo stand situated within the premises of Sahpur Patroy railway station for the period of two years. Interested persons were asked to file tender separately for bus stand as well as tempo stand. The area for bus stand was disclosed 85 Meter X 40 square Meter. The plaintiff-respondent tendered for bus stand by depositing Rs 20,000/- as earnest money and vide letter no 19.9.2002, he was informed by the Divisional Railway Manager Commercial, Sonapur division that his tender for bus stand was accepted on 20.6.2002 and accordingly, he was asked to deposit Rs 10,19,000/- within seven days and he was also asked to deposit security amount of Rs 58,450/- and the earnest money earlier deposited by



him was to be adjusted with security deposit. He was also asked to appear in the office with non-judicial stamp of Rs.100/- so that agreement could be executed. In response to the aforesaid direction, plaintiff-respondent vide his letter dated 29.10.2002 requested the Divisional Railway Manager Commercial, Sonapur division to grant facility to him to deposit the above stated amount Rs 10,19,000/- in instalment and the aforesaid request of the plaintiff-respondent was accepted by the Divisional Railway Manager Commercial, Sonapur division vide his letter no.536 dated 29.10.2002 and accordingly, he was permitted to deposit the above stated amount in six equal instalments at four months interval. The plaintiff-respondent deposited Rs 1, 69,834/- in first instalment on 01.11.2002 and similarly, on 03.11.2002, he deposited Rs 38,450/- as security money but in the meantime, plaintiff-respondent prepared map showing the place of bus stand near **Malgodam** of the railway station and not within the premises of Sahpur Patroy railway station and the plaintiff-respondent was asked to start bus stand on the above stated plot. The plaintiff-respondent visited the place which was allotted by the defendants-appellants and found that there were several ditches filled with water on the



aforesaid land and it was not possible to ply buses on the aforesaid land. He also noticed that there was no approach road and other facilities were also lacking. He immediately requested the defendants-appellants for removal of the aforesaid deficiencies and thereafter, a committee was constituted and the aforesaid committee also visited the aforesaid land and submitted its report with sketch map. The committee also found that allotted land was not suitable for bus stand. The plaintiff-respondent claimed that after acceptance of tender, the above stated land was marked for bus stand. However, the plaintiff-respondent also claimed that on 22.4.2003, he got a letter dated 22.4.2003 sent by the Divisional Railway Manager Commercial, Sonapur division informing him that 700 square meter land near old Malgodam was allotted to him for running bus stand but the aforesaid land was also not suitable to start bus stand and the plaintiff-respondent refused to take the aforesaid land for running bus stand. However, defendants-appellants by the above stated letter asked him to start bus stand by 28.4.2003, failing which his contract shall be cancelled and he was also asked to deposit second instalment by 27.6.2003 but on 7.6.2003, again, an advertisement was published in



Hindustan newspaper inviting tender for bus stand in respect of land which was previously allotted to him for running bus stand and thereafter, the plaintiff-respondent filed the above stated title suit seeking relief that the defendants-appellants be directed to make appropriate arrangement for running bus stand on the allotted land and also advertisement published on 7.6.2003 in Hindustan newspaper inviting tender be declared illegal and the defendants-appellants be restrained from inviting fresh tender in respect of bus stand and further if the defendants-appellants failed to make available appropriate and suitable land for running bus stand, the defendants-appellants be directed to return amount deposited by him with 18 per cent interest to him.

4. Defendants-appellants appeared in the aforesaid suit and defendant no.3 filed written statement raising ornamental objections with specific pleading that suit of the plaintiff-respondent is hit by section 80 of the CPC and there was no valid contract between the parties and there was only an agreement which was not binding upon the parties. It has further been pleaded that the aforesaid agreement was at negotiating stage and the plaintiff-respondent failed to abide the terms and conditions of the tender and failed to furnish



non-judicial stamp of Rs.100/- to execute an agreement and to obtain work order, though several reminders were given to him. It has further been pleaded that the terms and conditions of GCC were applicable but the plaintiff-respondent failed to comply with the terms and conditions of the GCC and furthermore, the plaintiff-respondent also failed to deposit the aforesaid amount. It has also been pleaded that site of the proposed bus stand as given in the tender was never changed nor there was any proposal to change the said site and furthermore, defendant no.3 denied that land allotted for bus stand measuring 85X40 square meter was submerged under water and having ditches. It has further been denied that land allotted for bus stand has no approach road rather it has specifically been pleaded that shops from two places were removed to give access to allotted land and there was about 40 feet wide approach road. Defendant no.3 also denied that the competent authority never directed the engineering branch of the railway to report about position of allotted land and submit estimate rather the plaintiff-respondent got prepared collusive report which was not binding upon the railway authority. Defendant no.3 further pleaded that when the plaintiff-respondent did not start running bus stand on



this or that pretext, a letter was issued to him giving warning to him to start work from 28.4.2003 and also to deposit second instalment by 27.6.2003, failing which his tender shall be cancelled but he failed to comply with the aforesaid direction as a result whereof his tender was cancelled and accordingly, the defendants-appellants prayed for dismissal of the suit of the plaintiff-respondent.

5. On the basis of pleadings of the parties, learned court below framed following issues:-

- i) Is the suit, as framed, maintainable?
- ii) Had or has the plaintiff valid right to cause of action for the suit?
- iii) Is the suit barred by law of limitation, estoppel, waiver and acquiescence?
- iv) Whether the plaintiff entered into a valid contract with Railway Administration?
- v) Is the plaintiff entitled to a decree as prayed for?

6. Plaintiff-respondent got examined, altogether, seven witnesses including himself and also got exhibited certain documents including letters as documentary evidence. The defendants-appellants also got examined two witnesses and also got exhibited some documents as documentary evidence.



7. Learned court below, took issue nos. 4 and 5 together and having analyzed evidences available on the record, came to the conclusion that the plaintiff-respondent intentionally had not deposited non-judicial stamp of Rs.100/- causing loss to the defendants-appellants and accordingly, learned court below directed for forfeiture of Rs 20,000/-whereas directed the defendants-appellants to return remaining deposit with 5 ½ per cent interest.

8. Learned court below, while deciding issue nos. 1, 2 and 3, came to the conclusion that the plaintiff-respondent had valid cause of action and the plaintiff-respondent had successfully proved his part claim and on the basis of the aforesaid conclusion, learned subordinate Judge passed the impugned judgment and decree.

9. Learned counsel appearing for the defendants-appellants assailed the impugned judgment and decree submitting that learned court below failed to comply with proviso of section 80(2) of the CPC because in the aforesaid proviso, there is a mandate that if the plea of urgency or immediate claim is negated by the court, plaint should be returned to the plaintiff for presentation to it after complying with requirements of sub-section 80(1) of the CPC. He,



further, submitted that in the present case, prayer for interim relief of the plaintiff-respondent was subsequently, turned down by the court below vide order dated 8.7.2003 and, therefore, learned court below was bound to return the plaint to the plaintiff-respondent for compliance of section 80(1) of the CPC.

10. He, further, submitted that rule 63 of GCC provides that if any dispute is arisen, the matter should be referred to arbitrator and, therefore, learned court below had got no jurisdiction to entertain the suit rather the plaintiff-respondent ought to have referred the matter to arbitrator. He, further, submitted that the plaintiff-respondent himself violated the terms and conditions of the tender by not depositing second instalment as well as not entering into an agreement by producing non-judicial stamp of Rs.100/- and it is admitted position that the plaintiff-respondent was asked by the defendants-appellants to start work by 28.4.2003 and also to deposit second instalment by 27.6.2003 subject to condition that failure on his part shall give liberty to the defendants-appellants to cancel the agreement and admittedly, plaintiff-respondent failed to execute an agreement within the above stated period as well as to start



bus stand and also to deposit the amount of second instalment as a result whereof the defendants-appellants rightly cancelled the agreement of the plaintiff-respondent.

11. He, further, submitted that learned court below found that it was the plaintiff-respondent who violated the terms and conditions of the agreement but even then learned court below directed the defendants-appellants to return the amount deposited by the plaintiff-respondent and only Rs 20,000/- was ordered to be forfeited. He, further, submitted that admittedly, Rs 20,000/- was deposited as earnest money which was subsequently, adjusted with security deposit and, therefore, learned court below committed error in directing forfeiture of the aforesaid earnest money of Rs 20,000/- rather learned court below ought to have ordered for forfeiture of entire amount deposited by the plaintiff-respondent, particularly, in the circumstances, when the learned court below came to the conclusion that due to non-start of bus stand, loss was caused to the defendants-appellants. He, further, submitted that if this court comes to the conclusion that amount deposited by the plaintiff-respondent can not be forfeited then, in that circumstance, this court may direct for forfeiture of security deposit



because in case of loss suffered by the defendants-appellants, they have every right to compensate the aforesaid loss by amount deposited as security deposit.

12. On the other hand, learned counsel appearing for the plaintiff-respondent refuted the aforesaid submissions arguing that admittedly, tender for running bus stand was invited and area of the land was mentioned but neither any plot number nor any specific identification regarding proposed land was given in the advertisement. However, after acceptance of the tender of the plaintiff-respondent, another land was shown to him to start bus stand but the aforesaid land was not suitable for running bus stand as there was big ditches filled with water on the aforesaid land and the aforesaid fact was properly brought into notice of the defendants-appellants but the defendants-appellants never made available the appropriate and suitable land for running bus stand and, therefore, the defendants-appellants failed to perform part of their agreement.

13. He, further, submitted that the defendants-appellants subsequently, changed the proposed land and offered another land to the plaintiff-respondent which was refused by the plaintiff-respondent and even thereafter,



defendants-appellants sent letter compelling the plaintiff-respondent to start bus stand on the land as offered by them and subsequently, in guise of the aforesaid letter, they cancelled tender of the plaintiff-respondent and got published fresh advertisement for the aforesaid bus stand which was completely illegal and arbitrary in nature.

14. He, further, submitted that proviso of section 80(2) of the CPC is not applicable in the present case because, admittedly, at the time of presentation of the plaint, court granted leave to the plaintiff-respondent waiving necessity of giving notice under section 80(1) of the CPC before filing the suit. He, further, submitted that the defendants-appellants participated before the court below in the suit and they never raised point of arbitration and now, they have no right to raise the aforesaid issue before the appellate court.

15. Having heard the above stated contentions of both parties, I have gone through the record along with lower court record.

16. It is admitted position that the plaintiff-respondent sought three reliefs but at the time of final hearing, plaintiff-respondent did not press two reliefs and the



plaintiff-respondent confined only relief no.3 i.e. for return of the deposited amount with interest.

17. Certain facts are admitted in this case. It is admitted position that vide letter dated 30.5.2002 tenders were invited for running bus stand and tempo stand and interested persons were asked to file separate tender for bus stand and tempo stand by depositing earnest money of Rs 20,000/- each. The area for bus stand was given in the aforesaid tender as 85 Meter X 40 square meter but neither plot number nor any boundary of the aforesaid area was given and furthermore, there was no identification of the land proposed for running bus stand. It is admitted position that vide letter dated 19.9.2002, information was given to the plaintiff-respondent about acceptance of his tender dated 20.6.2002 and accordingly, he was asked to deposit Rs 10,19,000/- within seven days and also Rs 58,450/- as security money and it was also informed that the earnest money of Rs 20,000/- shall be adjusted with security deposit of Rs 58,450/-. He was also asked to appear in the office with non-judicial stamp of Rs.100/-. The above stated facts are proved by exhibit 1 and exhibit 1/A respectively. It is also admitted position that the plaintiff-respondent requested



to pay the above stated amount in instalment and exhibit 1/B goes to show that prayer of the plaintiff-respondent was accepted vide letter dated 29.10.2002 and he was permitted to deposit the agreed amount of Rs 10,19,000/- in six instalments and accordingly, he was directed to deposit first instalment of Rs 1,69,834/- as well as security amount of Rs 38,450/- within a week which was complied by the plaintiff-respondent. Exhibit 1/C goes to show that the plaintiff-respondent on 06.11.2002 informed to official that there was big ditches on the plot allotted to him and it was not possible to ply buses on the aforesaid land as there was no approach road. Accordingly, he prayed for removal of hurdle for running bus stand. In response to the aforesaid exhibit 1/C, Divisional Railway Manager Commercial, Sonapur division vide his letter dated 22.4.2003 allotted another land of 700 square meter giving direction to him to start work by 28.4.2003 and also to deposit amount of second instalment, failing which agreement shall be cancelled which is evident from perusal of exhibit 1/D. However, on the next day i.e. 28.4.2003, the plaintiff-respondent again, gave letter to Divisional Railway Manager Commercial, Sonapur division refusing to take possession of 700 square meter land and



requested the defendants-appellants to make available the land proposed in the tender by removing hurdle for running bus stand. The aforesaid fact is proved by exhibit 1/E. Apart from this, exhibit 1/G also goes to show that officials of railway visited the earlier proposed land allotted in tender to run bus stand and found the aforesaid land was encroached by some persons and thereafter, a report was submitted making prayer for deputation of civil police and R.P.F for removal of encroachment. Above all exhibit 3 and exhibit 4 prove the assertion of the plaintiff-respondent. All the above stated documents have not been denied by the defendants-appellants and, therefore, it is obvious from perusal of the aforesaid documents as well as evidences available on record that land which was proposed in tender for running bus stand was not suitable for running bus stand and it is also obvious from the aforesaid facts that the defendants-appellants failed to remove the hurdle for running the bus stand from the proposed land or to make available a suitable land for that purpose in spite of several requests of the plaintiff-respondent and, therefore, it is well proved that the defendants-appellants violated the terms and conditions of the agreement because they failed to provide suitable and



appropriate land for running bus stand.

18. No doubt, learned court below came to the conclusion that the plaintiff-respondent failed to execute non-judicial stamp of Rs.100/-as a result whereof work could not be started and learned court below held that the plaintiff-respondent had violated agreement but, in my view, defendants-appellants failed to perform their part of the agreement by not providing suitable and appropriate land for running bus stand to the plaintiff-respondent and according to section 51 of the Indian Contract Act, 1872 when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Similarly, section 52 of Indian Contract Act, 1872 says that where the order in which reciprocal promises are to be performed is expressly fixed by contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

19. In the present case, admittedly, by inviting tender, the defendants-appellants proposed to make available suitable piece of land for running bus stand but proposed



land was found not to be suitable for running bus stand and they failed to provide suitable and appropriate land for running bus stand and, therefore, in the aforesaid circumstances, plaintiff-respondent could not have been compelled to enter into agreement by executing agreement on non-judicial stamp of Rs.100/- and, in my view, finding of the court below to the above stated extent should be modified.

20. It has also been argued that court below failed to take notice of proviso of section 80(2) of the CPC but, in my view, aforesaid proviso of section 80(2) of the CPC is not applicable in the present case. Admittedly, in the present case, court below granted leave to file suit without compliance of section 80(1) of the CPC. However, subsequently, learned court below refused to grant interim relief to the plaintiff-respondent by rejecting petition filed under Order 39 rule 1 of the CPC. Therefore, the aforesaid fact goes to show that permission to file suit without compliance of section 80(1) of the CPC had already been granted.

21. In my view, proviso of section 80(2) of the CPC applies in those cases in which at the time of hearing on the



point of grant of permission, if court feels that there was no urgent or immediate relief is needed, the court shall return the plaint for presentation to it after compliance of provision of section 80(1) of the CPC. In my view, once the court grants permission to file a suit without compliance of section 80(1) of the CPC in the same suit on, later stage, court can not return plaint taking help of proviso of section 80(2) of the CPC and, therefore, in view of the aforesaid discussions, contention of learned counsel for the defendants-appellants is, hereby, rejected.

22. It has also been argued on behalf of the defendants-appellants that the court below ought to have referred the matter to arbitrator but, in my view, learned counsel for the plaintiff-respondent rightly submitted that the defendants-appellants have no right to raise the above stated issue before this court as they had not raised the aforesaid issue before the court below at initial stage rather they preferred to participate in trial. Therefore, in the aforesaid circumstance, the above stated contention of learned counsel for the defendants-appellants is also rejected.

23. Admittedly, plaintiff-respondent has not filed any cross- appeal and has not challenged the impugned



judgment. Therefore, even if I have come to the conclusion that the plaintiff-respondent had not violated the terms and conditions of the agreement, then also, I do not think it proper to direct return of Rs 20,000/- as forfeited by the impugned judgment.

24. On the basis of the aforesaid discussions, there is no scope for interference into the impugned judgment and decree and accordingly, this appeal stands dismissed and the impugned judgment and decree are, hereby, confirmed with minor modification that interest shall be calculated on yearly basis. There shall be no order of cost.

Shahid	
AFR	
CAV DATE	5.12.2017
Uploading Date	12.12.2017
Transmission Date	

(Hemant Kumar Srivastava, J)

