

Sr. No.376

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.946 of 1995(O&M)

Decided on: 04.04.2018

M/s Chuni Lal Ujjagar Ram and others

.....Appellants

versus

The Food Corporation of India

.....Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Sanjay Majithia, Sr. Advocate with
Mr. Inderjit Singh, Advocate
for the appellants.

Ms. Jatinder Jit Kaur, Advocate
for the respondent/FCI.

Rajbir Sehrawat, J.(Oral)

This is the second appeal filed by the defendants in a suit for recovery; having failed before both the Courts concurrently.

For convenience the parties herein would be referred to as the plaintiff and the defendants; as they were described in the original suit.

The brief facts of this case are that the plaintiff, the Food Corporation of India filed a suit for a recovery of Rs. 1,10,333.76/- paise against the defendants/appellants claiming that the defendants were issued a service work contract for loading and unloading of food grains at Dasuya. As per Clause X of the Schedule agreement, if the defendants failed to supply the requisite number of labourers, scales and trucks/carts, the Senior Regional Manager shall; at his discretion, be at liberty to engage labour, scales, trucks etc. at the risk and cost of the defendants and in that event the latter would be liable to make good the Corporation of the loss incurred by

it in doing these works. It was further averred that on 05.08.1985, special loading of wheat was to be done by the defendants; in the railway wagons at Dasuya. The loading work was, however, deferred to 20.08.1985. The defendants failed to perform their legal obligation of loading the wheat in the railway wagons; with the result that the plaintiff Corporation had to pay a sum of Rs. 8,916/- as demurrage besides having forfeited its security amounting to Rs. 16,500/- to the railways. The plaintiff Corporation served a notice on the defendants calling upon them to make good the loss amounting to Rs. 25,416/-, failing which the Corporation would have to initiate the proceedings as per terms of the Schedule agreement. Before this notice, defendants were requested to do the requisite work but they failed to do so. Consequently, the work has been left undone by the defendants. Resultantly, the plaintiff, Corporation had to get work done at the cost and responsibility of the defendants. Thus the Corporation incurred a total loss of Rs. 1,10,333.76/- paise.

On being put to notice, defendants contested the suit. Besides taking the preliminary objections, it was averred in the written statement that defendants have not committed any default in performing their contractual obligations. However, it was admitted that the defendants entered into contract with the plaintiff to do the work of loading and unloading as claimed by the plaintiff. For this particular loading, there was only five hours time to complete the work of loading of wheat in railway wagons, but since the wagons were not on the side of the shed, therefore, the needful could only be done by cross-loading which was not possible. The doors of the railway wagons in which loading was to be done were also not in front of the doors of the wagons from which the foodgrains were to

be unloaded. It was thus, pleaded that there was no contract of the plaintiff with the defendants for cross-loading the foodgrains in the wagons. Further it was denied that the work remain undone by the defendants which was got completed by the plaintiff.

On the basis of the pleadings, the Trial Court framed the following issues:-

- “1. Whether the plaintiff is a body corporate created under Section 3 of the Food Corporation of India Act and Distt. Manager is competent to file sign and institute the present suit? OPP.*
- 2. Whether the Distt. Manager is competent to file the suit and whether there is a specific resolution for the same?OPP*
- 3. What were the tersma & conditions of loading and unloading work to be handled by the defendants, at plaintiff's food storage depot at Dasuya? OPP.*
- 4. Whether the defendants have committed breach of the agreement of the contract? OPP.*
- 5. What amount of loss and demurrage was incurred by the plaintiff and whether the security amount stands forfeited to the plaintiff?OPP*
- 6. Whether the plaintiff got done the work upto 5.2.1986 at the risk and cost of the defendants? If so, of what amount and at what extent and with what result?OPP.*
- 7. Whether civil court at Hoshiarpur has jurisdiction to try this suit?OPP.*
- 8. Whether the suit is barred under Section 69 of the Partnership Act?OPD.*

9. *To what amount the plaintiff is entitled?
OPP.*
10. *Whether the plaintiff is entitled to interest
at 19% P.A. As claimed?OPP.*
11. *Relief.”*

After appreciating the evidence, the Trial Court decreed the suit. While decreeing the suit, the Trial Court held that admittedly the defendants entered into an agreement, Ex:P-1 with the plaintiff Corporation for handling works of transport, unloading/loading of food-grains etc. at Food Corporation Depots/Godowns Dasuya. The terms and conditions governing the contract are contained in the Annexure attached to the agreement Ex:P-1. This agreement has been duly proved on record by the plaintiff as having been entered into between the parties. The Trial Court further held that; admittedly; the work was not done by the Contractor on the plea that it was cross-loading and therefore, not agreed to between the parties. Resultantly, the Senior Regional Manager of the plaintiff Corporation terminated the contract with the defendants and intimation was given to them by serving a notice Ex:P-3 dated 6.11.1985 through registered post. The Trial Court further held that the work left undone by the Contractor was got done by the District Manager, Hoshiarpur from one Bheim Sain at higher rate at the risk and costs of the defendants. Ex.P8 is the statement which contains the details of risk and costs amount of Rs.84,917.76/- paise recoverable from the defendants. This amount had to be incurred by the plaintiff Corporation as extra cost for getting the work done left undone by the defendants. Apart from this, Corporation had to pay a sum of Rs. 8916/- as demurrage to the railways. The security of Rs. 16,500/- was also forfeited by the railways. Accordingly, the suit was

decreed by the Trial Court.

The reliance of the defendants upon the testimony of PW-4 Chunni Lal to the effect that those wagons were not facing each other and the wagons were not standing parallel, therefore, it was not possible for them to complete the work within 5 hours; had not found favour with the Trial Court. While dealing with the plea regarding the cross-loading the Trial Court held that the term Platform has been defined in Clause X of Clause I of the Annexure. As per this definition, the Platform shall include all existing railway-lines whether on or off the platform. Defendants were not justified in not doing the work of loading and un-loading simply because the wagons were standing on the second line of the platform. If the wagons were not standing side by side and the doors of the wagon were not facing each other then the work could have been done by requesting the railway authorities. However, the Contractor simply did not do that. The Trial Court further held that as per clause 21 of the agreement, the Contractor is responsible for unloading and loading of railway wagons within the times allowed by the railways. In case of default, plaintiff is liable to make good the compensation, demurrage, and other charges as per the railway rules. In this regard, the decision of the Senior Regional Manager of the plaintiff-Corporation has been made final under the agreement. Therefore, the liability has rightly been finalised against the contractor by the plaintiff-corporation. Accordingly, the suit was decreed. Aggrieved against this judgment and decree, the defendants filed the appeal before the lower Appellate Court.

The lower Appellate Court dismissed the appeal filed by the defendants. While dismissing the appeal, the lower Appellate Court

recorded that as per the terms of the agreement, the defendants were required to do the work of loading and unloading within a specified period of time. The plea taken by the defendants that they were having 60/70 persons for the work of loading and unloading but the same could not be accomplished because the wagons were not standing side by side; with their doors facing each other was held to be not acceptable. The lower Appellate Court held that once the time was fixed for loading and unloading the material; it was the obligation of the defendants to perform their part of the agreement. But instead of performing their part of the contract, the appellants took a vague plea regarding the parking of the wagon and opening of their doors. The lower Appellate Court further held that in case of non performance of the work; required to be done by the Contractor, the authorities of the plaintiff Corporation had authority to terminate the agreement between the parties and get the work done from other person; at the risk and responsibility of the defendant. Accordingly, the findings recorded by the Trial Court were upheld by the lower Appellate Court. Aggrieved against the judgment and decree, present appeal has been filed by the defendants.

While arguing the case, learned counsel for the appellants has stressed upon the same plea; that in case the wagons are not parked side by side and doors are not opened in front of each other then it is not a case of loading and unloading, rather, it becomes a case of '*cross-loading*'. Since the '*cross-loading*' was not envisaged by the Contract, therefore, the defendant contractor was under no liability to perform this work, much less to do the same within specified time. Secondly, it is argued by learned counsel that since the time specified to do this work was limited only to 5½

hours, therefore, it was impossible for him to accomplish the work within the time frame given by the authority. Hence no liability can be fastened upon the defendants.

On the other hand, learned counsel for the respondent/plaintiff has submitted that the contractor was given the work of loading and unloading, to and from the go-downs of the plaintiff; to railway station and at the railway station from one platform to another platform. The term platform includes even the off platform railway lines. Therefore, this plea of the Contractor that unless the wagons were parked side by side and their doors were opened in front of each other, the work did not fall within the scope of the agreement does not find support from the agreement itself. Still further it is submitted by learned counsel that in case of non-performance of the contract by the Contractor, the authorities had a discretion to terminate the contract. Accordingly, the contract was terminated and the unfinished work was got done through another person, at the risk and responsibility of the contractor. All these facts have been duly proved on record through cogent evidence. Hence the Courts below have rightly decreed the suit filed by the plaintiff.

Having heard learned counsel for the parties, this Court finds sufficient substance in the argument raised by learned counsel for the respondent. The plea of the appellants that it was a case of '*cross-loading*' is liable to be noticed only to be rejected. This appears to be a term coined by the defendants contractor only to make an attempt to avoid their liability. Otherwise, the terms of contract as placed on record, clearly show that it included loading and unloading of all kind of material at all railway lines at the railway station. The contractor had accepted the terms with the open

eyes. There is no word used in the contract as '*cross-loading*' for any operation. Otherwise, also there can not be any '*cross-loading*' as such. In any case, if the material is to be taken off from one wagon to another wagon then it becomes a case of loading and unloading as is envisaged by the contract. Therefore, the work sought to be got done by the plaintiff from the contractor was well within the limit and scope of the agreement entered into between the parties. Therefore, the plea of the appellants that the work for which recovery has been sought against the defendant is beyond the scope of contract; is liable to be rejected. The other argument raised by learned counsel for the appellant is that it was impossible for the contractor to accomplish the work within the given time frame of 5 ½ hours because the wagons were standing at a distance. In this regard, suffice it to mention that once a party enters into the agreement, the party is supposed to comply with the terms of the agreement. Merely because a party is facing hardship in performing the agreement is no ground to avoid the obligation under the contract. The Indian Contract Act envisages the frustration of the contract only when the contract becomes impossible to be performed. However, there is marked difference between impossibility to perform and difficulty in performance. While impossibility of performance is well recognized as a ground for avoiding the liabilities under the contract, mere difficulty in performance of the agreement is no ground to avoid any obligation under the agreement. It is not even case of the defendant that by employing any number of labours this work could not have been done within the time frame. Only thing that they might have been required to do was to employ more work force and to put increased effort to accomplish this work. Hence the plea of the defendant regarding the contract not being

capable of being performed is also liable to be rejected.

No other argument was raised by learned counsel for the parties.

In view of the above, the present appeal is dismissed being devoid of any merits.

4th April, 2018
Shivani Kaushik

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned Yes

Whether Reportable Yes