

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

RSA No.2356 of 2011

Jaspal

...Appellant

Versus

Municipal Corporation, Faridabad

....Respondent

Date of Order: 21.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rohit Ahuja, Advocate for the appellant.

Mr. Saurabh Goel, Advocate for the respondent.

AMIT RAWAL, J (ORAL)

Defendant-appellant is in second appeal aggrieved of concurrent judgments and decrees passed by both the courts below whereby suit of the plaintiff-respondent/Municipal Corporation, Faridabad for mandatory injunction calling upon the appellant-defendant to pay instalments in pursuant to the contract, has been decreed vide judgment and decree dated 16.9.2010 passed by learned Civil Judge (Sr. Division), Faridabad and the findings affirmed in appeal by the lower Appellate Court vide judgment and decree dated 22.1.2011.

Plaintiff-respondent instituted the suit on the premise that the defendant-appellant had taken a contract for lifting the dead animals from and within the limits of boundaries of MCF NIT Zone II Faridabad in the year 1998-99 for the period from 16.5.1998 to 31.3.1999 in an open auction for Rs.3,60,000/-. He had deposited an amount of Rs.90,000/- as 1/4th amount of security with the plaintiff on 15.5.1998 on the basis of which letter of contract was issued. Neither the defendant-appellant deposited the seven equally instalments of Rs.38752/- by 15th of every calendar month nor produced seven post dated cheques and bank guarantee but deposited only three instalments of Rs.38,752/- each in June, July and August.

Upon notice, the defendant appeared and contested the suit by taking various objections qua maintainability, limitation and estoppel. He denied that he was liable to pay any instalment to the plaintiff after 15.11.1998, rather it was pleaded that the plaintiff breached the terms and conditions of the contract.

From the pleadings of parties, the following issues were framed by the trial Court:

- “1. Whether defendant entered into contract for period 16.9.98 to 31.3.99 in terms mentioned in memo no.MCF/98/631 dated 15.5.1998?OPP*
- 2. Whether plaintiff is entitled to recovery Rs.1,54,284/- as principal amount?OPP*
- 3. Whether the plaintiff is entitled to recover Rs.200/- per day total Rs.1,22,000/- as penalty?OPP*
- 4. Whether the suit is not maintainable in the present form?OPD*
- 5. Whether the suit is barred by limitation?OPD*
- 6. Whether plaintiff is estopped to file suit from his act and conduct?OPD*
- 7. Relief.”*

In order to prove their case, respondent-plaintiff examined two witnesses apart from tendering documentary evidence i.e Ex.P.1 to Ex.P.17. On the other hand, defendants brought on record Ex.D.1 to Ex.D.8.

On the basis of preponderance of evidence, the trial court decreed the suit of the plaintiff-respondent by ordering recovery of Rs.1,54,284/- along with interest @ 10% from 01.4.1999 to be paid by the appellant-defendant and the Appellate Court affirmed the findings in appeal.

Learned counsel for the appellant submitted that the findings recorded by both the courts below in decreeing the suit are patently illegal

and the same is liable to be set aside, for the suit was barred by the law of limitation. Even the last instalment of August 1998 is reckoned to be recovery of debt, the suit was time barred as it was filed on 26.10.2002. The remedy for the plaintiff-Corporation was to seek damages in terms of money but not in the manner and mode for seeking balance amount since the defendant-appellant was not liable to pay any instalment after 15.11.1998 to the plaintiff as he did not perform any work. Filing of the suit by the respondent-plaintiff in the absence of stay did not arrest the period of limitation and, thus he prayed for setting aside the judgments of both the courts below.

Per contra, learned counsel for the plaintiff-respondent submitted that no error could be found with the judgment and decrees passed by both the courts below. In the suit, there was interim stay with regard to cancellation of the contract and direction to the appellant to pay the instalment but thereafter the appellant refused to adhere to the terms and conditions of the contract. It is in these circumstances, the present suit was filed on 26.10.2002 and thus the same cannot be said to be beyond limitation. If a person undertakes to perform his part of contract and thereafter he does not come forward, the remedy was only to seek recovery of balance instalments. He thus prayed for dismissal of the present appeal.

After hearing learned counsel for the parties and appraising the paper book, I am of the view that the suit for recovery of the amount was not maintainable, for it was barred under Section 41(h) of the Specific Relief Act, which provides as under:

“ 41. Injunction when refused.—An injunction cannot be granted—

(a) to (g) xxxx xxxxx

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust”.

The only remedy for the respondent-plaintiff was to claim damages, in terms of money, as per Section 73 of the Indian Contract Act, which mandates as under:

“ 73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. —When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. —When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract."

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

No evidence has been brought on record by the plaintiff-

respondent to show as to how loss and damage has been caused to the Corporation necessitating it to file a suit for recovery. Once a dispute arose with regard to the terms and conditions of the Contract, the remedy availed by the plaintiff, in my view, was not appropriate. Both the courts below despite the issue having been framed qua maintainability, have not adverted to the aforesaid provisions of law.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 :

80 Punj LR 1 (FB)] cannot be sustained and is thus overruled." [at paras 27 - 29]" "27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force."

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned, present appeal is accepted and the judgment and decrees passed by both the courts below are set aside.

May 21, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No