

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.297/2008

1. THE PRINCIPAL,
College Of Engineering
Farmagudi, Ponda, Goa.

2. STATE OF GOA,
Through the Chief Secretary,
Government of Goa,
Secretariat, Panaji, Goa.

...APPELLANTS

Versus

MRS. ESTER FARIA
major, married,
resident of Khorlim, Mapusa
(Through her duly constituted attorney
Mr. Edwin Faria).

...RESPONDENT

Mr. P. Faldessai, Additional Government Advocate *for the Appellants.*

Mr. Vishal Sawant, Advocate *for the Respondent.*

CORAM: M. S. SONAK, J.

DATED: 23rd September 2021

JUDGMENT:

1. Heard Mr. P. Faldessai, learned Additional Government Advocate for the Appellants and Mr. Vishal Sawant for the Respondent.

2. The Appellants are the Original Defendants and the Respondent is the Original Plaintiff in Civil Suit No. 204/2004 instituted before District Court Judge-2, North Goa at Panaji (Trial Court).

3. This Appeal is directed against the Judgment and Decree dated 30.04.2008 made by the Trial Court decreeing the suit and directing the defendants to pay ₹26,600/- together with interest at the rate of 10% per annum from 26.02.1990 till its realization. This compensation was ordered because the Trial Court agreed with the case of Plaintiff that the contract for the supply of certain electronic items was wrongfully terminated.

4. Mr. Faldessai, the Learned Counsel for the appellant submits that the tender conditions that reflect the contract between the parties make it clear that time was the essence of the contract. He submits that the evidence on record bears out that there was a delay in making supplies. He, therefore, submits that there was no error in the termination of the contract, and the impugned judgment and decree warrants interference. He relies on *M/s. Hind Construction Contractors v. State of Maharashtra*, (1979) 2 SCC 70 and *Arosan Enterprises Ltd. v. Union of India and another*, (1999) 9 SCC 449 in support of his contentions.

5. Mr. Vishal Sawant, the Learned Counsel for the respondent defended the impugned judgment and decree based on the reasoning reflected therein.

6. The rival contentions now fall for my determination.

7. The short point for determination in this appeal is whether based on evidence on record, the Learned Trial Judge was justified in holding that time was not the essence of the contract and therefore, there was no justification on the part of the defendants in terminating the contract for supply.

8. Now there is no dispute, that the contract between the parties is contained in tender conditions dated 28.07.1986 which were duly accepted by Plaintiff.

9. The clauses relevant to the determination of this issue read as follows:-

“Clause 8- The goods supplied at college premises will be finally accepted only after inspection by a competent authority (inspection), appointed by the Principal, and the decision of the Principal in this regard will be final.

Clause 9- The goods should be delivered at college premises by the date prescribed in the supply order. In case of non-

delivery of delayed delivery against the order placed the Principal reserves the right to impose a penalty of per week of the amount of the order or to impose a penalty of ½ % per week of the amount of the order or part supply delayed as the case may be.

Clause 15-The approximate time of delivery should be intimated by the tenderer in his tender or in his covering letter.

Clause 16- The supply should be effected within the specified period from the date of issue of the office order.

Clause 17- In case, the tenderer feels that the delivery period cannot be adhered to an application to this effect, should be made to the Principal, College of Engineering, Farmagudi, Goa which may or may not be considered according to the circumstances.

Clause 22- Once the supply order is placed with the tenderer, if he fails to execute the supply, as per specifications or in time, the order shall be cancelled forthwith on a fresh order for the same shall be place with the tenderer who has quoted the next higher rate and SHO is willing to exact the supplies, failing which shall be placed with the next tendered and so on the difference in the cost between the rates of the defaulting tenderer and the successful tenderer shall be recovered from defaulting tenderer.”

10. From the clauses of the contract as also the oral and documentary evidence produced by the parties, there is no case

made out to fault the reasoning of the Trial Court that time, in this case, was not the essence of the contract. There is evidence that at no stage, was there any strict insistence about supplies within the period specified in the work orders. On no occasion, was any penalty of ½% per week imposed on the Plaintiff for the delay in supplies. No clause provides that delayed supplies will entail termination rather clause 9 provides that the principal reserves the right to impose a penalty of ½% per week in case of delayed deliveries. Clause 17 gives an option to explain the delay in making supplies. Even Clause 22, empowers cancellation of the order for supplies and placing of the order with the next best tenderer. All these clauses coupled with the other evidence on record support the finding recorded by the trial court that in this case, the time was not the essence of the contract.

11. Besides, in this case, there is evidence, that just before the issue of the letter of termination of the contract, supplies were attempted to be made on 17.09.1987 and thereafter on 21.09.1987. The plaintiff has deposed that the storekeeper refused to accept the deliveries on the said dates. The Trial Court has, therefore, quite correctly held that the defendants were not justified in terminating the entire contract, when, the store-keeper of the defendants refused to accept the supplies made within the prescribed period without assigning any reasons. The Trial Court

has quite correctly relied upon the evidence of the Plaintiff and thereafter, drawn an adverse inference because of non-examination of the storekeeper by the Defendants.

12. Besides, in this case, the witnesses on behalf of the defendants have not deposed from personal knowledge because the concerned officials present in the year 1987 had since retired or were otherwise unavailable. There is no documentary evidence to make good the case set out by the defendants. Upon cumulative consideration of these aspects, no case is made out for interference in the impugned judgment and decree.

13. In *M/s. Hind Construction (supra)*, the Hon'ble Supreme Court has held that the question whether the time is the essence of the contract, is a question of the intention of the parties to be gathered from the terms of the contract. The provision for imposition of penalty and extension would militate against such an inference. Time can be made the essence of the contract by fixing further period for the performance of a contract. In the present case, the contract contains provisions for extension, and there is no evidence that the defendants by addressing any letters made time the essence of the contract. Therefore, the decision assists the case of the Plaintiff rather than the Defendants.

14. In *Arosan Enterprises Ltd. (supra)*, the Hon`ble Supreme Court has held that when the contract itself provides for an extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first part of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise. The contract, in the present case, had made provision for extension of time *inter alia* by imposing penalty. Neither was any penalty imposed nor were supplies rejected for any alleged delay. Therefore, even this decision does not assist the defendants in the facts of the present case.

15. Mr. Faldessai finally submitted that the interest of 10% per annum is quite exorbitant and the same could not have exceeded 6% per annum. In this case, the plaintiff examined a retired bank officer (PW-3) who deposed that the lending rate on commercial loans in the year 1987 was generally 16.5%. She, however, admitted that this rate varies from category to category and the rate in the case of small-scale industries is much lesser. Having regard to this evidence and in the absence of any contrary evidence from the defendants, the Trial Court awarded interest at

the rate of 10% per annum. There is no error which warrants interference in this appeal.

16. For the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed.

17. There shall be no order for costs.

M. S. SONAK, J.