APPELLATE CIVIL

Before D. Falshaw, C. J. and S. K. Kapur, J.

UNION OF INDIA,—*Appellant.*

versus

MOHAN SINGH,—*Respondent.*

Regular First Appeal No. 43-D of 1955.

1965

March 24th

Central Public Works Department Code—Clause 89(*c*)—*Contract performed but payment not made—Variation in the rates of contract—Whether can be made—Chief Engineer—Whether competent to make such variation——Various clauses of the Code—Whether to be considered implied terms of contracts—Government of India Act,* 1935—*S.* 175(3)—*Variation in the terms of a contract—Whether compliance of section* 175(3) necessary.

Held, that a contract subsists till payments due thereunder are finally made. Hence under clause 89(c) of the Central Public Works Department Code, the Chief Engineer is competent to vary the rates of a contract which has been performed but payment thereunder has not been finally made.

Held, that the Central Public Works Department Code is merely intended to define the scope of functions of the officers of the Public Works Department and deals with what duties have to be discharged or exercised by each particular officer. It is not correct to say that all that is said in the Code should be held impliedly provided in the contract. It is not disputed that it is nowhere expressly provided in the contract that the clauses can be implied as forming part of the contract, and it is, therefore, difficult to see how these clauses can be implied as forming part of the contract. In the discharge of various activities the Government have to lay down the duties and functions of their officers and it would create an impossible situation if such instructions issued with regard to such matters were to be implied as terms of the contract.

Held, that varying the terms of an existing contract is as much a contract contemplated by section 175(3) of the Government of India Act, 1935, as the original contract itself. Hence compliance of the section for such variation is necessary.

In what circumstances can a term be implied in a contract—Discussed. British *Movie to news* vs *London and District Cinemas Ltd.* (1) *explained.*

(1) 1952 A.C. 166, 185.

Regular First Appeal under section 39, Act IX of 1919, from the Order of Shri S. S. Kalha, P.C.S., Sub-Judge, 1st Class, Delhi, dated 30th October, 1954, ordering the plaintiff to recover Rs. 1,66,904.15 from the defendant and further allowing two months' time to defendant to pay the decretal amount.

S. N. SHANKER, WITH DALJIT SINGH, ADVOCATES, for the Appellant.

R. S. NARULA, WITH S. S. CHADHA AND R. K. JUNEJA, ADVOCATES, for the Respondent.

ORDER

Kapur, J.

KAPUR, J.—This regular first appeal is directed against the judgment and decree of the Subordinate Judge, 1st Class, Delhi, dated the 30th of October, 1954.

The facts of this case need not detain us for very long since the two short questions that we have been called upon to decide are the validity of variation in rates provided in the contract between Mohan Singh and the Government of India, dated the 1st November, 1941 and in case the variation is not valid whether the plaintiff-respondent is entitled to base his claim on a quantum meruit. The plaintiff-respondent filed a suit for recovery of Rs. 1,66,904-15-0 against the Union of India on the basis of an agreement for the lease of Government Workshop at Barakhamba, New Delhi, for a period of three years commencing from the 1st October, 1941 (Exhibit D 1). Under the said agreement the Government had to purchase their requirement of the articles specified in schedule annexed to the said agreement. It is not disputed that the amounts due to the plaintiff-respondent under the said agreement have been paid and the present claim is based on the order, dated 22nd/28th of May, 1947 by the Chief Engineer sanctioning an increase of 184 per cent in the rates with effect from the 1st of April, 1942. The plaintiff-respondent claimed that immediately after the work was commenced there was a tremendous increase in prices due to the entry of Japan in War and therefore he started making representations to the Government for increase of rates by 200 per cent. As his own witness (P.W. 8) he stated that from March, 1942 onwards he made several representations to the Government for increase of rates by 200 per cent and in July, 1942,

he made a written representations to the Superintending Engineer, Provincial Division, C.P.W.D. It is relevant to refer to the said written representation which is Exhibit P. 12. In the said representation the plaintiff respondent pointed out that due to Anglo-Japanese War the rates had gone up considerably but yet he executed the works nearly 20 times more when compared with the outgoing agency in similar period. He also pointed out the various difficulties in carrying out the works. To quote his own words "after having done all this hard work I find that I have undergone a very heavy loss and am unable to bear any further blow due to the circumstances beyond my control, a few of which are mentioned below for your information:—

(a) Anglo-Japanese War which broke out 2½ months after the acceptance of the tender;

(b) effect on import of machines, tools and all sorts of material became severe;

(c) abnormal increase in prices of raw materials as per separate (torn) attached;

(d) scarcity of material;

(e) severe restrictions imposed by the Government on all raw material required for the execution of the work, i.e., Iron, Coal, Tool, Machine Parts, Steel, etc.;

(f) abnormal increase in labour rates more specially in the case of skilled classes which has gone up considerably so much so that I am paying the Head Mechanic Rs. 200 per mensem which ordinarily could be had on Rs. 70 to Rs. 80 per month;

(g) abnormal increase in rate of surcharge and super tax, etc., recently imposed by the Government in the month of April, after the acceptance of the tender;

(h) all the above factors combined together are not only responsible for the heavy loss but there are

Union of India
v.
Mohan Singh

Kapur, J.

great obstacles in the way of execution of the works, and also due to the delay in obtaining the material we have to keep the labour engaged throughout without any work.

In the end he *inter alia* requested for increase in rates by at least 200 per cent with effect from 1st February, 1942, and increase in period of lease to 10 years.

The next document having a bearing on this aspect of the case is the report of the Chief Engineer, dated the 20th of May, 1947 sanctioning an increase of 184 per cent with effect from the 1st of April, 1942. In the said report it has been *inter alia* pointed out that the case was referred to Government and the Government did not agree to the extension of the lease period but expressed their assent to obtain the concurrence of the Finance Department for increase in rate. It is also pointed out in that report that the papers and files of the Government of India and of his office were not forthcoming. In the end the Chief Engineer states "it has become an old case and cannot linger on any further. As the settlement of rates is within my competence, I decide that 184 per cent increase be allowed to the contractor with effect from April, 1942. The Government of India should be informed". The Chief Engineer by his letter, dated the 16th of June, 1947, wrote to the Secretary to the Government of India, Works, Mines and Power Department, bringing to his notice that he had sanctioned the increase and that he was competent to do so under paragraph 89(c) of the C.P.W.D. Code. By letter, dated the 27th of June, 1947, the Assistant Secretary to the Government of India, wrote to the Chief Engineer that the payment at 184 per cent above the contract rate should not be made until further instructions. In the above circumstances the plaintiff-respondent brought this suit for the recovery of the aforesaid amount. In the plaint he made his claim on the following bases:—

(a) due to the increase in rate the contract had become impossible of performance for all practical purposes and the plaintiff-respondent was persuaded to continue the work on the faith of representation contained in the assurance given from time to time and the parties proceeded on the footing that the Government would

sanction suitable increase in the rates and (b) the increase in rates was sanctioned by the Chief Engineer who was competent to do so. In paragraph 8 of the plaint the plaintiff-respondent had stated that the Chief Engineer by his order, dated the 22nd of May, 1947, had agreed that 184 per cent increase be allowed to him from 1st of April, 1942. In reply to paragraph 8 of the Union of India, said that the Chief Engineer was not competent to increase the rates of the contract between the parties and set out four grounds in support of their plea of lack of competence on the part of the Chief Engineer. The clause relevant to the present controversy is clause (d) of paragraph 8 which was the fourth reason for lack of competence to increase the rates. The said clause is as under:—

> "8 (d) that under section 175(III) of the Government of India Act, the Chief Engineer was not authorised or competent to bind this defendant by any order, agreement or promise to increase the rates in excess of those agreed to between the plaintiff and the defendant under their agreement, specially after the contract had concluded. Any such order, agreement or promise is void and not binding on this defendant."

We may straightway point out here that the objection relates to the incompetence or lack of authority on the part of the Chief Engineer to sanction the increase and not to the document sanctioning increase not being expressed to be made by the Governor-General as required by section 175(3) of the Government of India Act, 1935. Section 175 (3) of the Government of India Act consists of two parts (1) the contract must be expressed to be made by the Governor-General and (2) it must be made by such persons and in such manner as the Governor-General may direct. Our reading of paragraph 8 is that the objection is confined to only one aspect, namely, lack of authority. We will advert to this matter a little later since one of the objections taken on behalf of the plaintiff-respondent is that the Union of India should not be allowed to raise an objection which is not raised in the plaint.

Union of India
v.
Mohan Singh

Kapur, J.

Now, we come to the point raised at the bar. Mr. Shanker, the learned counsel for the appellant, contended that variation of rates was sanctioned by the Chief Engineer by his order, dated the 22nd/28th of May, 1947 which was itself a contract and required compliance with section 175(3) of the Act. The increase, therefore, suffered from two-fold infirmities: (1) it was not expressed to be in the name of the Governor-General and (2) the Chief Engineer was not competent to sanction the increase. According to Mr. Shanker the contract was for a period of three years from 1st of October, 1941 while the increase in rate was sanctioned by the Chief Engineer in May, 1947. Regulation 89(c), submits Mr. Shanker, could be invoked by the Chief Engineer only during the currency of the contract and not after it had been performed. Mr. R. S. Narula on the other hand submits that (a) the Chief Engineer was competent to sanction the increase by virtue of said regulation 89(c); (b) the power could be invoked even after the contract had been performed but in any case since the payments under the contract were still to be made in May, 1947, the contract had not come to an end and, therefore, it was immaterial whether clause 89(c) could be invoked only during the currency of the contract or not; (c) the variation was not a fresh contract but merely variation of rates in the original contract, Exhibit D. 1 which had been properly and validly executed in the name of the Governor-General. The variation order, therefore, need not have been expressed to be made in the name of the Governor-General, (d) the objection that the contract was not expressed to be made in the name of the Governor-General was not taken in the plaint and therefore should not be allowed to be raised particularly because the plaintiff-respondent had no opportunity to adduce evidence showing that the Government of India had properly and validly agreed to the increase in rates. Mr. Narula in this connection pointed out that even the file of the Government of India had not been made available and could not be got produced in Court in spite of the plaintiff-respondent's best efforts. He drew our attention to the interrogatories issued for the examination of Shri V. A. Krishnamurty, Electrical Engineer, Mechanical and Workshop Division and particularly question (6) in which he was asked whether the plaintiff-respondent had represented to the Superintending Engineer in July, 1942, asking for extension of such period and increase of rates. In reply Shri Krishnamurty stated that

the letter of 29th July, 1942 was received but it was not traceable on records of the Government. He further called attention to the reports of the Chief Engineer, dated the 20th of May, 1947 and of the 25th of May, 1947; and the report of Mr. Rup Lal to show that the papers regarding the increase of rates had been misplaced by the Government. Mr. Narula also contended that in case it be held that variation was a contract and, therefore, required to be expressed in the name of the Governor-General, the plaintiff's claim should be decreed on the principle of quantum meruit under section 70 of the Indian Contract Act. He submitted that we should imply a term in the contract that in view of clause 89(c) of C.P.W.D. Code, the rates could be varied by the Chief Engineer. He, further submitted that in any case we should imply a term that the contract would not be applicable in a situation which was fundamentally different from the one obtaining on the date, the contract was made and consequently when the plaintiff-respondent went on performing the contract and supplying goods on the assurance given by the Government that the rates would be increased, he became entitled to compensation under section 70 of the Contract Act. The argument of Mr. Narula on this branch was two-fold. (1) he asked us to imply a term that the contract Exhibit P. 1 ceased to be binding on the parties in the changed situation and since the supplies were lawfully made by the plaintiff and accepted by the Government of India, he was entitled to reasonable rates under section 70 of the Act, and the increased rates would not be allowed under the contract Exhibit D. 1, but under a quasi-contract evidenced by supply and acceptance and (2) after the plaintiff had, expressed his inability to carry out the contract, Exhibit D. 1 the plaintiff was supplying goods and the defendant accepting the same not in pursuance of that contract but in pursuance of the assurance that the rates would be increased and acceptance of goods in those circumstances would, attract section 70 of the Indian Contract Act. That according to Mr. Narula was his plea in paragraph 12 of the plaint. We might straightway deal with the argument of Mr. Narula that since the conditions in which the work had to be carried out were fundamentally different from those anticipated by the parties at the time the agreement was made, the parties should not be held bound by the rates in the original agreement for the reasons set out above. A term can be implied only on the footing that

Union of India
v.
Mohan Singh

Kapur, J.

the parties intended to provide for certain matters but they failed to express it in the contract. But there is an obvious fallacy in this argument for we find it difficult to see how the parties could have even impliedly provided for some thing which they neither expected not foresaw. If the whole case of the plaintiff proceeded on the footing that at the time the contract was made they never foresaw that a situation so fundamentally different would emerge due to the entry of Japan in War, how could it be said that the parties impliedly agreed that if that situation emerged, they would not be bound by the contract. If, on the other hand, the implied term theory is to be based on the principle that if the attention of the parties had been directed to the given contingency then the parties would have provided for that, then it would be demanding of a Court an impossible feat of speculation for then the Court has to speculate and infer intention from not what the parties have said but from what both the parties omitted to say; a task impossible of achievement. No doubt it was said in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* (1), by Viscount Simon that—

> "If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction, it does not apply in that situation."

But it has been pointed out by Lord Radcliffe in *Davis Contractors Ltd.* v. *Bareham Urban District Council* (2) at page 728 that—

> "But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw."

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(2) 1956 A. C. 696.

Both these cases were cases dealing with frustration based on implied term theory and apart from the fact that in India cases of frustration are governed by statute, namely the Indian Contract Act and not on different theories adopted in England, Mr. Narula does not contend that the original contract frustrated, for then he would have to show that it frustrated within the meaning of section 56 of Indian Contract Act. All that he contends is that after the plaintiff made representation the supply and acceptance of goods was on the basis of those assurances. Moreover when properly analysed the argument of implied term raised on behalf of the respondent really amounts to saying that due to the unexpected turn of events the earlier contract became impossible of performance and therefore the supplies were made and accepted under a different contract. We are of the view that the above quoted observations of Lord Radcliffe apply with equal force to the submission under consideration. The artificiality of the theory of an implied term is best demonstrated in the words of Lord Sands in *James Scott & Sons Ltd.* v. *Del Sel* at page 597 (3)—

> "A tiger has escaped from a travelling managerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract."

We, therefore, hold that no such term can be implied in the contract, Exhibit D. 1.

Now, we come to the other argument of Mr. Narula as to whether in view of clause 89(c) a term can be implied in the contract that the rates provided thereunder would be subject to variation by the Chief Engineer. We are afraid we are unable to agree with Mr. Narula even there. The Code is merely intended to define the scope of functions of the officers of Public Works Department and deals with what duties have to be discharged or exercised by each particular officer. It is not correct to say that all that is said in the Code should be held impliedly provided in the

(3) 1922 S.C. 592.

Union of India v. Mohan Singh

Kapur, J.

contract. It is not disputed that it is nowhere expressly provided in the contract that the clauses in the Code would form part of the contract. It is difficult to see how these clauses can be implied as forming part of the contract. In the discharge of various activities the Government have to lay down the duties and functions of their officers and it would create an impossible situation if such instructions issued with regard to such matters were to be implied as terms of contract. We next come to the argument of Mr. Narula that the variation by the Chief Engineer was not a contract and therefore it did not need compliance with section 175(3) of the Government of India Act. We do not agree. Varying the terms of the existing contract is as much a contract contemplated by section 175(3) of the Act as the original contract itself.

Regarding the argument of Mr. Shanker, that the power under clause 89(c) of the Code could not be exercised after the contract had been performed, we are in agreement with Mr. Narula that since payments under the contract had not been fully made and were still being claimed, the contract had not come to an end. It has been held by their Lordships of the Supreme Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram and others* (4), that contract subsists till payments due thereunder are finally made. Mr. Shanker does not dispute the fact that payments were still being claimed under the contract. In the circumstances there is not force in Mr. Shanker's submission that the contract had come to an end and therefore the increase was outside the competence of the Chief Engineer. Regarding the authority of the Chief Engineer to sanction the increase in rates clause 89(c) clearly shows that he was competent to do so. It has also been stated by the Financial Assistant to the Chief Engineer S. Mehar Singh who appeared as P.W. 6, that it was within the competence of the Chief Engineer to modify the rates in view of para 89(c)(2) of C.P.W.D. Code. In view of this we hold that the Chief Engineer was competent to sanction the rates. Having come the conclusion that the variation in rate was itself a contract requiring compliance with section 175(3), Mr. Narula can succeed only if he is able to show that (1) either the Union of India cannot be allowed to raise that point or (2) he is entitled to a decree under

(4) 1954 S.C.R. 847.

section 70 of the Indian Contract Act. Regarding section 70 Mr. Narula's argument as already stated is that in March 1942, the plaintiff had unequivocally expressed his views that it was no longer possible for him to continue the contract and therefore he should be allowed an increase in rates. According to Mr. Narula the Government assured the plaintiff that the rates would be increased and he supplied the goods thereafter not on the basis of the contract, Exhibit D. 1, but on the basis of the assurance by the Government that the rates would be increased. Having supplied the goods in those circumstances the Government cannot be said to have accepted the goods under the contract, Exhibit D. 1, but only on the footing on which they were supplied, namely, the understanding between the parties that the rates would be increased. That according to Mr. Narula attracts section 70 of the Indian Contract Act and for this he relies on *State of West Bengal* v. *B. W. Mondal and Sons* (5). Says Mr. Narula that the contract based on supplies made in pursuance of assurances and acceptance thereof by the Government obviously suffered from an infirmity of non-compliance with section 175(3) of the Government of India Act, and therefore the acceptance of goods must be presumed to have been done without a contract, Mr. Shanker, on the other hand, contends that section 70 has no application to the facts of this case for it deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. If on the other hand the supplies are made in pursuance of a contract and the other party has no option to reject the goods, section 70 would have no application. The learned counsel says that before section 70 can be applied it must be open to the recipient to reject the goods delivered. He points out that the Government had no option to reject the goods for they were bound under the contract, Exhibit D. 1, to accept the same. Mr. Shanker further points out that merely because the contract became too onerous for the plaintiff, it could not be said that he was not supplying the goods in pursuance of the contract. It can at most be said, according to Mr. Shanker, that he went on supplying the goods under the contract and at the same time asking the other party to reconsider the terms of the contract which the other party was not bound to do. Mr. Shanker distinguishes *B. K. Mondal's case* on the

(5) A.I.R. 1962 S.C. 779.

Union of India v. Mohan Singh

Kapur, J.

ground that there the contract itself was held to be void in view of section 175(3) of the Government of India Act and therefore the supplies were made and enjoyed without any contract. The point is not free from difficulty and we would prefer to rest our decision on the ground that the Union of India cannot be allowed to raise the point which they had not raised in their pleadings. As we have pointed out earlier in paragraph 8 of the written statement all that they contended was that the Chief Engineer had no authority to sanction the increase of rates. They did not contend that the contract was not expressed in the name of the Governor-General and was therefore void. We have already held against the appellant regarding the authority of the Chief Engineer to sanction the increase in rates. We do not propose to permit the appellant to raise the other question particularly because the question involves some investigation into the facts. Even the file of the Government was not available and if the issue had been raised the plaintiff may have succeeded in showing that the Government had agreed to the increase in rates and that was done in proper form. Their Lordships of the Supreme Court in *Kalyanpur Lime Works Ltd.* v. *State of Bihar and another* (6), did not permit such a point to be raised in the absence of plea in the pleadings. Even the perusal of the trial Court's judgment shows that this point was not agitated there and the arguments were confined only to the authority of the Chief Engineer to sanction the increase. In view of this the appeal must fail and is dismissed with costs.

D. Falshaw, C.J.

D. FALSHAW, C.J.—I agree.

K. S. K.

SALES TAX REFERENCE

Before A. N. Grover and S. K. Kapur, JJ.

KEWAL KRISHAN-OM PARKASH,—*Appellant.*

versus

THE STATE,—*Respondent*

Sales Tax Reference No. 3-D of 1958

1965

May, 11th

Bengal Finance (Sales Tax) Act. (Bengal Act IV of 1941) as extended to the Union Territory of Delhi—S. 4(5)(a) and (c)—Taxable quantum—Dealer whose turnover is less than Rs. 30,000 and includes turnover in respect of manufactured goods which is less than Rs. 10,000—Whether liable to be taxed under clause (a) or clause (c).

(6) 1954 S.C.R. 958.