

SYED ISRAR MASOOD, FOREST CONTRACTOR,
RET GHAT, BHOPAL

v.

B STATE OF MADHYA PRADESH

October 1, 1981

[A.D. KOSHAL, V. BALAKRISHNA ERADI AND
R.B. MISRA, JJ.]

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Right to repudiate a contract and for refund of earnest money in deposit arise when variation in quantity and quality is found on actual count between what was held out at the auction as being available—Non-production of the verification of report is hit by the doctrine of 'suppressio veri'—Condition number 3 of the Sale Notice, value of.

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Pursuant to the notice dated July 22, 1960, notifying that forest contracts will be settled by public auction, the appellant-plaintiff attended the said auction on August 17, 1960 after having deposited the requisite earnest money of Rs. 1,000 and furnished the solvency certificate for the sum of Rs. 1.5 lakh. At the time of auction, the details of the forest produce available in each coupe was announced. In the said announcement the total number of trees of each species available in each coupe as also their girth etc. were furnished and the bids were invited on the basis of the said information given to the intended bidders. The appellant was the highest bidder in respect of two coupes, namely, Searmau Coupe C/2 "A" and "B" with a bid of Rs. 69,000 for these two coupes. Pursuant thereto, the appellant deposited on August 22, 1960, Rs. 16,250 being the balance of the first instalment of Rs. 17,250, after adjustment of the earnest money in deposit. On executing the requisite security bonds, the appellant was directed, on October 27, 1960, to proceed to the site and sign the "coupe boundary certificate", before the Range Officer for getting possession of the two coupes.

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When the appellant visited the two coupes and conducted a detailed inspection of the trees available for extraction, he found that the coupes did not contain the forest produce as announced at the time of the auction. Inasmuch as the number of trees available for cutting in the two coupes were found to be very much short of the quantity and quality of the forest produce given out at the time of auction as being available in the two coupes, the appellant refused to sign the boundary certificate. The forest authorities, on January 19, 1961 served a notice calling upon the appellant to deposit the second and third instalments of the bid amount and threatening that in the event of default, the amount would be recovered as arrears of land revenue. Subsequently a distraint notice was also issued under section 146 of the Madhya Pradesh Land Revenue Code by the Tehsildar. On April 17, 1961, the forest authorities issued a notice calling upon the appellant to show cause why the contract be not terminated and the two

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coupes re-auctioned at his risk. Thereupon the appellant, after serving on the respondent a due notice under section 80 Civil Procedure Code, filed a suit for recovery of the amount deposited by way of first instalment plus damages arising out of the breach of contract. The appellant also prayed for a permanent injunction restraining the State for taking coercive step to recover further instalments. The Trial Court decreed the suit as prayed for. In appeal by the respondent. State the High Court set aside the decree on the ground that the appellant did not prove that the number of trees which were actually available for extraction in the two coupes, according to proper marking was less than the number of trees which was covered by the assurance given to the contractor at the time of the auction.

Allowing the appeal by certificate under Article 133 (1) (a) of the Constitution, the Court,

HELD : 1. While condition number 3 in the Sale Notice (Ex. D/D) will operate to prevent the Contractor from claiming any damages or compensation from the State Government on the ground that the details of the quantity of the forest produce were subsequently found to be incorrect, it will not preclude him from repudiating the contract on its being found that there was substantial variance between the particulars furnished at the time of the auction regarding the quantity and quality of timber that will be available for extraction in the concerned coupes and the quantity etc. of tree growth actually found to be available on the site. [902 D-F]

2 : 1. It has been clearly established by the evidence in this case that a very substantial quantity of timber standing on the bank of Nalla had been marked for extraction and numbered and the auction sale had been held on the basis that the highest bidder would be entitled to fell and remove all those trees. But by the time the coupes were allowed to be inspected by the auction purchaser, that area was declared to be "reserved", with the result that there was a complete prohibition against the felling of any timber therefrom. This has substantially altered the very foundation of the contract and hence it was perfectly open to the plaintiff to repudiate the contract and claim a refund of the amount deposited by him as a part payment of the purchase price. [902 F-H]

2 : 2. The subject-matter of the auction sale was the totality of the trees which were marked for cutting in the two coupes. Since a substantial number of the marked trees was contained in the area which was subsequently declared as "reserved", it is inevitable that there was a corresponding diminution in the total quantity of timber which was announced as available for cutting at the time of the auction sale. [903 A-C]

2 : 3. The appellant has fully proved his claim for the refund of the amount paid by him by way of the first instalment of the sale price by examining himself as P.W. 2 and also through P.Ws. 3 to 6, all of whom had inspected the coupes subsequent to the auction sale. The oral testimony given by them is further corroborated by the statements contained in Ex. P-1, P-3, P-5, P-6 and P-8. Further the sworn evidence of respondent's own witnesses (D.W. 2 and D.W. 3) and the suppression of their two inspection reports from the court confirmed the right to repudiate the contract and ask for a refund. [899 H, 900 A-E]

A 2 : 4. That the criticism made by the High Court that the argument by the appellant-plaintiff was the result of an after-thought is wholly unjustified and erroneous is clear from a mere reference to Ex. P-1. The correct factual position is that the plaintiff had categorically complained to the department that a substantial area containing the forest produce, which had all been originally marked for sale, had been subsequently "reserved" with the result that the quantity of timber available for extraction had become substantially reduced.[901D E,H,902A]

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2060 of 1970.

C From the judgment and order dated the 26th August, 1969 of the Madhya Pradesh High Court in First Appeal No. 100 of 1965

Harbans Singh, for the Appellant.

Gopal Subramaniam, D.P. Mohanty and R.A. Shroff for the Respondent.

D The Judgment of the Court was delivered by

E BALAKRISHNA ERADI, J. This appeal by certificate granted by the High Court of Madhya Pradesh under Article 133 (1) (a) arises out of a suit—Regular Civil Suit No. 7-A of 1963—on the file of the First Additional District Judge, Bhopal instituted by the appellant herein against the State of Madhya Pradesh, for recovery of a sum of Rs. 29,500 from the defendant by way of refund of the first instalment of the sale price deposited by the plaintiff with the Forest Department of the defendant-State pursuant to an auction of two forest coupes held on August 17, 1960, together with damages alleged to have been sustained by the plaintiff on account of alleged breach of contract by the defendant. The plaint contained a further prayer that the defendant should be restrained by a permanent injunction from taking any steps to recover from the plaintiff the second and third instalments of the sale price for which the two coupes had been knocked down in favour of the plaintiff at the auction sale.

G The trial court held that the plaintiff is entitled to recover from the defendant Rs. 17, 500 by way of refund of the first instalment of the sale price of the two coupes, but rejected the plaintiff's claim for recovery of damages. Accordingly, a decree was passed in the plaintiff's favour for recovery of Rs. 17,500 with proportionate costs. H The plaintiff's prayer for the relief of permanent injunction was also granted by the trial court.

The State (defendant) carried the matter in appeal before the High Court of Madhya Pradesh. The High Court took the view that the plaintiff's claim for refund of the first instalment of the sale price was unsustainable inasmuch as he had not proved that the number of trees which were actually available for extraction in the two coupes, according to the proper markings, was less than the number of trees which was covered by the assurance given to the contractor at the time of the auction. As regards the relief of permanent injunction, the High Court held that from the notice (Exh. P-7) issued by the concerned Divisional Forest Officer to the plaintiff on April 17, 1961, it was seen that the Government had indicated to the plaintiff its intention to terminate the contract before the second instalment had become due and hence the only right which the Government thereafter had was to realise from the plaintiff the deficiency, if any, occasioned by a resale of the two coupes. In this view, the High Court held that the Government had no longer the right to claim from the plaintiff the balance of the sale consideration represented by the second and third instalments and that the decree for permanent injunction granted by the trial court did not, therefore, call for any interference. Accordingly, the appeal filed by the defendant was allowed in part by the High Court and the decree granted to the plaintiff by the trial court for recovery of Rs. 17,500 was set aside. Hence, this appeal by the plaintiff.

The facts of the case on which there is no dispute are as follows. On July 22, 1960, the Forest Department of the State Government of Madhya Pradesh published in the State Gazette a notice notifying for general information that forest contracts of East Bhopal, Forest Division will be settled by public auction to be held by the Divisional Forest Officer at Sader Manjil, Bhopal on August 17, 1960. The plaintiff attended the said auction after having deposited the requisite earnest money. At the time of the auction, the respective Range Officers announced the details of the quantities of the forest produce available in each coupe. In the said announcement, the total number of trees of each species available in each coupe as also their girth etc., were announced by the concerned Range Officers and the bids were invited on the basis of the said information given out to the intended bidders. The plaintiff was the highest bidder in respect of two coupes, namely, Searmau Coupe C/2 "A" and "B". The plaintiff's bid of Rs. 69,000 for those two coupes was accepted by the Auctioning Officer and pursuant thereto, the plaintiff deposited on August 22, 1960 Rs. 16,250 being the balance of the first instalment of Rs. 17,250 after adjustment of the

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A earnest money already deposited. The plaintiff also produced a solvency certificate and executed the requisite Security Bonds. On October 27, 1960, the plaintiff was informed by the concerned Divisional Forest Officer that the security bonds furnished by the plaintiff were accepted and that the contract in respect of the two coupes was sanctioned in his favour by the Chief Conservative Officer of Forests. By the said communication, the plaintiff was directed to proceed to the site and sign the 'coupe boundary certificate' before the Range Officer for getting possession of the two coupes.

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C The plaintiff's case is that when, in pursuance of the aforesaid intimation, he visited the two coupes and conducted a detailed inspection of the trees available for extraction, he found that the coupes did not contain the forest produce as announced at time of auction, that a very large number of big trees which had been marked for felling and given serial numbers did not bear hammer marks either at the breast height or at the bottom, with the result that the contractor was debarred under the rules from felling those trees, that similarly a large number of trees which were hammer marked had not, however, been given serial numbers and that a large number of trees situated along the bank of a Nala in Coupe No. 2 "B" which had been marked for felling and had been serially numbered were found to have been subsequently "reserved" with the result that it was no longer open to the contractor to cut any of those trees. The plaintiff states that the aforesaid vital discrepancies and irregularities were pointed out by him to the Range Officer and inasmuch as the number of trees available for cutting in the two coupes was found to be very much short of the quantity and quality of the forest produce given out at the time of auction as being available in the two coupes, he refused to sign the boundary certificate. Thereafter, correspondence concerning the matter passed between the plaintiff and the Department, but notwithstanding joint inspections of the site and deliberations the parties could not reach any agreement. The plaintiff took the stand that unless the Department was ready and willing to put him in possession of the forest produce conforming to the quantity and quality of timber announced at the time of the auction, he was entitled to repudiate the contract and claim a refund of the amount remitted by him by way of first instalment of the sale price. The Forest Department issued a notice to the plaintiff on April 17, 1961, calling upon him to show cause why the contract should not be terminated and the two coupes reaucted at the

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plaintiff's risk. In the meantime, on January, 19, 1961, the plaintiff had been served with a notice requiring him to deposit the second instalment of Rs. 17,250 and threatening that in the event of failure to comply with the said demand, the amount will be recovered as arrears of land revenue. Subsequently, the Forest authorities of the State initiated action for recovering from the plaintiff the sum of Rs. 34,500 purporting to be the second and third instalments of the sale price, and a notice of demand under Section 146 of the Madhya Pradesh Land Revenue Code was issued to the plaintiff by the Tehsildar, Bhopal. Thereupon, the plaintiff instituted the present suit praying for the relief aforementioned, after serving on the defendant a due notice under Section 80, Code of Civil Procedure.

Admittedly, the auction sale was of the right to cut the trees which had been marked and numbered in the entire area covered by the two coupes in question. Details regarding the quantity and quality of timber available for cutting in the respective coupes were announced by the concerned Range Officers at the time of auction and it was on the basis of the said information that the participants in the auction were invited to bid. The trial Court as well as the High Court have concurrently found that an assurance had been given by the Department at the time of the auction that the two coupes contained the specified quantity of timber of different varieties and girth and that the details then given were as set out in the tabular statement appended to paragraph 3 of the written statement of the defendant. The plaintiff (examined as P.W. 2) and P.Ws. 3 to 6 all of whom had inspected the coupes subsequent to the auction sale have sworn that the quantity of the timber that was actually available for cutting in the two coupes was considerably less than the quantity announced at the time of the auction. The oral testimony given by them is corroborated by the statements contained in Exhibits P-1, P-3, P-5, P-6 and P-8, which are copies of the various representations made by the plaintiff to the Offices of the Forest Department after he found out on inspection of the coupes that there was vast divergence between what was announced at the time of the auction as the quantity of the timber available for cutting from the two coupes in question and the quantity that was actually found to be available. Even though the then Sub-Divisional Forest Officer, who was examined as D.W. 2, has stated in the evidence that after receipt of the plaintiff's complaint, he inspected the coupes and submitted a detailed inspection report to the Divisional Forest Officer, the defendant did not produce the said report in Court. It has also

A come out in the evidence of D.W. 3, who was the Forest Guard in
the area concerned at the relevant time, that he had submitted to the
Range Officer a report containing details of the timber available for
cutting in the two coupes. The aforementioned two reports would
B have been of valuable assistance in determining the extent of
shortfall, if any, in the quantity of timber actually available for
cutting in the coupes when compared with the particulars given
out at the auction. The non-production of the two reports by the
defendant, who alone was in possession of the documentary evidence
capable of throwing light on the subject-matter of this crucial issue,
C assumes significance in view of the admission made by D.W. 3 that
during his inspection of the coupes pursuant to the complaint
received from the plaintiff he had found that there were some trees
which had been numbered for cutting but had not been hammer
marked, that there were some other trees which contained hammer
marks only at one place instead of at the base as well as at breast
D height, as required under the rules, and that there were still some
other trees which had been marked by hammer but had not been
assigned any number. The inspection report prepared by this
witness which has been suppressed is a very material document since
the witness has sworn that he had actually counted and noted the
precise number of trees in respect of which such irregularities were
found to have been committed. Another important admission made
E by this witness is that there was some truth in the complaint of the
plaintiff with respect to the 'reservation' of the Nala.

The evidence clearly shows that there was a large number of
trees of different varieties situated on the bank of a Nalla in Coupe
No. 2 "B" and they had been hammer marked and serially numbered
F for cutting and removal. At the time of the auction sale, the Depart-
ment had treated these trees as being available for extraction by the
contractor and it was on that basis that the particulars regarding the
total quantity of timber belonging to different species available for
cutting in the two coupes were announced to the bidders. However,
G subsequently, the area comprising the bank of the said Nalla was
declared as "reserved", with the result that there was a prohibition
against cutting of the trees from the said 'reserved' area. The
plaintiff in his evidence, as P.W.2, has stated that there were about
300 teak trees in the area forming the bank of the Nalla and that
H the value of those trees would amount to between Rs. 10,000 and
Rs. 12,000. Though three Officers of the Forest Department were
examined on the side of the defendant, the aforesaid testimony given
by the plaintiff has not been controverted by them.

Notwithstanding the aforesaid facts brought out in the evidence, the High Court summarily rejected the plaintiff's contention based on the factum of reservation of the trees standing on the bank of Nalla by stating as follows:

"But there is nothing in the plaintiff's complaints to the Department at any stage alleging that this reservation had been made after the auction had taken place. The idea appears to be an after-thought. The mere oral statement of the plaintiff and his witnesses that this marking for reservation had taken place [after the auction, on the basis that they did not see these markings about reservation of the trees near the Nalla when they had gone to that forest on earlier occasions, are wholly insufficient to come to the conclusion that the Nalla area had been reserved after the auction."

The aforesaid reasoning is based entirely on the assumption that in one of the complaints preferred by the plaintiff before the Department Officers, it had been alleged by him, that the reservation of the trees on the bank of Nalla had been made after the auction had taken place. A mere reference to Exh. P-1 is sufficient to show that the aforesaid assumption made by the High Court is wholly erroneous. Exh. P-1 is a copy of the representation dated December 28, 1960 submitted by the plaintiff to the Divisional Forest Officer (East), Bhopal. In paragraph 4 thereof, the plaintiff had stated as follows:

"That the applicant inspected the coupe in or about the first week of November 1960 to give the coupe boundary certificate as is required under Clause 2 of the draft agreement deed. During this inspection the applicant was surprised to know that there were numerous irregularities committed in the marking of trees and huge area containing the Forest Produce marked for sale in the said coupe was *subsequently reserved.*"

(underlining supplied)

Thus, the correct factual position is that the plaintiff had categorically complained to the Department that a substantial area containing the forest produce, which had all been originally marked for sale, had been subsequently 'reserved', with the result that the quan-

A tity of timber available for extraction had become substantially reduced, The criticism made by the High Court that the argument advanced by the plaintiff was the result of an after-thought, was therefore not justified.

B We may at this stage refer to Condition No. 3 in the sale-notice (Exn. D/1) on which strong reliance was placed on behalf of the respondent, That condition reads:

C "The details of quantities of forest produce announced at the time of auction are correct to the best of the knowledge of the Divisional Forest Officer but are not guaranteed to any extent. The intending bidders are, therefore, advised to inspect on the spot the contract area and the produce they intend to bid for with a view to satisfy themselves about its correctness. No claim shall lie against the State Government for compensation or any other relief, if the details of the quantities are subsequently found to be incorrect".

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E In our opinion, the trial court was perfectly right in its view that, while the said condition will operate to prevent the Contractor from claiming any damages or compensation from the State Government on the ground that the details of the quantity of the forest produce were subsequently found to be incorrect, it will not preclude him from repudiating the contract on its being found that there was substantial variance between the particulars furnished at the time of the auction regarding the quantity and quality of timber that will be available for extraction in the concerned coupes and the quantity etc. of tree growth actually found to be available on the site. It has been clearly established by the evidence in this case that a very substantial quantity of timber standing on the bank of Nalla had been marked for extraction and numbered and the auction sale had been held on the basis that the highest bidder would be entitled to fell and remove all those trees. But by the time the coupes were allowed to be inspected by the auction-purchaser, that area was declared to be "reserved", with the result that there was a complete prohibition against the felling of any timber therefrom. This has substantially altered the very foundation of the contract and hence it was perfectly open to the plaintiff to repudiate the contract and claim a refund of the amount deposited by him as a part payment of the purchase price.

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We are unable to agree with the view expressed by the High Court that "the plaintiff cannot succeed unless he proved that, even after excluding the trees standing on the reserved area, the rest of the forest did not have sufficient number of trees which would satisfy the assurance given at the time of the auction". The subject-matter of the auction sale was the totality of the trees which were marked for cutting in the two coupes. Since a substantial number of the marked trees was contained in the area which was subsequently declared as "reserved", it is inevitable that there was a corresponding diminution in the total quantity of timber which was announced as available for cutting at the time of the auction sale.

We do not, therefore, find it possible to agree with the reasons stated by the High Court for refusing the plaintiff's prayer for refund of the amount paid by him by way of the first instalment of the sale price. The conclusion recorded by the trial court on this issue was perfectly correct and the High Court was in error in interfering with the said finding.

We notice, however, that a slight mistake has crept into the judgment and decree of the trial court, inasmuch as the amount of the first instalment refund has been wrongly mentioned therein as Rs. 17,500, whereas the amount actually paid by the plaintiff by way of the first instalment was only Rs. 17,250. A modification to this extent is, therefore, called for in the decree passed by the trial court.

This appeal is accordingly allowed, the judgment and decree passed by the High Court are set aside and those of the trial court are restored subject to the modification that the amount recoverable by the plaintiff from the defendant shall be only Rs. 17,250 and not Rs. 17,500 as stated in the trial court decree. In all other respects, the decree passed by the trial court will remain in tact. The respondent (defendant) will pay the costs of the plaintiff in this Court as well as in the High Court.

S.R.

Appeal allowed.