

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 342 of 2016

Date of decision: 26.11.2025.

Rajinder Singh

.....Appellant

Versus

State of H.P. & Ors.

...Respondents

Coram:

The Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?¹

For the appellant : Mr. J. S. Bhogal, Senior Advocate,
with M/s. Tarunjeet Bhogal, Swati
Verma & Srishti Verma, Advocates.

For the respondents : Mr. Gautam Sood, Deputy Advocate
General.

Satyen Vaidya, Judge (Oral):

The instant Regular Second Appeal has been filed by the appellant/plaintiff under Section 100 of the Civil Procedure Code (for short "CPC") against the judgment and decree dated 30.05.2016, passed by the learned Additional District Judge, Chamba, in Civil Appeal No. 927 of 2014, whereby the judgment and decree dated 21.11.2014, passed by the learned Civil Judge Junior Division, Dalhousie, District Chamba, in Civil Suit No. 45 of 2010, has been set aside and the suit of the appellant/plaintiff has been dismissed.

¹ *Whether reporters of Local Papers may be allowed to see the judgment?*

2. The appellant/plaintiff had filed a suit seeking declaration to the effect that Office Order dated 31.07.2009, passed by the Superintending Engineer, Himachal Pradesh Public Works Department (HPPWD), Dalhousie, District Chamba, H.P., was wrong, illegal, and not binding on the rights of the appellant/plaintiff. The relief of permanent prohibitory injunction restraining the defendants from effecting recovery of the penalty amount of Rs. 9,95,090/- was also sought.

3. The case as set up by the appellant/plaintiff before the learned Trial Court was that he was a Class-B Contractor and was enlisted with the HP Public Works Department. He had been awarded the execution of work relating to the construction of the Senior Secondary School building at Dalhousie, and for this purpose, a contract had been entered into between him and defendant No. 3, i.e., the Executive Engineer, Dalhousie Division, HPPWD, Dalhousie, District Chamba (H.P.). The work was awarded to the appellant/plaintiff on 13.01.2006. The stipulated period for completion of the work was two years, and the time was to be reckoned from the 15th day of the issuance of the letter of award. Accordingly, the work was to be completed by 27.01.2008.

4. It was further the case of the appellant/plaintiff that although he had executed the work with due diligence, the work could not be completed within the stipulated period. He further maintained that the reasons for delay in completion of the work were not attributable to him.

5. Plaintiff raised the grievance that defendant No. 3, vide letter dated 26.11.2008, had imposed compensation/penalty on the appellant/plaintiff to the tune of Rs. 8,29,780/- under Clause 2 of the contract and Rs. 1,65,310/- under Clause 3 thereof.

6. Aggrieved against the imposition of penalty the appellant/plaintiff had represented before defendant No. 2, i.e., the Superintending Engineer, HPPWD, who, after holding hearings on 31.01.2009, 04.03.2009, 20.03.2009, 17.04.2009, and 18.05.2009, had come to the conclusion that the delay in execution of the work was not attributable to the appellant/plaintiff and, resultantly, vide order dated 11.06.2009, had waived off the penalties imposed by the Executive Engineer, Dalhousie Division, HPPWD.

7. Plaintiff further alleged that the Superintending Engineer, HPPWD, subsequently withdrew his order dated 11.06.2009 by another order dated 31.07.2009, without assigning

any reason and without affording the plaintiff an opportunity of being heard.

8. In response, the defendants had filed their joint written statement. Objections as to the maintainability of the suit, locus standi of the plaintiff, absence of cause of action, jurisdiction of the Court, and valuation were taken. It was alleged that the dispute as raised by the appellant/plaintiff was arbitrable under Clause 25 of the contract; hence, the Civil Court did not have jurisdiction.

9. On merits, it was alleged that the work had not been completed on account of reasons attributable to the appellant/plaintiff. On this basis, the imposition of penalty by the Executive Engineer, HPPWD, was sought to be justified. It was specifically alleged that the order dated 11.06.2009, passed by the Superintending Engineer, HPPWD, whereby the penalty had been waived off, was without jurisdiction. According to the defendants, the cost of the work was Rs. 61,20,712/-, which exceeded the jurisdiction of defendant No. 2 – the Superintending Engineer, HPPWD; hence, such officer did not have the authority to waive off the penalty. In this manner, the subsequent order dated 31.07.2009, passed by the Superintending Engineer, HPPWD,

withdrawing his earlier order dated 11.06.2009, has also been sought to be justified.

10. On the basis of the pleas raised by the parties learned Trial Court had framed following issues:-

“1. Whether the order dated 31.07.2009 passed by defendant No.2 is wrong, illegal and not binding on rights of the plaintiff, as alleged?OPP.

2. Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for? OPP.

3. Whether the suit is not maintainable, as alleged? OPD

4. Whether the plaintiff is estopped by his own act and conduct from filling the present suit, as alleged? OPD.

5. Whether the suit is without cause of action, as alleged?OPD.

6. Whether this court has no jurisdiction to try and entertain the present suit, as alleged?OPD.

7. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction, as alleged? OPD.

8. Relief?.”

11. Issue No.1 was decided in affirmative whereas all other issues were answered in negative and the suit of the appellant/plaintiff was decreed in following terms:-

“33. On the basis of observations made while deciding issued No.1 to 7 above, suit of the plaintiff for

declaration to the effect that office order dated 31.07.2009 Ex.P-9 passed by defendant No.2 withdrawing his own order dated 11.06.2009 Ex.P-8 waiving off penalty imposed by defendant No.3 is illegal, null and void and not binding upon the rights of plaintiff is decreed. As a necessary consequence defendants are also restrained from recovering penalty amount from plaintiff on the basis of letter dated 26.11.2008 issued by defendant No.3. Keeping in view the peculiar facts and circumstances of the case parties are left to bear there own costs. Decree sheet be drawn accordingly. Let, this file after due completion be consigned to record room.”

12. The learned Trial Court held that even if the order dated 11.06.2009 had been passed by the Superintending Engineer, HPPWD, to waive off the penalty imposed upon the appellant/plaintiff without jurisdiction, the subsequent order of withdrawal could not have been passed without affording the appellant/plaintiff an opportunity to agitate his claim and grievance. The learned Trial Court found a serious abridgment of the rule of *audi alteram partem* and, resultantly, passed the decree in favour of the appellant/plaintiff as noticed above.

13. The defendants assailed the judgment and decree passed by the learned Trial Court by taking recourse to Section 96 of the Code. The appeal preferred by the defendants has been allowed by the learned Additional District Judge, District Chamba, vide the impugned judgment and decree, by holding that once the order dated 11.06.2009, passed by the Superintending Engineer,

HPPWD, had been found to be without jurisdiction, its withdrawal was inconsequential, and even if the order of withdrawal had not been passed, the order dated 11.06.2009, being without jurisdiction, was a nullity and could not be looked into for any purpose whatsoever.

14. The instant appeal was admitted for hearing on 27.12.2016, on the following substantial question of law:-

“1) Whether judgment and decree of learned 1st Appellate Court are based upon mis-reading of the agreement between the parties and evidence on record?

2) Whether in absence of any admission of default on the part of the plaintiff any penalty could be imposed?

3) Whether in absence of any specific power co-defendant No.2 had jurisdiction to review order dated 11.6.2009?

4) Whether rule of audi alterem partem not adopted if so its effect?”

15. I have heard learned counsel for the parties and have also gone through the entire record carefully.

16. Some of the facts that were not in dispute can be noticed as under:-

I) The appellant/plaintiff was awarded the work of constructions of Senior Secondary School Building at Dalhousie, District Chamba.

II) The award letter was issued on 13.01.2006.

III) The work was to be completed on or before 27.01.2008.

IV) The work was awarded for Rs.61,20,712/-.

V) The estimated tender cost of the work was Rs.41,48,902/-.

VI) The work was not completed within the stipulated period.

VII) The contract in writing was executed between the appellant/plaintiff and defendant No.3.

VIII) Defendant No.3 had imposed compensation/penalty to the tune of Rs.9,95,090/- under Clauses 2 and 3 of the contract vide order dated 26.11.2008 (Ex.P1).

IX) The appellant/plaintiff had preferred representation dated 01.12.2008 to defendant No.2 with a prayer to waive off the penalties.

X) Defendant No.3 had heard the parties on 31.01.2009, 04.03.2009, 20.03.2009, 17.04.2009 and 18.05.2009.

XI) Defendant No.3 had waived off the penalties vide order dated 11.06.2009 (Ex.P8) by holding that defendant No.2 had failed to provide complete site free from all imcumbrances to the appellant/plaintiff for constructions of the building.

XII) Defendant No.3 had withdrawn the order (Ex.P8) by a subsequent order dated 31.07.2009 (Ex.P9).

17. The above-noticed facts have been found as proved by both the Courts. This Court has also not found any material suggesting the contrary.

18. The only question around which the dispute revolves is whether defendant No. 3, i.e., the Superintending Engineer, HPPWD, had jurisdiction to waive off the penalty imposed by defendant No. 2, and if not, whether the subsequent act of defendant No. 3 in passing the withdrawal order Ex. P9 could be sustained in law.

19. Indisputably, defendant No. 2 had imposed the penalty upon the appellant/plaintiff vide Ex. P1 by taking recourse to Clauses 2 & 3 of the contract. According to defendant No. 2, the reasons for delay in completion of the work were attributable to the appellant/plaintiff. Thus, it will be relevant to take notice of clause No.2 of the agreement. The NIT along with a copy of the agreement has been placed on record as Ex. P14. Clause 2 of the agreement reads as under:—

“CLAUSE 2: Compensation for delay CLAUSE

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract shall be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to five percent of such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the tendered cost of the whole work as shown in the tender for every fort night that the work remains uncommenced or unfurnished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month save for special jobs to complete one-fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed one half of the work, before one half of such time has elapsed and three fourth of the work, before of such time has elapsed.

However, for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by Engineer-in-Charge, the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to five percent on the said tendered cost of the whole work for every fortnight that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed twenty percent, on the tendered cost of the work as shown in the tender.

The compensation can be levied by the Engineer-in-charge in his sole discretion subject to review as under:

1. Superintending Engineer – Works having tendered cost upto Rs.50 lacs.
2. Chief Engineer – Works having tendered cost 50 lacs to 2 Crore.
3. Engineer in Chief – Works having tendered cost more than 2 Crore.”

20. The reading of the aforesaid Clause 2 makes it clear that the compensation for delay could be levied in two different situations. In one part, the compensation was leviable in case the delay in adhering to the schedule of time was attributable to the contractor, and in such event, the Superintending Engineer, HPPWD, had the jurisdiction to impose the penalty at the rates specified in the said clause. The second situation would arise if there was availability of a time schedule for special jobs and its violation by the contractor was proved. In such a situation, the

Engineer-in-Charge, i.e., the Executive Engineer, defendant No. 2, had the power to impose the penalty, and such penalty was subject to review by the higher authorities, viz., Superintending Engineer, HPPWD, Chief Engineer, and Engineer-in-Chief, depending upon the tendered cost of the work. The Superintending Engineer, HPPWD, could review the decision of the Executive Engineer, HPPWD, in works having a tendered cost up to Rs.50,00,000/-.

21. The learned First Appellate Court failed to draw a distinction between the two separate parts of Clause 2. The said clause has been construed to have application only in one exigency, and that is how the said Court arrived at the conclusion that the Superintending Engineer, HPPWD, did not have jurisdiction.

22. The order Ex. P1 issued by defendant No.3 reveals that it was not a case of non-adherence by the contractor to the time schedule fixed for special jobs. It was not even alleged in the communication dated 26.11.2008 (Ex. P1). Being so, the case could be covered under the first part of Clause 2, under which only the Superintending Engineer, HPPWD, had the jurisdiction to levy the penalty. Thus, it was a case where the order of the Executive

Engineer (Ex. P1) could be said to be without jurisdiction; however, since the Superintending Engineer, HPPWD, had applied his mind to the merits of order Ex. P1 on the representation of the appellant/plaintiff, the order Ex. P8 could not be said to be without jurisdiction by any stretch of imagination.

23. Viewed from another angle, assumingly, if the penalty order had been passed under the second part of Clause 2 of the agreement, the Superintending Engineer, HPPWD, had the power to review the order passed by the Engineer-in-Charge, in The works having a tendered cost up to Rs.50,00,000/-. It cannot be disputed that the tendered cost in the instant case was Rs. 41,48,902/-, as is evident from the NIT (Ex. P14). This hypothesis gains credence from the fact that the Executive Engineer, defendant No. 3, had imposed the penalty of Rs. 8,29,780/-, i.e., @20% of the estimated cost. The penalty amount of Rs. 8,29,780/- cannot be said to be 20% of Rs. 61,20,712/-; on the contrary, it matches 20% of the tendered amount, i.e., Rs. 41,48,902/-.

24. Further, the withdrawal order Ex. P9 passed by the Superintending Engineer, HPPWD, did not reveal any reasons. It is also not disputed that the appellant/plaintiff had not been

heard by the Superintending Engineer, HPPWD, before passing withdrawal order Ex. P9. Since the order Ex. P8 has been held by this Court to be within the jurisdiction of the Superintending Engineer, HPPWD, its withdrawal vide order dated Ex. P9, without affording any opportunity of being heard to the appellant/plaintiff, cannot be sustained in law. The order Ex. P9 also suffers from illegality inasmuch as no reason has been rendered by the Superintending Engineer, HPPWD, for passing such an absurd order.

25. In result, the substantial questions of law, as noticed above, are decided in favour of the appellant/plaintiff. The appeal is allowed. The judgment and decree dated 30.05.2016, passed by the learned Additional District Judge, Chamba, in Civil Appeal No. 927 of 2014, is set aside, and the judgment and decree dated 21.11.2014, passed by the learned Civil Judge (Junior Division), Dalhousie, District Chamba, in Civil Suit No. 45 of 2010, is affirmed. The suit of the appellant/plaintiff is decreed as prayed for.

26. The instant appeal is disposed of accordingly.

27. Decree-sheet be prepared accordingly. Records be sent back forthwith.

28. All pending applications also stand disposed of.

26th November, 2025
(Shamsh Tabrez)

(Satyen Vaidya)
Judge