Puran Lal Sah

Vs

The State of U. P.

Civil Appeal No. 1687 of 1968

(I. D. Dua, P. Jagmohan Reddy JJ)

21.01.1971

JUDGMENT

REDDY, J. -

1. This appeal is by a Certificate under Article 133(1)(a) of the Constitution against the Judgment and decree of the Allahabad High Court, dated 8th March 1965, setting aside the decree of the Trial Court and dismissing the suit of the plaintiff-appellant.

2. The appellant had submitted a Tender to Construct Mile 3 of Nainital-Bhowali Road at 13 per cent. below the rates given in Schedule B to the Notice issued by the Government of the United Provinces on the 30th September, 1946. This tender was accepted and a contract was signed on 20th November, 1946. It is alleged by the appellant that the rates given in Schedule B were based on the calculation that stone required for the Road construction work would be available at a distance of 26 Chains while as a matter of fact no stone was available within that distance. The appellant had in fact to get stone from Gadhera and Bhumedar from a distance of 79 and 110 Chains respectively. It is his contention that by reason of the non-availability of the stone and the definite understanding and assurance given by the local authorities of the P.W.D. that higher rates would be given for the extra work done over and above the work provided in the contract he carried on the work. It was also alleged that during the construction work on the road very hard shale rock came in the way nor originally provided for in the contract, as such he was entitled to get the costs for the work so done at the current rates from the P.W.D. which was not paid to him. In respect of these items of work done as also due to him having done the work by bringing stone from a longer distance than was given in the estimates the appellant claimed Rs. 48,840-0-0 due as balance together with interest by way of damages of 12% amounting to Rs. 17,582-0-0, making a total of Rs. 66,422-0-0. When this claim was rejected the appellant gave notice under Section 80 of the C.P.C. and thereafter filed a suit for the above amount.

3. The defendant-respondent resisted the suit and pleaded that no assurance was given to the Appellant by officers of the P.W.D. as alleged, that the quantity of very hard shale shown in the plaint was incorrect and at any rate the contractor, under Paragraph 5 of the special instructions must be prepared to execute the work at the original tender rate in excess of the given quantities of work up to 30% and if an increase in excess of 30% is ordered over the work the contractor must intimate to the Engineer-in-charge in writing his willingness or refusal to do extra work at the original tendered rates. If he refuses to carry on at the original rates he is required to settle fresh rate for increased work over 30% before doing the work.

4. On these averments the Trial Court held Issues 1, 2, 6 and 7 in favour of the appellant while

Issues 3, 4, and 5 were decided against him. In the result a decree for a sum of Rs. 20,495/- for extra lead plus Rs. 1,653-14-0 for extra work done under the item very hard shale and Rs. 4,155/- interest by way of damages on Rs. 22,158-14-0 making a total of Rs. 26,313-14-0 was passed with interest at 3% per annum. In appeal the High Court reversed the decree holding that : "(1) the employment of the figure 26 Chains in the estimate was for no other purpose than that of calculation.... and if knowing that the same was available within 26 Chains it (P.W.D.) worked out its estimates on that basis, it could not be held to have extended any assurance much less guarantee to the contractors that they would get stone within that distance"; (2) the plaintiff-appellant performed the work required of him without exercising his right under Paragraph 5 of the special instructions which gives the option to do the extra work in excess 30% but if he refuses to do the extra work at the originally tendered rates he should settle fresh rates for increased work over 30% before doing the work which he failed to do. In view of these findings against the appellant the appeal of the respondent was allowed and the suit dismissed but in the special circumstances of the case left the parties to bear their respective costs in both the Courts.

5. The two main questions in this Appeal are : (1) whether the estimate of the P.W.D. formed part of the contract so as to be binding on both parties and whether any assurances were given to the Appellant that he would be given higher rates for bringing the stone from places situated at 79 Chains and 110 Chains respectively; (2) whether Clause 5 of the special conditions of the contract was applicable to the extra item of work contained in Ex. B-3 and whether he was entitled on the assurances given by the local officers to higher rate for the extra work done. Shri Bindra, learned Advocate for the Appellant has referred us to Clauses 8, 11 and 14 of the Notice calling for the tender as also to certain letters and passages in the evidence to substantiate his contention that the estimates of the P.W.D. were part of the contract and that in any case assurances were given to the appellant that when he could not get stone from distance of 26 Chains, to bring from Chains 79 and 110 for which higher rates would be paid. It may be stated that the P.W.D. of the United Provinces, as it then was, had issued a tender notice consisting of 16 paragraphs and the appellant was required to sign this tender notice in token of his having received it because ultimately under Clause 34 of the conditions of the contract all papers signed by the parties to the contract and bond will be deemed to be part of the contract bond and have to be read as conditions to the contract. Clauses 8, 11 and 14 of the notice to which reference was made are as follows :

> "8. All tenders should be on percentage rates above or below the rates given in the Schedule 'B'.
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11. Items not provided in the Schedule B will be paid at current schedule of rate plus or minus the percentage above or below as tendered by the contractor whose tender is accepted for this work.

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14. Contractors was advised to see the estimate, plans, specifications, special condition prescribed and site of work before tendering."

6. It is obvious from these clauses that the rates are given in Schedule B on the basis of certain plans and specifications. The person intending to tender for the work was required to examine this material and also inspect the site before tendering. These instructions were designed to make all those who were desirous of obtaining the contract responsible for their acts so that it cannot be said

that any misrepresentation was made or they were misguided in any way. The contention of the learned Advocate for the appellant is that it was definitely stated in the estimates that stone was available at 26 Chains which representation was binding on the Respondents and if no stone was available within that distance he was entitled to claim higher rates if he had to get stone from places farther away. In fact the appellant alleges that the engineers assured him that he would he paid higher rates.

7. We may here observe that in none of the clauses of the notice or conditions of contract or in any other document is there any specific mention that stone will be available at of 26 Chains nor is there any assurance that if stone was not available within that distance the contractor will be paid higher rates. The mere fact that the estimates were prepared by the P.W.D. on the basis of the stone being available at 26 Chains which Respondents admitted as stated in the Judgment of Civil Judge, Nainital, does not mean that there was any assurance or undertaking given that stone would be available at the place. In fact it is not denied that stone was available with the distance of 26 Chains but it was in the area belonging to the Cantonment, for the removal of which permission of the Cantonment authorities had to be taken. Evidently the contractor was not able to obtain that permission. In our view it was up to the contractor to have satisfied himself before entering into the contract that the Cantonment authorities would permit him to take stone from its jurisdiction just in the same way as permission will have to be taken from any private individual in whose land stone required for road building is found. If the contractor has failed successfully to negotiate with the owners of land from which he could bring stone it cannot be said that the estimate prepared by the P.W.D. on the basis that the stone was available at 26 Chains was a statement which amounted to an assurance or constituted a condition of the contract.

8. The appellant as P.W. 1 stated in his evidence : "Before giving offer I saw the estimates and plan. In the estimate it was written that the stone would be found within 26 Chains. On this basis estimate was prepared through the P.W.D. I enquired this from the Assistant Engineer also. He too informed that stone would be available within 26 Chains. On this basis I prepared the estimate.. In the beginning of the year 1947 I started work. I attempted to take out stones from within 26 Chains. The moment I started to take out stones, the Cantonment authorities checked me. For this act I challaned, but I was acquitted. The entire area within 26 Chains was of the Cantonment". Further on he says "I have seen the tender notice and I had gone through it; after that I signed it. Schedule B was attached to the notice. I signed it after going through it. I submitted tender 13% less than the scheduled rate..... before giving the tender I went to that place and found that the stones were available within 26 Chains, when I wanted to take them out I learnt that this was within the Cantonment boundary. I sought permission to take out stones from the Cantonment authorities, but it was disallowed".

9. It is clear from this evidence that the appellant before giving the tender inspected the site, went to the place where stone was said to be available and after satisfying himself that the stone was available he gave the tender. A perusal of the documentary evidence would also show that he actually commenced work after his request to allow him higher rate was rejected which was long after the time when under the contract he was required to start the work. In fact just before the date fixed for the completion of the work, he had under Ex. B-4, dated the 12th June, 1947, made the following representation.

10. "That as agreed upon the contract deed of my contract Nainital-Bhowali Motor Road Mile 3 the lead of stones for masonary work is given only about half a mile. On inspecting the place I find it very difficult to get a quarry there as there is no stone at all. I am getting the stones from near the K.K. Sanitorium which falls a distance of two and a half miles from my place, as has already been

brought to your and the C.E.'s kind notice. Therefore, you are requested kindly to allow me a lead of two and a half miles distance". On this the concerned authorities seem to have made the endorsement : "As lead and royalty is provided in the Schedule B of the tender, the request cannot be acceded to. Draft reply is put up". Accordingly by letter, dated the 21st June 1947, he was informed as follows :

> "Reference your application, dated 12th June, 1947. Please refer to item Nos. 6, 7, 8 and 9 of Schedule B attached with your tender and on which basis you rendered your rate in this connection. As the rates noted therein provide all lead and royalty and there is no mention there that the rate contains a lead for half a mile, your request cannot be acceded to."

11. This correspondence shows that the appellant's claim to have extra lead was definitely rejected as untenable even before he started the work under the contract, as is apparent from Ex. B-2, dated the 19th July, 1947. In that letter the appellant was being informed as follows :

> "Please note that since you have signed the contract for the above work, the work must be started now in consultation with the Overseer-in-charge, Nainital Section. The date of start and completion will be as follows :

Date of start - November 20, 1946

Date of completion - July 19, 1947."

12. It cannot therefore be said that the Appellant was in any way induced by any assurances given by the P.W.D. authorities that they would give a higher rate for the extra lead before he commenced work. The case of the appellant in these letters was that no stone was available within half a mile while in his deposition he gave a contrary version altogether. Subsequently he seems to have become hopeful because in the letter of the Assistant Engineer, dated 28th December, 1948, it is stated :

"In the estimate lead for 26 Chains was provided on the assumption that stone will be available within the distance from the quarries in Cantonment areas. Later on when the work was in progress the Cantonment authorities objected to quarrying stones from Cantonment land..."

Not doubt the Executive Engineer in his letter, dated 15th June, 1950, Ex. 22 has recommended the case of the appellant for a higher rate as he says "When the stones were not available from the Cantonment area it seems that the contractor naturally was forced to bring them from quarries situated outside the Cantonment area" and he further says "If these quarries are the places from where stones were actually obtained then naturally the contractor is entitled to get the lead for the full quantity of stones brought by him to complete different items requiring the use of stones".

13. The letter seems to be a recommendatory letter by a subordinate to the higher officer but it does not in any way establish the right of the appellant to obtain a higher rate, nor does the evidence justify this conclusion. In our view neither the terms and conditions of the contract nor the oral or documentary evidence justify the conclusion that the appellant was entitled to any extra lead.

14. Another argument was but forward by the learned Advocate for the appellant which is also based on the same assumption that the availability of stone at 26 Chains was a condition of the contract namely that once stone was not available at 26 Chains the contract was at an end and that

because the appellant had done the work he should be paid on the basis of quantum meruit. This in our view is a far fetched argument and has no relation to the facts and circumstances of the case. Even assuming that the stand taken by the appellant that the availability of stone at 26 Chains was a condition of the contract was justified, he had notwithstanding the rejection of his claim even before he started the work, acquiesced in the stand taken by the respondents that he is not entitled to any higher rates, carried on and completed the contract as if there was no such condition. We therefore cannot understand the contention of the appellant's Advocate as to how the contract came to an end and who put an end to it. Even if at that stage the contract had been but an end to by the respondent which is no one's case, as the appellant had not started the work no question of quantum meruit would arise. The principle of quantum meruit is rooted in English law under which there were certain procedural advantages in framing an action for compensation for work done. In order to avail of the remedy under quantum meruit, the original contract must have been discharged by the defendant in such a way as to entitle the plaintiff to regard himself as discharged from any further performance and he must have elected to do so. The remedy it may be noticed is, however, not available to the party who breaks the contract even though he may have partially performed part of his obligation. This remedy by way of quantum meruit is restitutory that is it is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this regard it is different to a claim for damages which is a compensatory remedy aimed at placing the injured party, as near as may be in the position which he would have been in, had the other party performed the contract. This Court had in M/s. Alopi Parshad and Sons Ltd., v. The Union of India, observed at page 809 :

> "Compensation quantum meruit is awarded for work done or services rendered when the price thereof is not fixed by a contract. For work done or services rendered persuant to the terms of a contract compensation quantum meruit cannot be awarded where the contract provides for consideration payable in that behalf.

Though in that case the basis of the principle was not explained, it nonetheless lays done that where work is done under a contract persuant to the terms thereof no amount can be claimed by way of quantum meruit. In the view we have taken on the facts of the case we do not propose to examine the decisions cited at the Bar in this behalf. The claim of the appellant for higher rates which in fact was by way damages has been rightly disallowed by the High Court.

15. On the second question also the appellant cannot succeed because under Clause 12 of the contract Ex. B-1, the plaintiff was bound to perform additional work which was required of him on the same terms and conditions on which he undertook to do the work for which he tendered. It appears that by a subsidiary contract entered into between the appellant and the P.W.D., Ex. B-3, on the 12th April, 1946, the appellant undertook to execute some additional work for the Department. The quantity of work which appellant actually performed was far in excess of what was mentioned in Ex. B-3. The Appellant therefore claimed payment for the work done by him in excess of the quantity mentioned in the contract plus 30% at the current rate as against the stipulated rates. It was submitted on behalf of the State of U. P. before the High Court that under Clause 12 of the contract Ex. B-1 and paragraph 5 of the special instructions the Plaintiff was not entitled to any amount in excess of what he had already been paid. This contention was accepted because under the aforesaid Clause 12 the contractor was bound to perform all additional work which was required of him on the same terms and conditions in which he undertook to do the main work. Paragraph 5 of the special instructions further provides as follows :

> "Contractors must be prepared to do at their original tender rate work in excess of the

> given quantities of work up to 30% if an increase in excess of 30% is ordered over the work the contractor must intimate to the Engineer Incharge in writing his willingness or refusal to do extra work at the originally tendered rates. In the latter case he should settle fresh rate for increased work over 30% before doing the work."

These instructions being part and parcel of the original contract Ex. B-1 would govern the parties. As such the appellant unless he gave notice under that paragraph that he is not prepared to do the extra work over the 30% at normal rates, he cannot claim anything other than at the rates mentioned in the contract, unless he had settled fresh rates for that extra work. There is no evidence nor is it claimed by the appellant that he had given any notice as required under Paragraph 5 of the special instructions and since he did the work without fulfilling these requirements he is not entitled to claim any amounts at a higher rate for the extra work done. As neither of the contentions have force the appeal is dismissed but in the circumstances without costs.

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