

Shri Bilas Singh Alias Ram Bilas Ojhas

Vs

State of Bihar

Civil Appeal No. 1113 of 1967

(A. N. Ray, M. H. Beg JJ)

26.07.1972

JUDGMENT

RAY, J. -

1. This is an appeal by certificate from the judgment, dated December 7, 1965, of the High Court of Patna decreeing the appellant's suit in part and setting aside the judgment of the Additional Subordinate Judge dismissing the suit of the appellant.
2. The appellant filed at suit for the sum of Rs. 1,67,017/- as balance due to the appellant for earth work done for cutting canal and raising embankments for a project known as Balwa Sathi Distributory.
3. On April 1, 1951 the appellant's tender was accepted and the contract for construction work was entered into. The work was completed in the month of June, 1952. The appellant claimed his total dues to be Rs. 5,09,053/-. The appellant's case was that he was paid Rs. 3,42,036/-. The appellant filed the suit for the balance sum of money.
4. One of the principal issues was whether the mode of measurement adopted by the defendant was correct and proper. There are two types of measurements for construction work. One is called the pit measurement. The other is called sectional measurement. These types are for measuring the total earth work done. The contract did not specify which type of measurement was to be adopted. The Trial Court came to the conclusion that there was an implied contract between the parties that the pit measurement was applicable in the present case. The High Court upheld that conclusion. This finding of the High Court was not challenged in this Court.
5. Counsel on behalf of the appellant only contended that items 2, 3, 8 and 9 in the Schedule of works executed by the appellant as particularised in the annexure to the plaint should have been allowed and decreed by the High Court. Item No. 2 is for extra lift on earth work recorded in measurement books amounting to Rs. 3,870/-. Item No. 3 is for extra lead recorded in measurement book amounting to Rs. 3,000/-. Item No. 8 is for earth work done in Satwaria Branch amounting to Rs. 5,597/-. Item No. 9 is for earth work done in Matraria Branch amounting to Rs. 35,929/-. The defendant in the written statement denied that the appellant was entitled to the alleged sums. The defendant further alleged that the earth work done by the appellant has been measured up completely with all lead and lift and finally paid for.
6. The High Court recorded in the judgment that items Nos. 6 to 10 in the schedule to the plaint were given up and not pressed. Therefore items Nos. 8 and 9 in the schedule are not open to be

canvassed. Counsel for the appellant submitted that those items were given up because of misapprehension of counsel. Reliance was placed on the decision in *Holt v. Jesse*. There the action came up for hearing. The defendant by his counsel submitted to account for all moneys. As application was later on made that counsel and solicitors who appeared for the defendant had misapprehended and mistaken their instructions, and were not authorised to give their consent. If all the information which Counsel ought to have when he gives a consent is not before him, the Courts find out whether the unfortunate client should be bound by such misapprehension. In the English case, counsel who asked the court to decide did not say that they were not in possession of every material fact which was necessary to their consent in the case. The Court was unwilling to give a general licence to undo what they did inside the Court, because they did not like it.

7. In the present case in the application for leave to appeal it was alleged that at the bar the claims as per items Nos. 8 and 9 were given up and not pressed on account of the misapprehension that these were not covered by the contract which related to the construction of Balwa Sathi Distributory only and not to the Satwaria and Matraria Distributories. The application for leave to appeal to this Court was affirmed by an affidavit of Anjani Kumar Sinha. He describes himself as a Pairvikar of the appellant. He state in the affidavit that the facts are true to his knowledge. He further says that there was and there could be no concession. But he does not say what instructions were given nor does he say as to how there was any misapprehension. The allegation by the deponent that Items 8 and 9 were misapprehended and were not covered by the schedule in the plaint which referred to work in Satwaria and Matraria Branches. The plaintiff appellant in oral evidence stated that his claim was inter alia for costs of the earth work with lead and lift in Matraria Distributory and also of Satwaria Branch. The plaintiff appellant's further evidence was that the Distributory was dug out near the site of the old Sathi canal. The plaintiff appellant further said in oral evidence that the State of Bihar produced one measurement book of Satwaria but did not produce the other books. There is no affidavit by the appellant himself as to what instructions he gave. There is no statement by counsel that there was any misapprehension. If there was any misapprehension it was open to the appellant and his counsel and agents to bring to the notice of the High Court that the claim was given up on account of misapprehension. The High Court would have dealt with that allegation. This Court is denied not only the benefit of affidavit evidence on the point but also the opinion of the High Court on that question. The appellant cannot be allowed to turn around at this stage and reside from the position which was solemnly adopted by counsel for the appellant before the High Court.

8. As far items Nos. 2 and 3 were concerned the High Court held that no evidence was led by the appellant to justify any of the claims. In the absence of the proof of claim the High Court rightly rejected the claims on account of items Nos. 2 and 3.

9. The High Court decreed the appellant's suit for Rs. 43,513/-. The High Court allowed interest at the rate of 6% per annum pendente lite and further interest. The suit was instituted in the year 1955. The interest at that rate up to this date will be a large sum of money. We are, therefore, modifying the High Court decree by allowing the appellant interest at the rate of 3% per annum pendente lite from the date of the institution of the suit up to the date of the decree of the High Court. There will be not further interest. There is no merit whatever in this appeal. The appeal fails and is dismissed. In view of the fact that we have reduced that rate of interest parties will pay and bear their own costs in this Court. The decrees for the costs made by High Court is however not disturbed.

</html