S. A. Jais and Co. and Others

Vs

Gujarat Electricity Board

And

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Civil Appeals Nos. 2310 (N) and 2311 (N) of 1972

(M. M. Dutt, M. H. Kania JJ)

17.11.1987

JUDGMENT

KANIA, J. –

1. These two appeals are directed against the judgment of a Division Bench of the Gujarat High Court and arise on a certificate granted by that High Court under Article 133(a) of the Constitution of India as it stood prior to its amendment in 1972.

2. The facts necessary for the appreciation of the controversy before us are as follows;

3. The appellants in Civil Appeal No. 2310 of 1972 and the respondents in Civil Appeal No. 2311 of 1972 are a partnership firm and its partners. The respondent in Civil Appeal No. 2310 of 1972 and the appellant in Civil Appeal No. 2311 of 1972 is the Gujarat Electricity Board. A suit was instituted by the said partnership firm and its partners against the said Electricity Board in the Court of the Joint Civil Judge, Senior Division, Baroda, claiming certain amounts in respect of the work done under a construction contract and for certain extra items of work. We propose to refer to the parties by their description in the suit. Since the dispute in the appeals before us relates to only three items, we propose to refer to the facts which relate to those three items alone. The trial court passed a decree in favour of the plaintiffs and against the defendant for a sum of Rs. 1,33,956.25 in respect of the claims of the plaintiffs for the amounts which allegedly remained payable to the plaintiffs. Out of these amounts, an amount of Rs. 1,00,522.28 was in respect of excavation of rock, two amounts of Rs. 13,930.10 each were for de-watering for cement concrete work at the bottom of the tank to be constructed and de-watering for masonry walls and a sum of Rs. 4662.84 was given as the extra amount for transport of excavated soil. The defendant preferred an appeal against this decision to the High Court of Gujarat, being First Appeal No. 32 of 1964 and the plaintiffs filed their cross-objections in the said appeal. The Division Bench of the Gujarat High Court, which disposed of the said appeal, reduced the amount to be paid to the plaintiffs for rock-cutting work to Rs. 62,740 and held that the remaining amounts set out earlier for de-watering and transport of excavated soil were not liable to be paid by the defendant to the plaintiffs. The appeal and the cross-objections were both

allowed with proportionate costs.

4. Coming to the first item in respect of which there is a dispute, although counsel argued at some length before us, the dispute is really in a narrow compass. One controversy was whether the item of rock-cutting is an item included in the contract and is liable to be paid for at the contract rates only, namely, Rs. 8 to Rs. 14 per hundred cubic feet in respect of excavation work at different levels as set out in paragraph 14 of the judgment of the Division Bench. The excavation referred to in the contract was of murram including hard murram. It is a common ground that there was no specific mentioned of excavation in rock or cutting of rock under the contract. The relevant term only spoke of "excavation for tank in any soil, murram sock, etc.". The only dispute is whether the word "sock" was intended to mean "rock" as contended by the defendant. Both the trial court and the Division Bench of the Gujarat High Court have examined the evidence and come to the conclusion that the word "sock" could not refer to rock. We are in entire agreement with the reasoning of the High Court in this connection and hence we do not propose to discuss the evidence in this connection in our judgment. The main reason for coming to the above conclusion which appealed to the Gujarat High Court, and also appealed to us, is that it is well known that the charge for rock-cutting would be much higher than the charge for excavation of soil or murram as rock-cutting would involve more labour and heavier cost and no contractor would agree to the same rate for excavation of soil and for rock-cutting. Thus, this item cannot be regarded as item covered by the contract or to be paid for at the contract rate for excavation. The next question is what is the proper rate which should have been paid to the plaintiffs for rock-cutting. In this regard, again, we are in full agreement with the Gujarat High Court that the proper rate was Rs. 45 per hundred cubic feet as awarded by the trial court as well as the Gujarat High Court. It is true that rock-cutting is more laborious and expensive than excavation of soil and the rate for rock-cutting would necessarily be higher. At the same time, the only evidence led by the plaintiffs in this connection was in respect of the rates for rock-cutting at Porbander which were over Rs. 90 per hundred cubic feet. However, as pointed out by both the courts below, those rates could not apply in the case before us because they related to cutting hard rock whereas in the case before us the rock which had to be cut was soft rock. There is, therefore, no reason to interfere with the conclusion that Rs. 45 per hundred cubic feet was the appropriate rate for rock-cutting. The last contention in connection with rock-cutting was regarding the quantum of rock-cutting for which payment was to be made. In this regard, the trial court came to the conclusion that the excavation made from the depth of 6 feet to 12 feet involved rock-cutting. The Division Bench of the Gujarat High Court in its judgment sought to be impugned has pointed out that although the claim was made by the plaintiffs on the footing that the excavation from the depth of 6 feet to 9 feet as well as from 9 feet to 12 feet was in rock, that is, it involved rock-cutting; in the first letter addressed by the plaintiffs, it was mentioned that rock had been found below 7 1/2 feet. It another letter on record addressed by the plaintiffs to the Chairman of the defendant Corporation, it was stated by the plaintiffs that rock was found below 7 feet. In the statutory notice, Ex. 141, it was alleged that rock was found below 7 feet and in the plaint, the plaintiffs had stated that at some places, rock was below 6 feet while at some other places it was at a distance of 7 1/2 feet. Because of these statements in the aforesaid documents, the evidence of Mistri Ghelabhai led by the plaintiffs, to the effect that rock-cutting was involved in excavation below the depth of 6 feet, was not accepted. The High Court awarded Rs. 45 per hundred cubic feet only for excavating or cutting rock in respect of the excavation from 7 1/2 feet to 12 feet. We may mention that there was no dispute that excavation below 9 feet up to 12 feet in depth involved rock-cutting. We may mention that the trial court had awarded the amount for rock-cutting calculated on the basis that excavation from 6 feet to 9 feet as well as from 9 feet to 12 feet involved rock-cutting. We agree with the view of the Division Bench of the High Court that in these circumstances, the claim of the

plaintiffs for rock-cutting from 6 feet to 9 feet could not be accepted in full. However, it must be appreciated that the defendant led no evidence to show that the claim made by the plaintiffs was false. Hence it would be proper to accept that rock-cutting was involved even in excavation at least at a few places from 6 feet to 7 1/2 feet in depth. The statement in the first letter of the plaintiffs that the rock-cutting was found below 7 1/2 feet must be taken together with the statements in the other document referred to earlier. In these circumstances, it appears to us that the fair thing to do would be to award some additional amount on this footing. We find that the Division Bench of the High Court has awarded an amount from rock-cutting from 7 1/2 feet to 9 feet on the basis that this excavation was of the quantum of 1145 brass, one brass being equivalent to one hundred cubic feet. We would award an additional amount of Rs. 10,000 on and estimate of the rock-cutting involved in the excavation from depth of 6 feet to 7 1/2 feet.

5. Coming next to the second item, for de-watering, this work was to be done initially by the Nawanagar Electricity Supply Company with which the contract was entered into by the plaintiffs. It may be mentioned here that the undertaking of Nawanagar Electricity Supply Company was taken over in 1956 by the Saurashtra Electricity Board and later on by the Bombay Electricity Board under the provision of the States Reorganisation Act, 1956. Thereafter, pursuant to the States Reorganisation Act, 1956, several rights, assets and liabilities of the Bombay Electricity Board including all rights and liabilities under the contract in question before us were taken over by the present defendant, the Gujarat Electricity Board. It was by a subsequent agreement that the work of de-watering was given to the plaintiffs. The work of de-watering of the sea-bad tank under excavation which was given to the plaintiffs was the same work as was to be done by the Nawanagar Electricity Supply Company itself. The copy of the minutes of the meeting dated October 25, 1956 (Ex. 65) on record shows that the rate to be given to this work was Rs. 2 per hundred cubic feet exclusive of electric power which the Nawanagar Electricity Company was provide (sic) part of the work. The High Court has pointed out that it was not as if for de-watering for carrying out three different processes, namely, (1) excavation, (2) laying of concrete bed and (3) completing masonry walls, separate amounts at the same rate for de-watering as set out in the contract were to be paid so that the entire de-watering from the bed of the tank would involve payment to the contractor at the rate of Rs. 6 per hundred cubic feet. We see no infirmity in the reasoning of the High Court although Mr. Rangarajan argued vehemently that the work of de-watering was to be paid for each time de-watering was done as the tank was flooded by tidal water and amounts for de-watering were liable to be paid each time de-watering had to be done whereas the payment had been made by the defendant only for de-watering once. This argument does not stand scrutiny because even the trial court awarded the additional amounts for de-watering not on the footing of repeated flooding by tides but on the footing that de-watering was required for excavation for the tank, concerting the bottom of the tank as well as for making masonry walls and de-watering had to be paid for separately each it was done. There is no justification for this.

6. The third dispute is regarding the claim for an additional amount of Rs. 4662.84 for transport of excavated material made by the plaintiffs. In the first place, this claim is a minor one and was accepted by the trial court but disallowed by the Division Bench of the Gujarat High Court. The basis of this claim is that there is an increase in the volume of murram when it is excavated from the ground, as when it forming part of the ground it is in a compact condition whereas once excavated it is loose. The claim was on the estimate that there would be an increase of 25 per cent in bulkage when murram is excavated from the ground. In this regard, as pointed out by the Division Bench, the defendant had already paid an increased amount of cartage on the footing that when material is excavated from the ground, there would be an increase in volume of 9.80 per cent. On appreciation of the evidence, the Division Bench came to the conclusion that there was no reliable evidence to

establish that there would be an increase in volume exceeding 9.80 per cent which had been paid for. We have been taken through the material portion of the evidence. We see no reason to interfere with this finding.

7. Finally, Mr. Rangarajan sought to argue that excessive costs were awarded by the Division Bench of the High Court to the defendant. We do not think that we need consider this question, particularly when the amount of costs is relatively minor and the court enjoys considerable discretion in awarding costs.

8. As far as Appeal No. 2311 of 1972 preferred by the defendant is concerned, Mr. Desai urged that amount of rock-cutting was included in the contract itself and was not liable to be paid for at a rate higher than the rate for excavation. This argument was advanced on the footing that the word "sock" used in the tender was intended really to refer to rock. For the reasons set out earlier, it is impossible to accept this argument. No other contention has been pressed before us. There is no substance in the appeal of the defendants and it must fail.

9. In the result, Appeal No. 2310 of 1972 succeeds only to the extent that the amount awarded will be increased by a sum of Rs. 10,000 with interest at 6 per cent per annum from the date of the suit up to the date of payment or realisation. In other regards, the appeal fails. Appeals No. 2311 of 1972 also fails and is dismissed.

10. There will be no order as to the costs of these appeals.

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