SUPREME COURT OF INDIA

K.C. Skaria

Vs

State of Kerala and Another

Civil Appeal Nos. 6885-6886 of 2003

(Arijit Pasayat and R.V. Raveendran, JJ)

10.01.2006

JUDGMENT

R. V. RAVEENDRAN J.

These are plaintiff's appeals against the common judgment and decree dated 12-11-2002 of the High Court of Kerala in Appeal Suit No.481/1992 filed by the defendant, and Appeal Suit No. 697/1991 filed by the plaintiff both against the judgment and decree dated 16-2-1991 in O.S. No. 24/ 1990 on the file of the Subordinate Court, Muvattupuzha.

2. The plaint averments, in brief, were as follows:

2.1) The second respondent (The Superintending Engineer, PWD, Central Circle, Always, Kerala) invited tenders for execution of a construction work (Improvements to Thalakkad to Mularinad Road). The appellant's offer was accepted and an agreement dated 7-6-1982 was executed between the State of Kerala as the employer (represented by second respondent), and the appellant as the contractor. The estimated cost of the work was Rs. 11, 28, 595/- and the security deposit payable by the appellant was Rs.22, 600/-. The contract required the work to be completed within 18 months from the date of handing over of site. As the site was formally handed over on 17-8-1982, the work

had to be completed on or before 16-2-1984. According to the appellant, on account of delays, defaults and breaches committed by the Department, he could not complete the work.

2.2) The appellant submitted an on account bill forRs. 5, 36, 800/- on 25-8-1984. It was no paid. In spite of the delay in payment and other breaches by the department, the Appellant proceeded with the work and completed substantial portion of the work. He also sent various letters seeking payment. The Executive Engineer by letter dated 4-7-1985 and 18-10-1985 informed the Chief Engineer (B&R) that the appellant had executed work worth about Rs.lO lacs and the delay in payment was affecting the progress of the work. In spite of it, the payment was delayed and ultimately Rs.4, 04, 628/- was belatedly released on 26-3-1986 after making certain deductions (that is 10% towards errors in measurement, Rs. 40, 463/- as retention amount etc.). No further payments were made by the Department.

2.3) The appellant alleged the following braches by the respondents:-‘

(i) Delay in issuing cement and steel required for the work which was the Department's responsibility (delay of 16 months in Issuing Cement and delay of 26 months in Issuing steel);

(ii) Default in releasing further cement and MS rods thereby preventing him from completing the work (two bridges);

(iii) Failure to finalise the formation level of the road, thereby preventing him from metal ling the road (delay in approving initial levels tentatively being 9 months);

(iv) Delay in making on account payments for the work done as required by the contract terms (delay of 19 months in releasing the payment towards first part of bill);

(v) Requiring him to do more than 25% in excess of the agreed quantities in regard to certain items of work;

The appellant contended that in vies of the expiry of the contract period as also the extended period and the breaches committed by the Department preventing him from completing the work within the extended period, he was not liable to execute the balance work and that the Department cannot foist any liability on him in regard to any extra cost in getting the balance work completed through another agency.

The appellant field O.S. No. 691/1987 on the file of the Sub-ordinate Judge, Vernacular (later transferred and renumbered as O.S. No. 24/1990 on the file of Sub-Judge, Moovattupuzha) against

the respondents, for the following reliefs:

(i) For recovery of Rs. 2 lacs towards the amount due for work done, with interest at 18% per annum. (The appellant also claimed proper accounting and prayed that if the amount due for the work done was in excess of Rs.2 lacs estimated by him, he may be permitted to pay additional court fee in regard to the actual amount found due);

(ii) For recovery of Rs. 1, 000/ as damages and branch of contract with interest at 18% per annum thereon;

(iii) For a declaration that he was not liable to execute the remaining part of the work and that the completion of the remaining work shall not be his risk and cost, and for i consequential direction to refund the entire security deposit and retention money with interest at 18% per annum;

(iv) For costs and such other reliefs as the court may deem fit to grant in the circumstances of the case.

3. The appellant valued the suit, for the purposes of court fee, as follows, under the Kerala Court Fees and Suits Valuation Act, 1959 ('CF Act' for short') and paid court fee accordingly:-

S.No

Relief Rs.

Valuation Rs.

CF paid

a. Relief (i) under Section 35 of CF Act

2, 00, 00

19, 980

b. Relief (ii) under Section 22 of CF. Act

1, 000

100

c. Relief (iii) under Section 25(d) (ii) of the Act

300

Rs. 30

d.Total

2, 01, 300

20, 110

4. The suit was resisted by the State, inter alia, on the ground that there was no breach on its part. It was alleged that the work consisted of

(a) Cross drainage works,

(b) Earth-work for forming the roadway,

(c) Protective works and (d) supply of material like stone, metal etc. The respondents stated that cement was issued on 9-11-1983 when the appellant made arrangements for cross drainage works. It was also alleged that a part of steel rods were issued on 26-10-1984 and balance as and when the work progressed. It was contended that major items of work (like earthwork for road formation, supply of stone/metal for soling and metal ling work) did not involve cement and steel and nothing prevented the appellant from proceeding with those works pending issue of cement and steel. It was also alleged that any delay in supply of materials by the Department would entitle the appellant only to extension of time and not to any extra payment. It was alleged that time was extended from 16-8-1984 to 31-3-1985 and again up to 31-12-1985 with fine of Rs. 100/- and the appellant did not complete the work in spite of such extensions and in spite of final notice dated 11-11-1986. The respondents contended that they would get the unfinished work completed at the risk and cost of the appellant and recover any extra cost in completing the work as also the cost of unreturned material from the security and retention amounts and other amounts due to the appellant.

5. During the pendency of the suit, the Department passed in order dt. 31-5-1989 terminating the contract at the risk and cost of the appellant and ordering of the security deposit amount of Rs. 22, 600/-. The trial court framed the following issues:

1. Whether the defendants committed breach of contractual obligation and if so, what is the amount due to the plaintiff as damages for breach of contractual obligations?

2. Whether the plaintiff is entitled to get the value of the work done and, if so, what is the amount

due to him?

3. Whether the plaintiff is entitled for a declaration that the balance work shall not be arranged at the risk and costs of the plaintiff and consequently directing he defendants to release security deposit and retention amount?

4. Whether the plaintiff is entitled to get 18% interest per annum on the amount due to him from the date of the suit 16-7-1987 till the date of realization.

5. Cost and other reliefs."

7. After appreciating the oral and documentary evidence lead by the parties, the trial court by a judgment and decree dated 16-2-1991 decreed the suit, in part. It held that as per the measurements contained in the Measurement Book (Ex. B-2) maintained by the Department, the total value of the work done by the appellant was Rs.10, 05, 466.42 and as Rs. 4, 36, 963.29 had already been paid, the balance due for the work done was Rs. 5, 68, 487.13, and after deducting the cost of the material Rs. 5, 33, 560/-. The trial court also found that the Department committed breach by causing delays on various counts, thereby preventing the appellant from completing the work. The trial court held that though the amount due towards the work done was Rs.5, 33, 560/-, as the appellant had claimed only a sum of Rs. 2 lacs on that count and paid court fee thereon, the appellant was entitled to a decree for Rs.2 lacs only towards value of work done. As a consequence of its findings, the trial court decreed the suit against the respondents as follows:-

(i) A decree for Rs. 2 lacs towards the cost of the work done with 12% rendition of accounts. In Narandas Morardas Gajiwala v. S.P.A.M. Papammal , this Court considered the maintainability of a suit by an agent against the principle for accounts. Negativing the contention that only a principal can sue the agent for rendering proper accounts and not vice versa, (as Section 213 of the Contract Act provided that an agent is bound to render proper accounts to his principal on demand without a corresponding provision in the Contract Act enabling the agent to sue the principal for accounts), this Court held:

"In our opinion, the statute is not exhaustive and the right of the agent to sue the principal for accounts is an equitable right arising under special circumstances and is not a statutory right Though an agent has no statutory right for an account from his principal, nevertheless there may be special circumstances rendering it equitable that the principal should account to the agent. Such a case may arise where all the accounts are in the possession of the principal and the agent does not possess accounts to enable him to determine his claim for commission against his principal. The right of the agent may also arise in a exceptional case where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into."

16. To summarise, a suit for rendition of accounts can be maintained only if a person suing has a right to receive an account from the defendant. Such a right can either be (a) created or recognized under a statute; or (b) based on the fiduciary relationship between the parties as in the case of a beneficiary and a trustee, or (c) claimed in equity when the relationship is such that rendition of accounts is the only relief which will enable the person seeking account to satisfactorily asserts his legal right. Such a right to seek accounts cannot be claimed as a matter of convenience or on the ground of hardship or on the ground that the person suing did not know that exact amount due to him, as that will open the floodgates for converting several types of money claims into suits for accounts, to avoid payment of court fee at the time of institution.

17. Let us now examine wither a contractor engaged to execute a particular work, can file a suit for accounts against the employer in regard to payment for the work done. Such a right is not created or recognized by any statue. The independent contractor is not an agent of the employer. Nor is the employer in the position of a trustee with reference to the independent contractor. Can to claim be supported in equity by stating that where the relationship is such that rendition of accounts is the only relief which will enable the contractor to satisfactorily asserts his legal right? A contractor, who is engaged to execute a work, is expected to maintain his own accounts. At all events, there is no bar for a contractor to keep an account of the work done. Even where the contract between the employer and independent contractor may provide for payment on the basis of measurements to be recorded by the employer, nothing prevents the contractor from measuring the work done by him and then suing for the value of the work done. The contractor may also demand joint-measurements to determine the quantum of work done. If the employer for some reasons does not co-operate or prevents the contractor from taking physical measurements, the contractor can seek appropriate legal remedy which will enable him to take measurements or to secure the information from the measurement book in the custody of the employer. Therefore, either the fact that the measurement book is maintained by the employer, or the fact that the contractor does not possess the exact measurements, will not entitled the contractor to file a suit for rendition of accounts against the employer.

18. In this case, the appellant could have either himself measured the work done by him or secured the information from the respondent. The appellant has neither made out a right under a statute nor any fiduciary relationship or any right in equity by establishing that except by calling upon the defendants in the suit to render accounts, it is not possible for him to get relief. The appellant has sued for Rs.2 lakhs and paid court fee thereon. Nothing prevented him from suing for Rs.5, 33, 000/-. In para 5 of the plant, he states that the total value of work done by him was Rs. 10, 00, 000/-. He knew that he had been paid only Rs.4, 04, 628/-. He also knew the value of material supplied by the employer. In the circumstances, the prayer for rendition of accounts is not maintainable.

19. The appellant next attempted to pass into service Section 149 of CPC to contend that he ought to have been given an opportunity to pay the deficit court fee on the total amount due for the work done. Section 149 provides that where the whole or any part of court fee prescribed for any

document has not been paid, the court may, in this discretion, at any stage, allow the person by whom such fee is payable, to pay the whole or part as the case may be, of such fee, and upon such payment, the document in respect of which such fee is payable, shall have the same force and effect's as if such court fee had been paid in the first instance. Section 4 of the Court Fee Act bars the court from receiving the plaint if it does not bear the proper court fee. Section 149 acts as an exception to the said bar, and enables the court the permit the plaintiff to pay the deficit court fee at a stage subsequent to the filling of the suit and provides that such payment if permitted by the court, shall have the same effect as if it has been paid in the first instance. Interpreting Section 149, this Court in Mannan Lai v. Chhhotka Bibi held that Section 149 CPC mitigates the rigor of Section 4 of the C.F. Act, and the courts should harmonies the provisions of the C.F. Act and the CPC by reading Section 149 as a proviso to Section 4 of the C.F. Act and allowing the deficit to be made good within the period to be fixed by it. This Court further held that if the deficit is made good, no objection could be raised on the ground of bar of limitation, as Section 149 specifically provides that the document is to have validity with retrospective effect.

20. A careful reading of Section 149 shows that it would apply only in respect of the court fee payable at the time of institution of the suit. If the court fee due on the plaint when instituted, is not paid wholly or partly by the person instituting the suit, the court in its discretion, may allow him to pay the court fee or deficit court fee with the period fixed by it. Section 149 has no application where the court fee, due on the plaint as per the valuation of the suit, is fully paid, but subsequently it is found that a larger amount is due to the plaintiff. For example, if the plaintiff values the suit at Rs.2 lacs and the court fee payable is Rs. 20, 000/-and the plaintiff pays a court fee of Rs. 10, 000/-, on his request time for payment of balance of Rs. 10, 000/- can be extend by the court at its discretion under Section 149 CPC. But where the claim was Rs.2 lacs and full court fee on Rs.2 lacs was paid at the time of institution of the suit, and during evidence it transpires that the amount due to plaintiff is actually Rs.5 lacs and not Rs.2 lacs, the question of permitting the plaintiff to pay deficit court fee at that stage by calling in aid Section 149, does not arise as no court fee becomes payable at that stage. Plaintiff can increase the claim only by seeking amendment of the plaint and paying additional court fee on the amended claim. In regard to such amended claim also, Section 149 may be pressed into service. But then amendment would depend on limitation and may not be permitted after the period of limitation. Where there is no deficit in court fee at the time of institution and when there is no amendment to plaint increasing the suit claim, there is no occasion for pressing Section 149 into service in regard to court fee payable on plaints.

Re: Point No. (iD:

21. The High Court treated the suit as one for accounts. In view of its finding that a suit for accounts by a contractor is not maintainable, it held that the suit in entirety ought to be dismissed as not maintainable.

22. The plaint contains all averments necessary for the plaintiff to sue for the value of the work

done. He estimated the account due towards work done at Rs.2 lakhs and paid court-fee on the said Rs.2 lakhs. If the plaintiff-appellant has established that the work could not be completed on account of the breaches on the part of the employer, and also establish that the value of work done by him exceeded Rs.2 lakhs, we find no reason why he should be denied a decree for at least Rs.2 lakhs. Merely because the plaintiff also chose to seek accounting, he cannot be non-suited. This is not a case where the plaintiff had sued only for accounts, paying court fee on a mere Rs. 1, 000/- under Section 35 of the Court Fee Act. The prayer in the suit is for recovery of Rs.2 lakhs towards the value of the work done with an additional prayer for accounting and several other reliefs. In fact, plaintiff did not even seek in the prayer column, a decree for any higher amount, if the amount found due on accounting was found to be more than Rs.2 lacs. If the prayer in regard to accounting was found to be not tenable, that prayer could not be granted. But nothing could come in the way of plaintiff getting a decree for the amounts claimed towards value of the work done for which he has paid the court fee, by proving that such amount was due for work done and by proving that he was not at breach. Having regard to the frame of the suit, we are of the view that the High Court was not justified in dismissing the suit as not maintainable, ignoring the other prayers. The second point is answered accordingly.

Re: Point No. (in):

23. The trial court after exhaustive reference to the evidence and the rights and obligations of the parties under the contract, recorded clear findings of fact that there was inordinate delay on the part of the respondents in supplying steel and cement, in finalizing the formation level which was a condition precedent for further progress of work, and in making on account payment for the work done. It consequently held that the employer (respondents) was at breach and the contractor was not at breach. The High Court however reversed the said findings and held that the respondents were not in breach merely on the following reasoning, not based on evidence:

"There is definite contention by the defendants that department had made all arrangements to supply the departmental material and that the departmental material were issued only according to the progress of the work at site in order to safeguard the interest of the Government As contended by the defendants, supply of department materials would have become necessary, only if there was progress in the work done by the plaintiff. The defendants submit that department materials were issued only in accordance with the progress of the work at site. On the basis of the materials available on records it is not at all possible to say that there was breach of contract by the defendants."

24. The contract work even according to the respondents consisted of four parts, namely, (i) cross drainage work, (ii) earthwork for forming the roadway, (ii) protective works and (iv) supply of material like soling stone, metal etc. The cross-drainage work required cement and steel and under the contract, it was for the Department to issue those materials. The site was delivered on 17-8-1982 and the work had to be completed within 18 months i.e. by 16-2-1984. The schedule prescribed for progress/executions required the cross-drainage work to be carried out first. But, strangely, the first batch of cement was issued only on 9-11 -1983 and the first batch of steel was issued only on 26-10-

1984. When the period stipulated for completion was 18 months and if the first supply of cement is made after 15 months and first steel supply was made after 26 months, very little is required to conclude that there was inordinate delay and consequential branch on the part of the Department, in supply the material. The question is about the initial delay in supplying the cement and steel. The High court has only referred to subsequent progressive supply of steel and cement and is strangely silent about the enormous delay in commencing the supply of steel and cement. The evidence discloses that the appellant had written several letters (Ex. A5 dated 13-10-1982, A3 dated 8-12-1982, A4 dated 6-4-1983, A6 dated 10-8-1983 andA7 dated 17-8-1983 among others) requesting for issue of steel and cement and pointing out that he had collected the materials like rubble, metal, sand etc. for cross-drainage work and unless the Department issues cement and MS rods, he cannot start the cross-drainage work. In spite of it, issue of cement was commenced only on 9-11-1983. The delay of 16 months in issuing cement and 26 months in issuing steel is clearly established by oral and documentary evidence. The fact that after the initial delay, steel and cement were progressively supplied will not wipe out the breach on account of the initial delay in supply.

25. The Department contended that even though there was delay in supply of cement and steel, the contractor could have commenced the earthwork for road formation and metal ling work which did not involve cement and steel. But the various letters exhibited by the contractor (referred to above) show that the cross-drainage and road work were interconnected and that though he had collected the material for cross-drainage work immediately after the site was handed over to him, earthwork for the road could not be completed until the cross-drainage work was executed. Further, as per the schedule for progress of work, cross-drainage work had to be done first. Ignoring, this evidence and ignoring the findings by the trial court on the basis of the evidence, the High Court has concluded that there was no delay on the part of the Department by holding that the departmental material was to be issued only in accordance with the progress of the work and that the Department had progressively issued the material and, therefore there was no breach. But where has been lost sight of is the fact that there was an initial delay of as many as 16 months in regard to issue of cement and 26 months in regard to issue of steel and until cement and steel were issued, the contractor could not start the cross drainage work and the cross-drainage work was linked to completion of the earthwork.

26. The contractor has also established by evidence that there was inordinate delay on the part of the department in approving the levels (approved only on 2-6-1983) in spite of requests in Ex.A5/13-10-1982, ExA3/8-12-1982andA4dt. 6-4-1983 and that until levels were approved, road formation work could not be carried out.

The contractor has also clearly established that there was inordinate delay in making payment for the work done. The first bill was submitted on 25-8-1984 for Rs.5, 36.800/-. After certain deductions, a sum of Rs.4, 04, 628/- towards the said bill was released only on 26-3-1986 i.e. after 19 months. This delay remains unexplained.

27. The trial court has examined the evidence in details and has recorded clear findings of fact about the delays and the breach committed by the Department. The finding of the High Court without consideration of the evidence cannot be sustained. We therefore restore the finding of the trial court that respondents committed breach of their obligations and the appellant was justified in refusing to complete the work, and the consequential finding that the respondents could not therefore recover the extra cost in getting the work completed from the appellant. Re: Point No iiv):

28. It is not in dispute that as per the measurements recorded by the Department (in Ex. B-2), the value of the work done was Rs. 10, 05, 466.42 and the amount due in regard to the work done after deducting the part payment and value of the material supplier, was Rs. 5, 33, 560/-. The plaintiff has estimated the amount due for work done as Rs.2 lakhs and paid the court-fee therefore. He did not amend the suit claim nor pay any additional court fee. The claim for accounting has been rejected as not maintainable. Therefore, the plaintiff is entitled only to a decree for Rs.2 lakhs towards the value of the work done, even though he has established that the amount due in that behalf was Rs. 5, 33, 560/-.

29. As the appellant has established breach by the respondents, the award of Rs. 1, 000/- as damages for breach by the trial court is also upheld. As a consequence of the finding that the breach is no the part of the respondents and not the appellant, the trial court was justified in giving a declaration that the respondents were entitled to recover any extra cost involved in getting the work completed from the appellant. But it could not have granted the further relief of directing the respondents to refund the security deposit amount and retention deposit amount, as the appellant has neither quantified the said security deposit/retention deposit nor paid court fee thereon. Therefore, the decree granted by the trial court, to the extent it directs refund of the security deposit and retention amount, cannot be sustained. The fourth Point is answered accordingly,

Conclusion:

30. In view of our aforesaid findings, we allow these appeals in part, set aside the order of the High Court and restore the decree granted by the trial court for Rs.2 lakhs plus Rs. 1, 000/- with interest thereon as per the decree of the trial court. The appellant will be entitled to costs on the amount decreed throughout.