SUPREME COURT OF INDIA

National Building Construction

Vs.

State of Maharashtra

C.A.No.10269 of 2017

(Dipak Misra and A.M.Khanwilkar,JJ.,)

23.08.2017

JUDGMENT

A.M.Khanwilkar,J.,

1. The present appeal arises out of the judgment and decree dated 1st September, 2009, passed by the High Court of Judicature at Bombay, Nagpur Bench, in First Appeal No.312 of 1992 whereby the High Court has partly modified the decree passed by the Trial Court and negatived Claim Nos.1 and 3 set up by the appellant.

2. The appellant, a partnership firm engaged in civil construction works, had submitted a tender for work pertaining to construction of one Nishanghat Minor Irrigation Tank in pursuance of a notice issued by respondent No.1 - State of Maharashtra. After the appellant's tender was approved and work order dated 21st December, 1978 was issued by the State in favour of the appellant, the parties executed an agreement at Nagpur. After completion of the contract work on 16th June, 1982, final bill was paid to the appellant on 22nd October, 1982, which the appellant disputed on the ground that it had performed extra work over and above the tendered work, for which payment was not included. Feeling aggrieved by the alleged shortfall in payment and unable to settle the dispute with the respondents, the appellant filed a suit against the respondents before the Court of 6 th Joint Civil Judge (Senior Division), Nagpur being Special Civil Suit No.279 of 1985, inter alia seeking a decree for amounts due to it under the following heads of claim:

> "a. Claim 1: Unpaid amounts arising out of difference in government-prescribed rates for work of excess stone revetment/pitching, amounting to Rs. 1,76,199.28/-
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> b. Claim 2: Unpaid amounts for difference in rates relating to excavation work, amounting to Rs. 90,165/¬c. Claim 3: Unpaid amounts for extra lead for water works, amounting to Rs. 80,000/¬and

d. Claim 4: Unpaid amounts for extra lead for sand, amounting to Rs. 9900/¬In addition, the appellant also claimed interest on the claim amount, of Rs.1,42,505.60, calculated at 15% p.a. from 22nd October, 1982 till the date of filing the suit. With interest, the aggregate claim of the appellant was Rs. 4,98, 769.86/-.

3. Each of the above claims was specifically challenged by the respondents in their written statement. After considering the rival contentions and the evidence on record, the Trial Court passed a decree in favour of the appellant on 29th October, 1991, the operative part of which is reproduced herein below:

"ORDER

1] Suit is decreed with costs.

2] Defendants do pay Rs. 4,98,769.87 to the plaintiff.

3] The decreetal amount to carry future interest @ 15% per annum from the date of filing of the suit till its actual realization.

4] Decree be drawn accordingly."

4. The respondents preferred an appeal against the aforesaid decree passed by the Trial Court before the High Court of Bombay, Nagpur Bench, being First Appeal No.312 of 1992. Over the course of hearing, the learned Single Judge framed the following points for consideration:

"I) Whether the trial Court was justified in granting the claim of Rs.1,76,199/towards pitching?

II) Whether the plaintiff was entitled to an amount of Rs.90,165/for the excavation of the soft rock of the strata?

III) Whether the plaintiff was entitled to an amount of Rs.80,000/for additional lead for water?

IV) Whether the grant of compensation @ Rs.9,900/towards lead for sand was justified?

V) What order?"

5. Ultimately, the High Court by its judgment and decree dated 1st September, 2009 partly allowed the respondents' appeal, modifying the decision of the Trial Court and reducing the decreetal amount as under:

"23. For the reasons aforesaid, the first appeal is partly allowed.. The judgment and decree passed by the 6th Joint Civil Judge (Senior Division), Nagpur on 29.10.1991 is

> hereby modified. It is held that the respondent plaintiff would not be entitled to claim an amount of Rs. 1,76,199/towards pitching an amount of Rs. 80,000/for additional lead of water. The findings recorded by the trial Court in regard to the entitlement of plaintiff to an amount of Rs. 90,165/for excavation of soft rock and an amount of Rs. 9900/towards lead of sand are hereby confirmed.. The plaintiff respond.ent would., therefore, be entitled to only an amount of Rs. 1,00,065/with interest @ 15% per annum from the date of filing of the suit till its actual realization. Order accordingly. No order as to costs."

The High Court, while partly allowing the appellant's claims, viz. Claim 2 and Claim 4, struck off Claim 1 and Claim 3, having held that the said claims were granted by the Trial Court without considering the evidence on record. The High Court further held that while there was no dispute as to the work done by the appellant under this head of claim, the Government/C.S.R. rate at which such work was to be compensated was erroneously expressed in terms of square metres instead of cubic metres, resulting in confusion. The High Court came to hold that the respondents had produced evidence to show that this error had been rectified and, in fact, the appellant was paid at a rate higher than the rectified prescribed rate. The Court noted that despite this, the appellant was claiming payment under this head of claim at an exorbitant and abnormal rate, which was untenable. The High Court went on to hold that the Trial Court also erroneously granted the claim relating to extra lead for water (i.e. Claim 3). For, the agreement executed by the parties for the contract work clearly mentioned that the work done by the appellant under this head of claim would include watering and mechanized compaction of earth work and no extra payment towards lead for water would be payable. Further, the appellant was duly informed by the Executive Engineer, Minor Irrigation Division, Nagpur, that its claim relating to extra lead for water was not acceptable. Hence, such claim was rejected. The High Court, however, did not disturb the interest component as ordered by the Trial Court.

6. The High Court's decision has been assailed by the appellant in the present appeal, on several grounds. As regards Claim 1, the rectification issued by the respondents with respect to the Government/CSR rates for pitching work was misleading and was produced as an afterthought, being issued much after the end of the relevant financial year. Such direction could not be issued with retrospective effect. The rectification itself is inadmissible in evidence, not having been pleaded by the respondents in their written statement before the Trial Court. As regards Claim 3, the High Court ought not to have disregarded the said claim when the respondents' witness himself admitted that there was a need for additional water to be brought by the appellant. The respondents' contention that they had rejected the appellant's demand relating to lead for water and duly communicated the same to it, was also rightly rejected by the Trial Court as bereft of merit. Finally, since the agreement executed between the parties for the contract work was one between a private party and the State, the State (i.e. the respondents) was obliged to act in a just, fair and reasonable manner.

7. The respondents, in reply, have contended that the High Court's decision was justified and based on the evidence brought on record. The respondents have reiterated the findings

and conclusion reached by the High Court while rejecting Claims 1 and 3 of the appellant. Additionally, the respondents have faintly denied the claims made by the appellant for variation in excavation of rock i.e. Claim No.2 and in extra lead of sand i.e. Claim 4, stating that the respondents never agreed to pay for any variation. Notwithstanding the above, the respondents had nevertheless paid the appellant for extra work done.

8. Considering the rival submissions, we are called upon to examine the justness of the view taken by the High Court with respect to the claim set up by the appellant in respect to pitching of stones and extra lead for water, being Claim Nos.1 and 3, respectively. Taking up the issue regarding Claim No.1 for a sum of Rs.1,76,199/-, the Trial Court, for allowing the same in favour of the appellant, had noted that there was no pleading in respect of the evidence produced by the respondents (defendants) and, therefore, such evidence was inadmissible. Secondly, the direction issued by the Superintending Engineer vide its letter dated 30 th May, 1983, pertained to financial year 1981-82. That was illegal. For, it was impermissible to correct the earlier notified rates of CSR with retrospective effect. The High Court, on the other hand, accepted the said evidence and found fault with the view taken by the Trial Court that there was no pleading or that the evidence produced by the defendants was inadmissible. As regards the pleading in their written statement in relation to Claim No.1, the respondents had asserted thus:-

> "A. As to claim no. 1: Item No. 12A as put forth by the plaintiff in this suit is denied.. It is submitted that the deals with the providing of stone revetment (Pitching of 30 cm. thickness). The quantity put to tender of this item was 300 M3 and the remaining quantity of pitching from available material, vide tender item No. 12-B was 3144 M3. However, during the execution, the quantity of item No. 12-A which was 300 M3 has been increased to 3455.50 M3 as material available for pitching was less than tender quantity. The allegations that clause No. 38 of the agreement has not been complete with, are denied. It is submitted that as per clause 38 of the agreement, the quantity exceeded by more than 25% of the tend.er quantity is to be paid as per CSR during which the work executed and the plaintiff was paid as per this condition as below:
>
> As per tender rate 481 M3 @ Rs.27.60 Rs.13275.60 As per CSR 80-81 409.24 M3 @ Rs.28.75 Rs.11765.65 As per CSR 81-82 2575.26 M3 @ Rs.35.70 Rs.91936.75 It is denied that the plaintiff is entitled to claim the amount as detailed in chart given in this para. It is submitted that the plaintiff's claim for CSR 81-82 i.e. Rs. 97.30 is not correct as the rate of pitching in CSR 81-82 was given as Rs. 24.25 per M2 by the Govt. and no rate for per cubic meter is given in this CSR. However, the Superintending Engineer, Nagpur Irrigation Circle Nagpur, vide letter No. 3517/HMD dt. 19.6.1981 instructed to increase the rates for the year, 1981-82 by 30% above the CSR 180-81 for the items not included in the Govt. Sanctioned CSR for 1981-82. Accordingly, this office has taken the rate of pitching per cubic meter for 80-81 which was Rs. 27.60 per cubic meter and adding 30% above that the rate worked out Rs. 35.70 per M3 and the plaintiff was paid at this rate. Hence there is no substance in the

claim of the plaintiff as he has been paid fully as per contract conditions. The plaintiff is bound by the terms of the agreement and in view the provisions made in the agreement reference as to the dispute raised by the plaintiff was already made to the Superintending Engineer and it was finally settled by the said authorities. The plaintiff is bound by the said decision."

(emphasis supplied)

The evidence adduced by the respondents, including the deposition of DW1, was nothing but elaboration of the said pleading. The material facts to deny the claim of the appellant qua this head under consideration was duly pleaded. In the context of pleading in the written statement, DW1 in his examination-in-chief had stated thus:-

"2. In agreement so executed by plaintiff he had quoted the rate of pitching work 10% above the Govt. rate in cubic metres. In case the actual work carried out by the contractor exceeds by 25% above the estimate then the contractor is entitled to charge the rate as per CSR prevailing. It was also agreed that in case the rate of any particular item is act mentioned in the CSR then the rate is to be fixed mutually by department and contractor to be derived from CSR.

3. Plaintiff never raised any dispute about the rates. The pitching rates in the CSR of 1981-82 are mentioned in the square metres and not in cubic metres. But the pitching rates in ea.rlier CSR of 1979-89 a.nd 1980-81 were in the cubic metres. As per clause 38 of the agreement a.s the rate of pitching in CSR 1981-82 were not in cubic metres that rate was not applicable to be paid to the contractor. In such a case the rate was to be fixed for pitching work in the year 1981-82 by the superintending Engineer. By Exh 47 I reported to the Supdt. Engineer that whom I converted the rates from square metres to cubic meters for pitching work for the year 1981-82. I found that the rates of was too high and abnormal and therefore what should be done. Exh. 47 in my opinion is not a recommendation to Supdt. Engineer. But only an abnormality was pointed out to the Supdt. Engineer. The Supdt. Engineer in pu.rsua.nce of my letter Exh. 47 intimated such abnormality to the Govt. Govt. by letter dated 23.6.82 intimated all Supdt. Engineer that it was an anomaly and therefore the labour rate should be corrected. The letter now shown to me is the same. The Zerox copy of the Govt. letter received by the Department is placed on record along with list Exh 113. The Xerox copy tallies with the letter received by us. The letter received by the department is returned to the witness and the Xerox copy is placed at Exh 117.

4. Supdt. Engineer subsequently issued directions that in case any rate is not mentioned in the CSR then the payment should be made as per the earlier CSR with 30% raise in it. As the rate of pitching in the CSR of 1981-82 was abnormal and end of was mentioned in square metres, as per the directions of the Supdt. Engineer rates as per the CSR of 1981-82 with 30% raise was to be paid to the contractor plaintiff. Those instructions are vide letter dt. 19.6.1981. It is placed at Exh 118. Plaintiff

agreed in the agreement that Supdt. Engineer in the final authority to decide the rates. It is also so mentioned in the manual. Nagpur Irrigation Project Circle Supdt. Engineer in authorized by the Govt. to fix the CSR. Accordingly on the instruction of the Govt. Supdt. Engineer Nagpur Irrigation Project Circle corrected the pitching rates of CSR 1981-82 and informed us accordingly vide letter dt. 30.5.1983. The letter is dt. 30.5.1983 and S.E. NIRC quoted us the rate Rs. 9.95 for square metre against K.M. 24.25 per squa.re metre against wrongly mentioned rates on CSR of 1981-82. By the same letter Supdt. Engineer also fixed the rates in cubic metres. The cubic metre is Rs. 33.15. The department received the Xerox copy of letter dt. 30.5.1983 from Supdt. Engineer. The letter date 30.5.1983 is placed at Exh 119. Exh 119 is issued by Executive Engineer, Canal Design Division in the Capacity of Secretary. CSR Committee. Nagpur to the Supdt. Engineer, NIPC in the capacity of president of the CSR committee."

(emphasis supplied)

Notably, this evidence was allowed to be let in by the appellant without any demur. No objection was taken for exhibiting the aforementioned official documents.

9. Having perused the pleading in the written statement and the evidence produced by the respondents (defendants), the High Court, after analysing the same, concluded that there was obvious typographical error in the CSR rates pertaining to financial year 1981-82, which was later on corrected, and gave benefit of that position to the respondents and came to hold that the appellant was not entitled to the claim amount of Rs.1,76,199/-. The High Court analysed the pleading as well as the oral and documentary evidences produced by the defendant to come to the said conclusion. It will be useful to advert to the discussion found in the impugned judgment in that behalf which reads thus:-

"19. On perusal of the Record & Proceedings, it appears that the trial Court had committed a serious error in granting the claim of Rs. 1,76,199/towards pitching. In the instant case, the appellants State of Maharashtra had not disputed that the total excavated quantity by the plaintiff contractor was 2575.26 meter cube which was over and above the actual quantity which was required for the stone revetment and, hence, the plaintiff contractor was entitled to seek payment in this regard at the C.S.R. rate. It is not in dispute that the contract existed for the period from 1979 to 1982. For the year 1979-80, the C.S.R. rate for pitching was Rs. 27.60 Ps. Per Cubic Meter, for the year 1980-81, it was Rs. 28.55 Ps. Per cubic meter. For the third year i.e., 1981-82, the year for which the dispute arose, the rate was wrongly shown in square meters in stead of showing it in cubic meters. The rate was shown as Rs. 24.25 Ps. Per squa.re meter and this error on the part of the Government of wrongly quoting the rate in C.S.R. of the year 1981-82 has given rise to the dispute and had also given rise to the claim made by the plaintiff for the pitching work @ Rs. 80.33 Ps. The State had produced the C.S.R. rates for the year 1982-83 also. These rates show that for the year 1982-83, the C.S.R. rate for pitching was Rs. 46.65 Ps. Per Meter cube. Thus, it is

apparent that C.S.R. rate was Rs. 27.60 Ps. For the year 1979-80, Rs. 28.55 Ps. For the year 1980-81, for the year 1982-83, it was 46.65 Ps. and due to a mistake in mentioning the C.S.R. rate in squa.re meters in the year 1981-82, the plaintiff was claiming at an exorbitant and abnormal rate @ Rs. 97.60 Ps. per cubic meter. The State had produced the necessary documents on record to show that this error was rectified by the Government. The document at Exh. 119 clearly show that there was a rectification of the mistake and it was held that for the years 1981-82, the rate was Rs. 33.50 Ps. per cubic meter and for the year 1982-83, it was Rs. 46.65 ps. per cubic meters. It is not in dispute that the plaintiff has been paid @ Rs. 35.70 per cubic meter for the extra work of pitching carried out by the plaintiff during the year 1981-82 and this is over and above the rate of Rs. 33.50 Ps. which was due and payable for the year 1981-82 according to the rectification. The submission made on behalf of the respondent contractor that even if there is a mistake in the C. S.R. rate, the Government is bound to pay at the rate stated in the C.S.R. is totally ill founded. It would be also interesting to consider whether the plaintiff contractor would have accepted the C.S.R. rate of Rs. 1/or Rs. 2/per cubic meter if it was so wrongly mentioned in the C.S.R. of the year 1981-82. The documents on record clearly show that there as a mistake in the rate of pitching in the C.S.R of the year 1981-82 and that mistake was duly rectified and the plaintiff contractor was indeed paid at a rate which was more than the rate prescribed after rectification. It appears that the trial Court has granted the first claim of the plaintiff on the mere asking without considering the necessary documents produced by the State on record. The oral evidence of the defendant is also not considered on the ground that there are no pleadings to support that evidence. This observation of the trial Court is also totally incorrect as the evidence of the witness of the defendants is in consonance with the pleadings of the defendants in the written statement, specially in paragraph 5A of the written statement. The defendants' witness had clearly stated in his evidence that the rate of pitching as per the C.S.R. for the year 1981-82 was abnormal and was mentioned in square meters. According to the witness, the abnormality was pointed out to the Superintending Engineer and in view of the anomaly in the rate, there was a rectification of the mistake by the Government.

It is stated that by the communication at Exh. 119, it was brought to the notice of the authorities that the C.S.R. rates for pitching for the year 1981- 82 were wrongly quoted and the rate per cubic meter was Rs. 33.50 Ps. The plaintiff ha.d been paid at the rate of Rs. 35.70 Ps. per cubic meter. The witness further deposed that the rate of Rs. 97.60 per cubic meter as claimed by the plaintiff had never reached at any point of time and the plaintiff was not entitled to claim at that rate only on the basis of the mistake in the C.S.R. for the year 1981 -82. The finding on the first issue is recorded without considering the material evidence on record and without considering that there was a genuine mistake in the C.S.R. of the year 1981-82 so far as the item of pitching was concerned. It would also be necessary to refer to the document at Exh. 71A to deny the claim of the plaintiff towards pitching. It is necessary to reverse the

finding of the trial Court on this issue and hold that the plaintiff would not be entitled to an amount of Rs.1,76,199/- towards pitching."

(emphasis supplied)

10. In our opinion, the High Court was right, both on facts and in law, in rejecting the claim of the appellant in respect of pitching of stones, to the extent of Rs.1,76,199/-. We find that the finding of facts recorded by the High Court is in consonance with the pleading in the written statement and the oral and documentary evidences produced by the respondents (defendants) in that behalf. The appellant, however, relies on the observation made by the Trial Court that it was not open to the Superintending Engineer to modify the rates of CSR with retrospective effect. This argument does not commend us. The effect of typographical error in the CSR applicable for the financial year 1981-82, is not one of modification of the rates as such. Whereas, the effect of correcting the typographical error in the CSR rates is to restate the correct position as applicable for the relevant period and not one of modification of the rates, as contended. It is not disputed that in the previous financial year 1979-80, the rate prescribed in the CSR was Rs.27.60 per cubic metre. In the following financial year 1980-81, it was Rs.28.55 per cubic metre. It is, therefore, logical and rational to accept the stand taken by the respondents that the rates specified for pitching work in the year 1981-82, were erroneously mentioned in square metres which worked out @ Rs.80.33 per cubic metre. In the next financial year i.e. 1982-83, the rate prescribed for the same work was only Rs.46.65 per cubic metre. Thus, correcting the typographical error in the CSR rates was not an act of modification of those rates as such. That act cannot be construed as retrospective change introduced in the CSR by the respondents. The High Court has justly rejected this plea by giving an illustration that if the CSR rates were to be misprinted as Re.1 or Rs. 2 per cubic metre for the financial year 1981-82, the appellant would not have agreed to be bound by such rate.

11. Suffice it to observe that we find no error, much less any infirmity in the approach of the High Court in disallowing the claim of the appellant concerning pitching of stones to the extent of Rs.1,76,199/-. The view taken by the High Court, in our opinion, is just and proper, and a possible view. We find force in the argument of the respondents (defendants) that the Trial Court misled itself in misreading the pleading and discarding the legal evidence relied upon by the respondents (defendants) concerning Claim No.1. Further, the Trial Court has selectively referred to the deposition in the cross examination of DW1 and not analysed his evidence as a whole. Hence, no interference is warranted at the instance of the appellant in respect of Claim No.1.

12. Reverting to the Claim No.3 set up by the appellant regarding additional lead for water, we find that the Trial Court was swayed away by the fact that the appellant was required to transport water from some distance via Kaccha Road for which the appellant was entitled to such claim. The High Court in paragraph 21 of the impugned judgment, however, considered the said claim of the appellant with reference to the contract document. In that, Clause "d" of tender Item No.8, pertaining to watering and mechanized compaction of earth work,

clearly stated that the rates for earthwork raising are inclusive of watering and compaction at optimum moisture content. Further, in Clause "d" of Item No.8, it has been made amply clear that no extra payment for these items would be given. The High Court held that the appellant having accepted the terms in the contract, which did not provide for any extra payment relating to lead for water, was not entitled to that claim. The High Court also took note of the document issued by the Executive Engineer dated 19th June, 1981 which also forms a part of record at Exh.-65A and noted that it reinforced the stand of the respondents that the appellant was not entitled to grant of the amount of Rs.80,000/- for additional lead for water. We find no infirmity in the view so taken by the High Court. The Claim of the appellant under this head is not supported by express terms of the contract document. As a result, no interference is warranted even with the conclusion reached by the High Court in relation to Claim No.3 set up by the appellant.

13. As no other issue arises for our consideration in this appeal, the appeal must fail.

14. Accordingly, appeal is dismissed with costs.