RAJASTHAN HIGH COURT

Multimetals Ltd.

Vs.

K.L. Jolly

Civil First Appeal No. 198 of 1997
(Arun Madan, J.)

16.05.2002

ORDER

Arun Madan, J.

1. The appellant M/s. Multimetals Ltd. by way of this appeal has challenged the impugned judgment and decree dated 2-5-1997 of ADJ No. 4, Kota in *(titled as K.L. Jolly through his L.Rs. v. Multimetals Ltd., Kota*) [1] on the grounds inter-alia that the respondents (hereinafter referred to as "the plaintiffs") had instituted a suit against the appellant (hereinafter referred to as "the defendant") praying therein for a decree of Rs. 4,38,938/- seeking possession of the machineries as per details furnished in Annexure-1 to the plaint or alternatively reimbursing the cost to the tune of Rs. 39,000/- being the cost of the machinery.

2. The further case of the appellant is that a contract was executed between the parties to the suit on 7-12-1977 for construction of a new shed in the premises of the defendant. As per the averments of the plaint, the duration of contract was up to 6-10-1978. The plaintiff had to execute the construction work on the instructions of the Architect and as per the drawings and the designs, so provided by them. The plaintiffs alleged collusiveness between the Architect and the defendant since the drawings and designs were not provided to them within time as a result of which, the delay had occurred in execution of the work. It was alleged that the designs were changed by the Architect repeatedly and further that the Architect had instructed the plaintiff to dismantle the constructed work and to reconstruct the same. As a result, the plaintiff sought extension of time for completion of the work which was not granted to him by the Architect. He further alleged that his machineries were detained in the factory premises of the defendant on the instructions of the Architect. The plaintiff also

impugned the deductions made by the Architect in his final bill. He also impugned the genuineness of the recovery of Rs. 91,500/- on account of damages for delay in construction of the shed. In the written statement filed by the defendant, he had specifically denied the contention of the plaintiff by contending *inter alia* that :-

> (a) the suit was not maintainable on account of Section 69 of the Indian Partnership Act;
> (b) the plaintiff had deliberately delayed the execution of the work due to which, the operation schedule of the defendant was unnecessarily delayed resulting in huge loss;
> (c) the construction work was defective and contrary to the instructions of the Architect and further the defects were not removed which were brought to his notice;
> (d) the Architect was empowered by the agreement of the contract to make the amendments in the drawings as and when required and the work could be deemed to have been completed only after issuance of the certificate by the Architect. Since the work had not been completed, it makes clear that the plaintiff had not completed the work after the date of filing of the written statement, and;
> (e) the suit was not maintainable on account of limitation being time-barred. During the pendency of the suit, the plaintiff died and his legal representatives were taken on the record.

3. On the basis of the pleadings of the parties, the trial Court framed issues on which the parties were to lead their evidence.

4. The plaintiff in order to establish his case examined Sri S. K. Jolly as PW-1 and various documents were exhibited while the defendant examined Sri J.S. Narwekar as DW-1 and Sri S. N. Choudhary as DW-2 and exhibited various documents.

5. The trial Court after hearing parties, partly decreed the suit on 2-5-1997 against the defendant for Rs. 4,13,345.65/- with simple interest @6% p.a. w.e.f. 3-7-1982 till realization, while Issue Nos. 3, 7, 12 and 17 were decided in favor of the defendant. Issue No. 8 was left undecided by the trial Court. Hence, this appeal.

6. During the course of hearing, learned counsel for the appellant while assailing the

decree of the trial Court has contended *inter alia* that the impugned judgment and decree is not sustainable for the reason that:-

> (a) the judgment and decree is erroneous apparently on the face of law and the material on record;
> (b) the impugned judgment and decree passed is based on surmises and conjectures and as such deserve to be quashed and set aside by this Court; and
> (c) the plaintiffs have miserably failed to prove their case against the defendant. The trial Court has failed to appreciate that building contract is a contract of reciprocal promises and cannot be unilaterally enforced. It was further contended by the learned counsel that when the contractor accepts the extension granted by the employer and continues to work beyond the stipulated date of completion without raising any objection or serving a notice to claim compensation under Section 55 of the Contract Act, the contractor shall be deemed to have waived his right to claim compensation at a later date for working beyond the stipulated date of completion.
> (d) since the time was not the essence of the contract between the parties, the learned trial Court has not erroneously considered this aspect of the matter in view of the principle of law as incorporated in Section 55 of the Contract Act.
> (e) in the instant case the delay was caused by the contractor of 243 days and thus the Architect by allowing relaxation of sixty days as a reasonable period has rightly deducted a sum of Rs. 91,500/- which is lawful and reasonable as against the amount actually due to the plaintiff.

7. It was the further contention of the defendant's counsel that the trial Court has failed to appreciate clauses 27 and 35 of the terms and conditions of the Contract and the powers of Architect as it had left Issue No. 8 undecided in absence of which, the relief sought for could not be given to the plaintiff.
8. The counsel further contended that there is an error apparent on the face of the record since the trial Court had shifted the onus of providing the Issue No. 4 on the defendant. The burden of proving the said issue was heavily on the plaintiff and since they had proved the said issue, the onus could not be shifted on defendant. Moreover, S. K. Jolly PW-1 had failed to prove this issue and the trial Court has not properly appreciated the evidence in true perspective.

9. I have heard learned counsel for the parties and examined their rival claims and

contentions as well as the evidence on the record and so also the findings recorded by the trial Court.

10. Prima facie, I am of the considered view that the findings recorded by the trial Court on due appreciation of evidence do not call for any interference by this Court.
11. The finding of the trial Court as regards Issue No.1 on the question of maintainability of the suit is to the effect that since the execution of the agreement in question (Annexure-1) has not been disputed by the parties and since the suit has been filed by the plaintiff in his personal capacity and not on behalf of the firm hence, the objection of the defendant that this suit has been preferred neither on behalf of the firm nor on behalf of its partner and as such, the suit is not maintainable is not sustainable. Issue No.1 was thus answered in favor of the plaintiff.

12. As regards Issue No. 3 regarding the violation of Condition No. 7 of the agreement being opposed to the public policy the trial Court has recorded a finding in favor of the appellant-defendant by observing that since the plaintiff had failed to establish as to which of the conditions of the agreement was opposed to the public policy, no conclusion can be arrived at to establish that the agreement was opposed to the public policy. This issue was accordingly answered in favor of plaintiff.

13. As regards Issue No. 4, the finding recorded by the trial Court is that the plaintiff had in paras 8 and 9 of the plaint has averred that as on 7-12- 1977 when the agreement was executed between the parties it was well known that the work was to be completed within the stipulated period of the agreement up to 6-10-1978. The Architect of the defendant was to supply the drawings and designs for construction work to the plaintiff for the which the time was fixed for 7-2-1978 but the same were not forthcoming for which the work was held up. Apart from this, the hindrance was caused, time and again by suspending the work on one pretext or the other, ultimately, resulting in withdrawal of the drawings which were supplied earlier to the plaintiff was taken up with inordinate delay in February, 1979. On behalf of the plaintiff only one witness was examined who in his evidence had deposed that as on 7-12-1977, he could not commence the work since the drawings etc. had not been supplied to him resulting in delay of the work. Even, as on 7-2-1978, the drawings were not supplied to him contrary to the settlement between the parties. Thereafter, the drawings were supplied in breakups till 6-1-1979 resulting in undue delay in execution of the work. Finally, in February 1979 all the drawings were withdrawn from the plaintiff.

14. From the perusal of the evidence, it is fully established that if there was any delay in execution of the work or completion thereof, it was primarily on account of the attitude of the defendant and for which the plaintiff cannot be blamed. Since time was the essence of the agreement and the plaintiff was deprived of either having commenced the same by 7-12-1977, consequently, on account of the delay in submitting the drawings etc. in my view, there was sufficient cause for the plaintiff not to have completed the work by 6-10-1978 and for which the defendant is to be blamed and not the plaintiff. Since time was essence of the agreement, the corresponding obligations which as per the agreement were upon the appellant which he had not satisfactorily discharged, hence, the plaintiff cannot be blamed for this delay.

15. Contrarily, the defendant has not successfully led any evidence on the record to discharge the onus cast upon him.

16. As a result of the above discussion and having also taken note of the findings of the trial Court, I am of the concerned opinion that the findings recorded by it are not open to challenge. The appellant-defendant has failed to establish the violation of any of the conditions of the agreement and rather the defendant himself is blame-worthy for the delay in execution of the work for which no liability can be fastened on the plaintiff.

17. During the course of hearing, learned counsel for the appellant has not been able to establish any infirmity or irregularity on the part of the trial Court in having recorded the findings in favor of the plaintiff-respondent regarding appreciation of the evidence led by the plaintiff on the record.

18. Rather, the defendant-appellant had not returned all the machinery installed in his factory premises contrary to the agreement which he was not supposed to withhold and for which the plaintiff has been put to undue loss, hence, the finding recorded by the trial Court in this regard is not open to challenge. Moreover, the defendant has failed to establish by way of any documentary evidence in rebuttal to the evidence led by the plaintiff as against the running bills which he had duly supplied to the defendant and which in turn he failed to pay. The findings of the trial Court in this regard are also not open to challenge.

19. Hence, the findings recorded by the trial Court neither call for any interference nor are open to challenge in the present appeal.

20. Before parting with this case, I would like to observe that counsel for the appellant has laid much emphasis on his application filed under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 on the grounds *inter alia* that during the pendency of the appeal, the appellant- company had become sick and thereafter an application under Section 15(1) of the Act was moved before the Board for Industrial Financial Reconstruction at Delhi and the appellant-company was declared as a sick company in terms of Section 3(1)(o) of the said Act and IDBI Bank has been appointed as the operating agency under Section 73 to examine the viability of the company and to formulate a rehabilitation scheme for its revival if it is found viable.

21. The learned counsel for the appellant has contended that the proceedings of the appeal before this Court in view of the provisions of Section 22 of the said Act are to be stayed till the appellant-company is revived and till the appellant-company continued as sick industry.

22. Be that as it may, since I do not find any merit in the appeal itself, the question of carrying out any further exercise in compliance with the provisions of the Act of 1995 would not arise.

23. As a result of the above discussion, the appeal stands dismissed. the application under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 is also dismissed.

Appeal dismissed.

Cases Referred.

1. Civil Suit No. 5/96