2022 INSC 368

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.556 of 2012

SHRIPATI LAKHU MANE ... APPELANT(S)

VERSUS

THE MEMBER SECRETARY,
MAHARASHTRA WATER SUPPLY
AND SEWERAGE BOARD & ORS.
...RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian

1. The plaintiff in a suit for recovery of money has come up with the above appeal challenging the judgment and decree of the High Court of Judicature at Bombay in a regular appeal under Section 96 of the Code of Civil Procedure, 1908, by which the decree granted by the Trial Court for recovery of Rs.24,97,077/- together with interest at 10% per annum was modified into a decree for

recovery of Rs.7,19,412/- together with interest.

2. We have heard Mr.Vinay Navare, learned senior counsel for the appellant, and Mr. Sunil Murarka, learned counsel for the respondents.

3. The appellant is a registered contractor with the Government of Maharashtra. In a tender for the execution of the work of Regional Rural Piped Water Supply Scheme for Dabhol-Bhopan and other villages in Ratnagiri District, the appellant became the successful tenderer. He was issued with a work order on 03.07.1986, for the execution of the work at the cost of Rs.80,45,034/-, which was 47% above the estimated cost. The time for the completion of the work was stipulated as 30 months. But it appears that Respondent No.3 herein issued a letter dated 28.07.1986 informing the appellant that the work order was kept in abeyance. After a few representations, Respondent No.3 informed the appellant *vide* letter dated 17.12.1986 to start the work.

4. Though the appellant started executing the work from

29.12.1986, he was informed about the non-availability of C-1 pipes and cement pipes of the diameter stipulated in the contract. Later, the respondents wanted a change in the terms of the work order by substituting pipes of different diameter. Therefore, the appellant started demanding modified rate.

5. When the above dispute was brewing, Respondent No.3 instructed the appellant, *vide* letter dated 02.03.1987 to stop the pipeline work and start the work of construction of another work at a different place namely Panchanadi. By another letter dated 04.03.1987, the Respondent No.2 informed the appellant about a modification which involved the construction of one head-work at Karjai and another at Panchanadi. A work order dated 01.07.1987 was also issued in respect of these head-works.

6. Compounding the agony of the appellant, the bills raised by him were not honoured in time due to shortage of funds. Therefore, the appellant did not proceed with the work. As a result, Respondent No.2 issued a threat to withdraw the work order and also to levy a fine of Rs.10/- per day from 01.03.1988. Ever since

then, the parties were at loggerheads, which ultimately led to the appellant filing a suit for recovery of a sum of Rs.51,35,289/-

7. The aforesaid claim of Rs.51,35,289/- comprised of several heads of claim such as ***(i)*** value of the work done; ***(ii)*** release of the security deposit; ***(iii)*** compensation; and ***(iv)*** damages etc.

8. Before the Trial Court, the appellant examined himself as PW-1 and marked several documents as exhibits. On the side of the respondents, 5 witnesses were examined as DWs 1 to 5 and the respondents also marked several documents.

9. Eventually, the Trial Court, by a judgment and decree dated 02.02.1998 decreed the suit partially, directing the respondents to pay to the appellant, a sum of Rs. 24,97,077/- together with interest at 10% per annum from the date of the suit till realization.

10. Aggrieved by the decree so granted, the respondents filed a regular civil appeal under Section 96 of the Code of Civil Procedure, 1908 on the file of the High Court of Judicature at Bombay. The appellant did not file any appeal though the suit was decreed

partially.

11. By a judgment and decree dated 24.04.2009, impugned in this appeal, the High Court allowed the appeal partially and reduced the decree amount to Rs.7,19,412/-. Therefore, the plaintiff has come up with the above appeal.

12. Before we proceed to consider the grounds of attack and the rival contentions, it will be useful to see the different heads of claims made by the appellant before the Trial Court, the heads of claims and the extent to which these heads of claims were allowed by the Trial Court, and the heads of claims allowed by the High Court in the impugned judgment. For easy appreciation, they are presented in a tabular column as follows:-

S.No.	**Heads of Claim**	**Amount claimed in Plaint (Rs.)**	**Amount awarded by Trial court (Rs.)**	**Amount awarded by High Court Rs.)**
1.	Value of work done but not paid, up to the date of withdrawal of work	12,25,864	28,418	28,418
2.	Value of work done under extra item	5,82,250	4,42,944	4,42,944
3.	Release of security deposit	2,21,000	2,21,000	Disallowed
4.	Idle labour	1,57,000	1,57,000	1,57,000
5.	Idle machinery	91,000	91,000	91,000

6.	Overheads	5,63,115	5,63,115	Disallowed
7.	Loss of Profit	11,55,000	9,73,250	Disallowed
8.	Interest at 18% p.a. up to date of Suit	11,38,860	Disallowed	Disallowed
9.	Notice Charges	300	300	Not allowed
TOTAL		**51,34,389**	**24,77,027**[1]	**7,19,362**

13. As could be seen from the above table, what was allowed by the Trial Court under three heads of claims namely, ***(i)*** the release of security deposit to the tune of Rs.2,21,000; ***(ii)*** over-heads for the period from January 1989 to 30.09.1990 to the tune of Rs. 5,63,115/-; and ***(iii)*** loss of profits to the tune of Rs.9,73,250/-, were disallowed by the High Court. Therefore, the appeal before us is actually confined only to these 3 heads of claims.

14. The main and perhaps the only reason why the High Court rejected the claims under the aforesaid 3 heads, was that the appellant had abandoned the work under the main contract and that therefore neither the question of release of security deposit nor the question of payment of overheads nor the question of allowing a claim for loss of profit, did arise. Therefore, the only issue that

1 Though the amount totals to Rs. 24,77,027/-, the decree of the trial court was for Rs. 24,97,077/-

arises for consideration in this appeal before us is as to whether there was abandonment of work by the appellant.

15. In order to see whether there was abandonment on the part of the appellant, it is necessary to have a look at the timeline of events, as reflected by the documentary evidence on record. The timeline was as follows:-

(i) The work order was issued to the appellant on 03.07.1986 and an agreement was registered. The agreement stipulated a period of 30 months for the completion of the work;

(ii) By a letter dated 28.07.1986, the respondents informed the appellant that the execution of the work order shall be kept in abeyance. Though no reason was indicated in the letter, the respondents took a stand later that it was due to "administrative exigencies";

(iii) After nearly 5 months, a letter dated 17.12.1986 was issued directing the appellant to commence work;

(iv) While the case of the appellant was that his obligation to commence the execution of the contract came into effect on 03.07.1986, the case of the respondents in the written statement was that the date of commencement of the work should be taken

only as 17.12.1986, which was the date on which the order for keeping the work-order in abeyance was lifted;

(v) Within a few days, the appellant notified the respondents, about the non-availability of C-1 pipes and cement pipes of the diameter originally agreed. When the respondents wanted to replace the pipes with pipes of different dimension, the appellant demanded a fresh rate to be finalized, through a letter dated 20.02.1987. This fact is admitted in paragraph 8 of the written statement;

(vi) Even before the issue raised in the letter dated 20.02.1987 could be resolved, the respondents issued another letter dated 02.03.1987 instructing the appellant to stop the pipeline work and start the work at Panchanadi. Though the respondents claimed in paragraph 9 of their written statement that the letter dated 02.03.1987 merely called upon the appellant to concentrate on the construction of head-work, it is nevertheless admitted that the said letter contained the words, "*please be stopped*", in so far as the pipeline work is concerned;

(vii) According to the respondents, they issued a telegram dated 02.04.1987 calling upon the appellant to start the work of laying the pipelines;

(viii) By a letter dated 04.03.1987, the plaintiff was informed that the Scheme was undergoing modifications. While the appellant claimed that the modification involved one head-work at

Panchanadi and another head-work at Karjai, the respondents claimed in paragraph 10 of the written statement, that the head-work at Karjai, was already included in the original tender itself. However, the respondents admitted that there was at least one modification, imposed by their letter dated 04.03.1987;

(ix) The fact that the appellant sent a representation dated 04.11.1987 raising 2 issues namely **[1]** the issue of non-payment of bills due to paucity of funds and **[2]** the issue of delay in sanction of the modified rate already proposed on 20.02.1987 for the work of laying pipes of different dimension, is admitted by the respondents in paragraph 11 of the written statement, though they disputed the correctness of the contents of the said letter. Interestingly, the averments of the appellant in paragraph 11 of the plaint about the reply dated 02.12.1987 in response to the appellant's representation dated 04.11.1987, was not at all dealt with by the respondents in paragraph 11 of their written statement;

(x) It was at this juncture, that Respondent No.3 issued a letter dated 22.02.1988, imposing a fine of Rs.10/- per day w.e.f. the date of the said letter. By this letter the appellant was also called upon to start the work by 01.03.1988;

(xi) Despite the appellant's objections, another letter dated 22.03.1988 was issued, reiterating the proposal for imposing a fine and calling upon the appellant to start work;

(xii) In fact, in the letter dated 22.03.1988, the respondents admitted for the first time that the subject work was split into two parts and that the proposed revised rates were as provided therein;

(xiii) Subsequently, there were several communications in April, June, July and August, 1988 all of which pointed to a disagreement on the revised rates on account of the modifications and the non-payment of bills;

(xiv) While according to the appellant the execution of the work under the contract was to commence on 03.07.1986 with a liability to complete it by 03.01.1989, the contention of the respondents was that the execution of the work was to commence only in December, 1986 and that therefore the liability to complete the work expired only in June, 1989;

(xv) However, admittedly, the respondents increased the fine amount from Rs.10/- per day to Rs.25/- per day *vide* their letter dated 19.04.1989. By another letter dated 06.10.1989, the respondents informed the appellant that though the time for completion of the project expired on 17.06.1989 and though the appellant did not ask for any extension, he was being granted extension up to 31.12.1989.

16. The entire sequence of events narrated in the preceding paragraph would show that the appellant was not guilty of anything

including abandonment. Admittedly, Clause 3(a) of the contract enabled the respondents to rescind the contract, forfeit the security deposit and entrust the work to another contractor at the risk and costs of the appellant. This clause was never invoked by the respondents. Therefore, we are surprised, especially in the light of the communications from February, 1988 up to October, 1989 as to how the High Court could have found the appellant guilty of abandonment.

17. In fact, Section 67 of the Indian Contract Act, 1872 makes it clear that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal. Section 67 together with the illustration contained there under reads as follows:-

> **"67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.**—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby."
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> Illustration
>
> A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal."

18. In the case on hand, the respondents issued the work order on 03.07.1986 but directed the work order to be kept in abeyance by a subsequent letter dated 28.07.1986. After this stalemate was lifted by a letter dated 17.12.1986, two things happened namely, ***(i)*** a change in the diameter of the pipes supplied by the respondents for carrying out the contract; and ***(ii)*** request for the performance of additional work without finalization of the modified rates. Therefore, the respondents cannot even accuse the appellant of non-performance of the contract.

19. It is fundamental to the Law of Contract that whenever a material alteration takes place in the terms of the original contract, on account of any act of omission or commission on the part of one of the parties to the contract, it is open to the other party not to perform the original contract. This will not amount to abandonment. Moreover, abandonment is normally understood, in the context of a right and not in the context of a liability or

obligation. A party to a contract may abandon his rights under the contract leading to a plea of waiver by the other party, but there is no question of abandoning an obligation. In this case, the appellant refused to perform his obligations under the work-order, for reasons stated by him. This refusal to perform the obligations, can perhaps be termed as breach of contract and not abandonment.

20. It is interesting to note that the respondents did not choose, ***(i)*** to allege breach of contract against the appellant; and ***(ii)*** consequently to invoke the right to rescind the contract under clause 3(a). The respondents, if they were justified in doing so, could have taken recourse to the remedy available under Section 75 of the Contract Act and sought compensation for the damage sustained through the non-fulfillment of the contract. On the contrary they attributed abandonment to the appellant (without understanding the true purport of the word 'abandonment') and refused to honour the claims made by the appellant.

21. The finding of the High Court that there was abandonment of contract, was on the basis that after the second bill was cleared in

May, 1987, the work under the main contract did not progress. This finding goes completely contrary to yet another finding that the period of the contract was up to June, 1989 and that the respondents themselves granted extension of time to complete the contract up to 31.12.1989, despite there being no request from the appellant. We fail to understand as to how a person who abandoned the contract in May, 1987 could be granted extension of time up to December, 1989 on the very understanding of the respondents that the contract was up to June, 1989. In fact, the High Court recorded a finding in paragraph 9 of the impugned judgment that according to DWs 3, 4 and 5, the power to rescind under clause 3(a) of the tender was invoked and the security deposit forfeited. This was not how the respondents pitched their claim even in the written statement. In any case such a finding cannot co-exist with the specific stand of the respondents that the period of contract was extended up to December, 1989.

22. The refusal of a contractor to continue to execute the work, unless the reciprocal promises are performed by the other party,

cannot be termed as abandonment of contract. A refusal by one party to a contract, may entitle the other party either to sue for breach or to rescind the contract and sue on a *quantum meruit* for the work already done. Paragraph 694 of Volume 9, Fourth Edition of *Halsbury's Laws of England*, may be usefully extracted to highlight the remedies available to a party to the contract, if the other party absolutely refuses to perform his part of the contract.

> "**694. Work done under a contract terminated for breach.** Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a quantum meruit for the work actually done. Thus, where a publisher engaged an author to write a work but abandoned the project, the author was entitled to recover reasonable remuneration without tendering the completed work; and where a defendant wrongfully revoked the plaintiff's authority to sell his land after the latter had found a purchaser, the plaintiff recovered reasonable remuneration for his work and labour up to that date.
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> This type of quantum meruit claim is analogous to claims for the repayment of money on total failure of consideration. In both cases, the contract must be at an end before the claim can be brought; but once the contract is at an end there is a logical difficulty in saying that the claim is contractual."

The respondents did not choose the option of rescinding the contract and suing for damages in terms of clause 3 (a) and (b). It

was the respondents who made it difficult for the appellant to execute the contract as per the terms originally agreed.

23. In the light of the above, we are of the view that the High Court was clearly in error in overturning the judgment of the Trial Court with regard to the aforesaid 3 heads of claims, on a wrong understanding that there was abandonment of contract on the part of the appellant. Hence this appeal is allowed. The impugned judgment and decree of the High Court are set aside and the judgment and decree of the Trial Court are restored. It appears that during the pendency of the first appeal before the High Court, the respondents deposited a sum of Rs.42,98,168/- towards the amount decreed by the Trial Court. As seen from paragraph 16 of the impugned judgment of the High Court, the amount deposited by the respondents before the High Court was withdrawn by the appellant on 13.01.1999 by furnishing a bank guarantee. Therefore, while modifying the decree, the High Court directed the appellant to return the balance amount, failing which the Trial Court was empowered to encash the bank guarantee for the remainder

amount. In view of this, while ordering the issue of notice in the special leave petition and granting interim stay, this Court directed the appellant to keep the bank guarantee alive. Now that we are allowing the appeal setting aside the judgment of the High Court and restoring the judgment of the Trial Court, the bank guarantee shall stand discharged.

24. The appeal is allowed. There will be no order as to costs.

.....J.
(Hemant Gupta)

.....J.
(V. Ramasubramanian)

New Delhi
March 30, 2022