

(2000) 12 GUJ CK 0091

In the Gujarat High Court

Case No : First Appeal No's. 1615 and 1675 of 1990

Gujarat Housing Board

APPELLANT

Vs

S. K. Ghadvi and Company

RESPONDENT

Date of Decision : 19-12-2000

Acts Referred:

Contract Act, 1872 — Section 52

Citation : (2000) 12 GUJ CK 0091

Hon'ble Judges : M.R. Calla, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Ketty A. Mehta, for the Appellant; G.T. Dsyani, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Calla, J.—These two First Appeals are directed against the judgment and decree passed in Civil Suits Nos. 856/85 and 925/85 decided on 19th April 1990 by the City Civil Court at Ahmedabad.

2. In Civil Suit No. 856/85, the plaintiff M/s. S.K. Gadhvi & Co. came with the case that it was a partnership firm registered under the Partnership Act; Shri S.K. Gadhvi, Shri M.K. Gadhvi, and Shri B.S.Gadhvi being its partners. Shri M.K. Gadvi and Shri B.S. Gadhvi retired from the partnership firm in the year 1973 and Shri S.K. Gadhvi became the sole proprietor of the said firm. On 22nd January 1974, the firm was reconstituted with fresh registration with the Registrar of Firms, consisting of Shri S.K. Gadhvi, Shri G.R. Gadhvi, Shri D.S. Gadhvi, and minor Rajendra S. Gadhvi as its partners. On 31st March 1975, Shri S.K. Gadhvi retired and rest of the partners continued in the firm which was reconstituted on 28th April 1980 when Shri G.R. Gadhvi and Shri B.S. Gadhvi retired, whereas Shri S.K.Gadhvi and Ranjanaben A. Taperia joined the said firm and the plaintiff firm filed the present suit. The plaintiff firm came with the case that the concerned Executive Engineer of the Gujarat Housing Board, i.e. defendant had invited tenders for constructing Tenements at Wadaj Group-I, at Ahmedabad. The plaintiff firm submitted the tenders for Rs. 15,52,092.40ps

against the estimated cost of Rs. 12,22,120/-. Thereupon a regular agreement was entered into by the parties for execution of the work as aforesaid and the work order was given to the plaintiff by the Executive Engineer on 19th June 1973, but the date was reckoned to start from 21.6.1973. The work under the contract was required to be completed within 15 months, i.e. on or before 21st Sept.1974. The plaintiff claimed that the suit contract created certain reciprocal contractual obligations to be performed by the parties and that there was no express provisions in the contract fixing the order in which the said reciprocal obligations were required to be performed and therefore, the reciprocal obligations were required to be performed in terms of the nature of the transaction under Sec. 52 of the Indian Contract Act. It was further the case of the plaintiff that the defendant miserably failed to perform the following reciprocal contractual obligations:

- (i) the defendant failed to supply the material in time and within the time limit of the work,
- (ii) the defendant failed to supply necessary drawings and certified copy of the tender along with the work order as stipulated,
- (iii) the defendant failed to give necessary decisions on the progress of the work in time, and
- (iv) the defendant failed to sanction extra items in time (the same are not even sanctioned upto now even though the work is completed and final bill is passed).

It is the plaintiff's assertion that on account of the prolongation of the work for the reasons aforesaid, the plaintiff was required to apply for extension which was granted upto 31st Oct.1975 without application of liquidated damages and/or penalty. But the defendant wrongly imposed penalty for extension from 1.11.1975 to 30th April 1978 and such penalty is assailed to be illegal on the grounds that no itemwise programme was fixed under the suit contract; the time was not the essence of the contract; and that the penalty was in terrorem. Thus, the recovery of the penalty amount was sought. It was asserted by the plaintiff that the plaintiff had completed the work under the suit contract in all respects, the final bill was prepared on 31st March 1980 which had been accepted by the plaintiff under protest. Accordingly, the plaintiff did not admit the payments to be true and correct. The plaintiff claimed that it had executed the work to the extent of Rs. 17,36,846/- and the plaintiff set up five items of separate and distinct claims and these items were with regard to the interest for the amount covered by the five claims.

3. The defendant has sought to traverse the claim of the plaintiff by filing the written statement at Exh.10 denying all the allegations contained in the plaint and asserting that the Court had no jurisdiction to try and entertain the suit; that the suit was barred by the law of limitation and the suit notice was not legal and valid. According to the defendant, the plaintiff was required to carry out the work in accordance with the terms and conditions of the tender, i.e. the suit contract.

According to the defendant, the materials were supplied as and when required by the plaintiff and whenever it was necessary, extensions had also been granted by the competent authority to the plaintiff. With regard to the extra items it was stated that the same were sanctioned and nothing had remained pending on that account. It was further the case of the defendant that the plaintiff had delayed the completion of the work beyond reasonable time even after the supply of materials as per Schedule-"A" by the defendant to the plaintiff and that the defendant was therefore entitled to levy compensation as per the suit contract and the authority was compelled to levy penalty after considering the progress of the work and there was no question of refund of the penalty imposed by the Department. The defendant also denied the allegation that the work was prolonged on account of the defaults on the part of the defendant. According to the defendant, the plaintiff failed to carry out and complete the work inspite of the notice given by the defendant to the plaintiff, as a result of which, the defendant was compelled to carry out and complete the work with the help of another contractor at the risk and cost of the plaintiff. That therefore, the defendant deducted an amount of Rs. 93,826/- from the final bill. The recovery of Rs. 3,406/- from the final bill of the plaintiff was perfectly justified and there was no question of refunding the said amount. The plaintiff's claim for interest in the sum of Rs. 2,46,713/- was not tenable at law. The defendant also stated that the plaintiff had accepted the amount of final bill in full and final settlement and therefore, the plaintiff's suit was required to be dismissed with costs.

On the aforesaid pleadings, the issues were framed and the findings were recorded as mentioned below against each of the issues:

- (1) Is it proved that the In the affirmative. suit contract creates mutual bilateral, reci- procal contractual obli- gations?
- (2) Is it proved that the As stated below. defendant failed to perform his obligation and committed breach of contract as averred in plaint para 11?
- (3) Whether time is the In the negative. essence of the contract?
- (4) Whether the defendant As stated below. is entitled to impose penalty?
- (5) Whether the plaintiff In the affirmative. is entitled to the re- fund of the penalty amount?
- (6) Whether the suit notice In the affirmative as is legal and valid? stated below.
- (7) Whether the suit is In the negative. barred by limitation?
- (8) Whether this Court has This Court has juris- jurisdiction to try diction to entertain and entertain the suit? and try this suit.
- (9) To what relief, if As stated below. any, the plaintiff is entitled?
- (10) What order and decree? As per order below. 19th Dec.2000:

Accordingly Civil Suit No. 856/85 was partly decreed and the defendant Gujarat

Housing Board was ordered and directed to pay to the plaintiff a sum of Rs. 1,45,821/- with running interest at 10% per annum from the date of the suit till realisation on Rs. 1,35,651/-. The rest of the suit claim was dismissed with no order as to costs.

4. In Civil Suit No. 925/85, the plaintiff claimed recovery of Rs. 6,63,868/- with running interest at the rate of 12% per annum from the date of the suit till realisation and cost. In the frame of the suit, six claims were set up as under:

Claim No. 1 being the amount penalty recovered by the defendant wrongly. Rs. 15,892.00

Claim No. 2 as per Statement of Claim "A" being the amount of extra items. Rs. 1,91,730.00

Claim No. 3 being the amount for increase in prices of building materials and labour on the work carried out after October 1973 till completion as per State of Claim "B". Rs. 1,99,889.00

Claim No. 4 being the amount of refund of money recovered from the plaintiff's final bill as per claim "D". Rs. 37,687.00

Claim No. 5 being the amount of refund wrongly recovered in the final bill (Statement 2(7) of the final bill). Rs. 772.00

Claim No. 6 being the amount of interest at the rate of 12% on the total amount of above claims from 1.1.78 to 31.5.82 (on Rs. 4,46,971/-). Rs. 2,36,898.00
----- Total : Rs. 6,63,868.00 =====

5. The grounds in support of these six claims as have been pleaded are almost identical to those which have been mentioned in respect of Civil Suit No. 856/85. The suit was resisted as per the written statement at Exh.157 on almost identical grounds on the basis of which the other suit No. 856/85 was resisted.

6. On the basis of the pleadings of the parties, the trial Court framed the following issues and the findings were recorded as mentioned below against each of the issues:

(1) Is it proved that the In the affirmative. contract creates mutual, bilateral, reciprocal con- tractual obligations?

(2) Is it proved that the As stated below. defendant failed to per- form his obligation and committed breach of contract as averred in plaint para 11?

(3) Whether time is the In the negative. essence of contract?

(4) Whether the defendant As stated below. is entitled to impose penalty?

(5) Whether the plaintiff In the affirmative. is entitled to the refund of the penalty amount?

(6) Whether the suit As stated below. notice is legal and valid?

(7) Whether the suit is barred by limitation?

(8) Whether this Court has jurisdiction to entertain the suit?

(9) To what relief, if any, the plaintiff is entitled?

(10) What order and decree? As per order below.

Accordingly, this suit was also partly decreed and the defendant Gujarat Housing Board was ordered and directed to pay to the plaintiff a sum of Rs. 88,340/- with running interest at the rate of 10% per annum from the date of the suit till realisation of Rs. 82,179/- and the rest of the suit claim was dismissed without any cost.

7. Before we proceed to deal with the submissions of the parties in these two appeals, we may mention that in both these matters, Cross Objections (Stamp No.) 16123 in First Appeal No. 1615/90 and Cross Objections (Stamp No.) 16124/90 in First Appeal No. 1675/99 were filed by the plaintiff but both these Cross Objections were withdrawn on 7th Dec.2000 without any effective hearing and both these Cross Objections have been withdrawn before any effective hearing.

8. The judgment and decree passed in each of these two appeals was sought to be assailed before us by learned Counsel for the appellant on three grounds as under:

(i) That in these matters, the time was the essence of contract and the trial Court has wrongly held that the time was not the essence of contract;

(ii) That the suit was barred by limitation and the trial Court has wrongly held that the suit was within the period of limitation, and

(iii) That the penalty had been rightly imposed and recovered by the defendant - Gujarat Housing Board and yet the trial Court deleted the amount of penalty.

9. We have heard learned Counsel, have gone through the impugned judgment and order and have perused the relevant record and proceedings. So far as the first ground of attack as to whether the time was the essence of contract or not is concerned, we find that admittedly the work was ordered to commence on 21st June 1973, the stipulated period for completion of the work was 15 months and therefore the plaintiff was expected to complete the work on or before 21st Sept.1974. In the suit contract at Exh.142 it was provided under the title on "Conditions of Contract" that the time allowed for carrying out the work entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence the work is given to the contractor; the work shall throughout the stipulated period of the contract be proceeded with, but Clause (6) of the terms of the contract provided as under:

"6. If the contractor shall desire an extension of time for completion of the work

on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiration of the period stipulated in the tender or before the expiration of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension accrued, whichever is earlier and the Executive Engineer may, if in his opinion, there are reasonable ground for granting extension grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final."

The very existence of Clause (6) of this nature with regard to the extension of time for completion of the work on the ground of unavoidable circumstances shows that it could not be a case of a contract wherein the time was the essence of the contract. When the provision is made in the contract itself to extend the time for performance of the contract, it cannot be said that the time is the essence of the contract and in the facts of the present case, admittedly the work under the suit contract had been performed and allowed to be performed after the expiration of the stipulated time as is clear from the evidence available on record. Not only that there is a further provision for compensation in the form of penalty made in the contract itself for delay in the work and therefore, the performance of the contract by the contractor beyond the period stipulated by the parties is also contemplated between the parties to the contract. We may add that even in cases where it is expressly provided that time is the essence of contract such stipulation has to be read along with other provisions of the contract and such other provisions may on construction of the contract exclude the inference that the completion of the work by a particular date was intended to be the basis for invoking the time as essence of the contract. In our opinion, the trial Court has decided the issue nos.1 to 3 together including the issue with regard to the time being the essence of the contract on the evidence and material which were available and the findings have been recorded for good and valid reasons and the same do not warrant any interference and in no case, it could be said that time was the essence of the contract in the facts of this case.

10. So far as the question of limitation is concerned, we find that the work order was given on 19th June 1973, the work was to start from 21st June 1973 and was to be completed within a period of 15 months, i.e. on or before 21st Sept.1974. The fact is not in dispute that the work was completed on 30th April 1978, the suit was lodged on 31st March 1983 and the final bill for the work was prepared by the defendant on 31st March 1980. It has been held by our own High Court in the case of State of Gujarat v. Shirinbai Pirojshah Wadia and anr., reported in 17 GLR 638 that the limitation in such cases would begin to run from the day the final bill was prepared and accepted. It is not in dispute that in these cases the final bill was prepared only on 31st March 1980 and therefore if the suits were filed on 31st March 1983 the suits could not be said to be time barred and the date of commencement of the limitation could not be taken on the date on which the work was completed. The reason is obvious in as much as it is open for the party to wait till the final bill is prepared because it may be that in the

final bill there is no error and after issuing the final bill if the party finds that the final bill meets his dues and it has no grievance there remains no need to file the suit. Therefore, the date of commencement of the limitation has to be the date on which the final bill was prepared and there is no question of the suits being time barred in the facts of the present case. Therefore, we find that the issue no. 7 has been correctly decided by the trial Court.

11. Whereas we are in agreement with the findings of the trial Court on issues as above that the suit contract did create mutual, bilateral and reciprocal contractual obligations and it has been proved that the defendant, i.e. Gujarat Housing Board - the appellant herein failed to perform its obligations and committed breach of the contract, there is no question of imposing any penalty by the defendant. This aspect has been correctly decided while deciding issue no. 4 in both the cases. The trial Court has considered the question of defendant's imposing penalty while considering issue no. 4 together with issue nos.5 and 9 and considered the same in para 41 onwards. The oral evidence has been adduced to the items in particular and in the facts of these cases, the defendant - Gujarat Housing Board could not be permitted to benefit out of the delay in execution of the work which was partly the result of defendant's own breach as stated above. Exh.98 dated 31.5.1977 is a letter addressed by the Executive Engineer of the defendant Gujarat Housing Board wherein it is clearly made out that there was shortage in supply of cement. In spite of the fact that the plaintiff went on praying for extension, for the reasons stated in various letters, the extension was granted conservatively and thus the pressure was exerted by the defendant despite the fact that there was a rise in price of materials and as per various letters including the letter dated 17th March 1980 at Exh.17, the extension in time limit was granted with levy of compensation and the work was completed on 30th April 1978. Thus, it is very clear that there was no entitlement with the appellant-defendant Gujarat Housing Board to impose any penalty and consequently the plaintiff's entitlement to the refund of the penalty amount is established. The finding with regard to the validity of the notice as decided under issue no. 6 has not been subjected to any challenge before us. No other point has been argued. We find that all the issues have been correctly decided by the trial Court and the trial Court has recorded elaborate reasons with support of evidence on each and every aspect of the matter in detail with reference to each and every item of the claim. We find no merit in any of these two appeals and both the appeals are hereby dismissed with no order as to costs.