
(2013) 09 GUJ CK 0013
In the Gujarat High Court
Case No : First Appeal No. 4807 of 2001

Jayendra Construction and Others

APPELLANT

Vs

Rajkot Jilla Panchayat

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : AIR 2014 Guj 137 : (2014) 1 GLR 292 : (2014) 2 RCR(Civil) 980

Hon'ble Judges : R.D. Kothari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.D. Kothari, J.—In case analogous to anticipatory breach of contract, sustainability of plaintiff's claim for specific damages is in issue in the present case. The facts that lay in very narrow compass are thus : The plaintiff - as it claims - acting as an agent of the State, looks after construction of the buildings, roads, dams, nalas etc. For such work, in respect of villages Lodhika, Thordi, Patiyali, Kolithad, Garnala, Trakuda, Charkhadi etc., the plaintiff had invited tenders in early 1978. The appellant had applied for and had submitted its tender. The appellant's tender came to be accepted. Letter of Acceptance was issued on 4-5-1978. The appellant had deposited Rs. 14,728/- as security deposit. Work Order was issued on 6-7-1978. The appellant was required to complete the work within 18 months, i.e. from 6-7-1978 to 5-1-1980. Progress of work was alleged to be very slow. The plaintiff had said to have issued various reminders to the appellant. It is alleged that letters/notices have no effect, and therefore, by order dated 31-8-1982, contract was terminated. It is the case of the plaintiff that it had re-initiated process of inviting tenders to complete the incomplete work left out by the appellant. It is further the say of the plaintiff that for completing such incomplete work left by the appellant, he had to pay additional Rs. 6,41,291-39 ps. The present appeal arises from the Special Civil Suit instituted by the plaintiff to recover such additional expenses of Rs. 6,41,291-39 ps. from the appellant. Special Civil Suit No. 25 of 1985 filed before

the Senior Division Court at Rajkot came to be decreed by the trial Court. Hence, the present appeal.

2. The defendant filed Written Statement at Exh. 84, wherein he denied all the assertions made by the plaintiff in the plaint.

3. The learned trial Court upon considering the material on record and considering the submissions made by the learned Advocates for the parties has held thus: That Exh. 75 to Exh. 80, all these documentary evidence goes to show that the appellant had left the work incomplete and the plaintiffs have had to complete the same by paying some additional amount for that. That, the defendant has not led any rebuttal evidence that would make the assertions of the plaintiff unacceptable. Further, when there is no dispute regarding the suit amount, it can be concluded that the plaintiff must have paid additional amount of Rs. 6,41,291-39 ps. The issue of limitation appears to have been pressed seriously before the learned trial Court and the learned trial Court, after considering the authorities cited before it, has held that the appellant's plea that the claim is time-barred is not possible to accept.

4. Heard the learned Advocates for the parties.

5. Learned Advocate Mr. Dayani for the appellant has mainly placed reliance on Exh. 63. It is a letter written by the appellant- defendant to the plaintiff. The learned Advocate submitted that in Exh. 63, the appellant has specifically prayed for extension of one year's time by pointing out that due to heavy rains and the time taken in acquiring the land, line out by the plaintiff was delayed. It was also submitted that the appellant had written the letter during the operation of the contract. In the opinion of the learned Advocate for the appellant, non-reply to Exh. 63 by the plaintiff absolves the appellant from all the liability. It was submitted that as per the terms stipulated in the tender, under special circumstances, right is conferred upon the contractor to apply for extension of time. The plaintiff never replied to the said letter. Much emphasis was placed on this short three lines letter.

6. On the other hand, the learned Advocate for the respondent, after referring the relevant documents on record, has submitted that in the circumstances the learned trial Court has passed just and equitable order and no interference is called for. On behalf of the plaintiff, attention of the Court was drawn to Clause (iii) of the "instructions to the person tendering", wherein it is provided that if the Government have had to complete the work that is left incomplete by the contractor, through any other contractor, then the price difference in the form of additional expenditure that the Government have had to bear, would be required to be recovered from the earlier contractor.

7. Exhs. 75 to 80 appear to be one of the main basis of the suit. They are : Exh. 75 - Tender Acceptance Letter dated 20-7-1984, Exh. 76 - Work Order to Samip Construction Co. dated 4-8-1984, Exh. 77 - copy of Extract of Accounts, Exh. 78 - 11th running Account Bill submitted by Samip Construction Co., and also Yadi

of payment. It is for Rs. 17,164-05 ps., Exh. 79 - copy of first running bill of Samip Construction Company dated 6-9-1984, and Exh. 80 - Order of Government (Deputy Secretary, Roads & Buildings) laying down that there should be clause in the Tender to the effect that, "whenever Government has to incur additional amount of expenditure on account of work left by the original contractor, the Government would recover such additional expenditure from the original contractor."

8. If we refer the oral evidence on record, the plaintiff has examined one Babulal at Exh. 54 and on behalf of the appellant, one Kanubhai is examined at Exh. 88. Babubhai is supervisor. All the relevant evidence including Exhs. 75 to 80 referred to above, were brought on record through this witness of plaintiff. On reading his evidence, it would appear that except referring these documents, the plaintiff does not at all give any detail about any of these documents, nor he elaborate on any of these documents. He says that the plaintiff got the work completed, which was left incomplete by the appellant, through Samip Construction Co., and the plaintiff have had to pay excess amount to Samip Construction Co., and incurring of excess expenditure claimed by the plaintiff from the appellant. In his cross-examination, he says that, "he was Section Officer in the plaintiff's body at the relevant time and he can say by referring the record, when the land required for the road work was acquired. He does not know on which date the plaintiff had terminated the contract of the appellant."

9. A partner of the appellant-Firm - Kanubhai, who is examined at Exh. 54, says that the work was delayed, as the land required for road work, was not acquired in time. He also says that Nala could not be constructed because twice there was heavy rain and due to that, materials etc. could not be brought at the site. In his cross-examination, Kanubhai says that he has no personal knowledge about the suit transaction (with Samip Construction). He denies the suggestion that the work could not be completed due to the appellant's negligence. He also denies the suggestion that the appellant had voluntarily abandoned the work.

10. What is the nature of the present suit? The suit is for recovery of the amount from the defendant - appellant. In the title of the suit, subject is stated as "suit for recovery of Rs. 6,72,369-31 ps." The say of the plaintiff about arising of cause of action gives impression that it is a suit for damages based on contract.

10.1. In a sense, the present case is a case of anticipatory breach of contract. What is anticipatory breach of contract? Shortly stated, it is assertion by the party to the contract that he will not perform henceforth an obligation arising under the contract. In other words, it arises when contract is subsisting prior to the time fixed for performance, one of the parties makes its intent clear and specific that he will not perform his part of contract. In such a case, other party would have right to treat the contract as ended.

10.2. It may be stated that alleged abandonment of work by the defendant and termination of his contract by the plaintiff in the present case has taken place

much after the original date of completion of contract. However, the record - letter/order of the termination of contract itself - shows that time was extended for carrying out the work from time to time. In that way, case can be considered to be a case of anticipatory breach of contract. The plaintiff has to discharge the burden to prove his case. In that sense and in that regard, it does not make much difference whether it is a case of anticipatory breach of contract or case of damages for breach of contract.

10.3. How to appreciate that plaintiff has successfully established its case or not. Unless it is a case of liquidated damages and the amount that the aggrieved party would be entitled to is quantified in the contract itself, in general and broadly, it can be said that in order to succeed in cases like the case on hand, the party has to establish its case on three points: (i) there is a breach of contract by the defendant and termination of contract with the defendant in accordance with the terms of contract, (ii) that the plaintiff has taken all necessary steps to mitigate the damages, and (iii) expenditure/damages that plaintiff had said to have incurred for carrying out the incomplete work left by the defendant.

11. In the present case, it is the say of the plaintiff that progress of defendant's work was very slow. The plaintiff had written repeated reminders for expediting the work. The plaintiff's letters in this regard are on record (Exh. 66 to Exh. 69 etc.). The defendant has virtually abandoned the work. In the circumstances of the case, commission of breach of contract by the defendant is possible to believe. As to the termination of contract with the defendant, it is the say of the plaintiff that by order dated 31-8-1982, the plaintiff has terminated the contract with the defendant. This order/letter is at Exh. 71. It may be stated that in the order/letter, the plaintiff does not make specific assertion as to the termination of contract with the defendant. In the said order/letter, at the end the plaintiff says that by letter dated 18-5-1982, you were requested to show necessary progress in the work. But, you (the contractor) have not taken any progress despite that letter. Therefore, the construction committee by its resolution has resolved that incomplete work be completed at the risk and cost of the contractor. That's all. From this order/letter, it would appear that termination of contract may be implied, however, the plaintiff ought to be specific and clear in terminating the contract of the defendant. It is clear that termination of contract is not clear and specific.

12. In *Maula Bux Vs. Union of India (UOI)*, , the plaintiff-contractor had filed a suit against the Union of India claiming Rs. 18,500/- deposited by him as a security deposit for due performance of contract. In that case, the plaintiff has entered into two contracts with the Union of India. As per first contract, the plaintiff was required to supply potatoes to Military Headquarter at U.P. Area for one year. The plaintiff has deposited Rs. 10,000/- as a security deposit. In another contract, the same plaintiff has undertaken to supply eggs and fish to Military Headquarter for the same area for the same period. The plaintiff had

deposited Rs. 8,500/- as a security deposit for another contract. Both the contracts relate to period 1947 to 1948. The Union of India terminated plaintiff's contract as the plaintiff was making persistent default in making "regular and full supply" of the commodity agreed upon. The first contract was terminated on 23-11-1947 and second was terminated on 2-12-1947. The Government has also forfeited the deposit of the plaintiff. The plaintiff filed a suit for recovery of the security deposit. The trial Court decreed the suit. The trial Court has held that the Government was justified in rescinding the contract but, they could not forfeit the deposit because they had not suffered any loss in consequence of the default committed by the plaintiff. In appeal, the High Court had modified the decree and awarded Rs. 416-25 ps. only to the plaintiff. In further appeal, the Supreme Court was pleased to allow the plaintiff's appeal. On forfeiture of earnest money, it held that if the amount of forfeiture is reasonable then Sec. 74 of the Contract Act would not be attracted but, if it is in nature of penal then Sec. 74 would be attracted. The Supreme Court held in Para 7 as under:

7. Forfeiture of earnest money under a contract for sale of property - movable or immovable - if the amount is reasonable, does not fall within Sec. 74. That has been decided in several cases : AIR 1926 PC 1; Roshan Lal v. Delhi Cloth and General Mills Co. Ltd., Delhi, ILR 1911 (33) All. 166; Mohammad Habib-Ul-Lah Vs. Mohammad Shafi, ; Rada Kishan Das Vs. Bishan Chand, . These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Sec. 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

12.1. On behalf of Union of India, it was urged that Rs. 10,000/- in respect of first contract and Rs. 8,500/- in respect of second contract represents genuine pre-estimated amount of damage that the Union has suffered on account of breach of contract, and therefore, the Government was justified in forfeiting the amount. An attempt was also made to urge that it is not necessary for the party aggrieved to prove actual damage. In this regard, reliance was placed on Sec. 74 of the Act. This contention was negatived by the Supreme Court. It was held in Para 8 as under:

8. Counsel for the Union, however, urged that in the present case Rupees 10,000/- in respect of the potato contract and Rupees 8,500/- in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Sec. 74 of the Contract Act) "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation." It is true that in every case of breach of contract the

person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

(Emphasis supplied)

13. The expression in Sec. 74, viz., "whether or not actual damage or loss is proved to have been caused thereby" ought not to be read as laying down that no evidence as to the actual damage is necessary. The expression deals with distinct category of cases. The Supreme Court, referring to the evidence led by the Government, has held in Para 9 as under:

9. In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made.

13.1. The Supreme Court was pleased to decree the plaintiff's suit.

14. In the present case, the case of plaintiff hangs on Exh. 75 to Exh. 80. These documents are referred hereinabove. Relying on these documents plus evidence of Babulal, the plaintiff claims decree for Rs. 6,41,291-39 ps. Of these documents, Exh. 77 is "summary of damages." In the paper-book, Exh. 77 is at Page 52. The back side of Exh. 77 is not a part of the paper-book. If we refer the original record, it would appear that it contains seven "headings" plus other items/headings. The last item/heading on the first page is Column No. 7. It is difficult to make out what does it mean. It reads, thus:

14.1. The last item in front page shows amount of Rs. 9,24,142-22 ps. This item does not appear at all on the next page. On the next page, after referring 3 or 4 figures, at the end, amount of Rs. 6,41,291-39 ps. is mentioned. How this amount is arrived at is certainly not clear nor the plaintiff has tried to clarify this in his evidence. The evidentiary value of such summary of damages is questionable. Further, Exh. 77 is prepared only on a plain paper. It is neither on

the letter-head of the plaintiff nor it contains any seal of the plaintiff's body. Further, still, what is produced before the Court is the carbon copy of the summary of damages and not the Original. Such copy even prima facie can be said to be inadmissible in evidence. It would not be safe, just and proper to accept the plaintiffs claim on the basis of Exh. 77.

15. As laid down in Maula Bux's case (supra), "where the loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him". The plaintiff comes forward with the case demanding specific sum from the defendant. It is the say of the plaintiff that Rs. 6,41,291-39 ps. is the additional expenditure that plaintiff has to incur for completing the incomplete work left by the defendant. The plaintiff had alleged to have completed the work through another contractor i.e. Samip Construction Company. There is virtually no evidence as to what amount the plaintiff had paid to Samip Construction Company. The plaintiff has produced Exh. 78 which is a copy of 11th running account bill said to have been submitted by Samip Construction Co. It is for Rs. 17,164-05 ps. The only other document is at Exh. 79 - copy of the 1st running bill. Barring these two - these two too, are non-payment receipt/vouchers - there is no evidence of payment made to the Samip Construction Company. Further, barring vague assertion about "incomplete work" there is nothing on record showing what was incomplete work. The contract originally entrusted to the defendant was for construction of Road, Nala etc. for about 8 villages. It is the say of the plaintiff that notice was given to the defendant to remain present for carrying out measurement work. However, the defendant has remained absent. The defendant denies this assertion. Assuming that the say of the plaintiff is true, what measurement was carried out and what actual work carried out by the defendant and what was the incomplete work, ought to have been clarified by the plaintiff. Neither in pleading nor in evidence, the plaintiff says what was incomplete work.

15.1. In this context, it is relevant and important to refer Item No. 4 in Exh. 77. Item No. 4 says "incomplete work that does not require to complete because of lapse of time", the amount stated against the column is "Nil". It is difficult to appreciate how the work i.e. incomplete work that does not require to complete because of lapse of time can be crystallised and can be stated in the form of rupees. The meaning and reason of "Nil" appearing against this column is not explained. It is undisputed fact that some work was left incomplete by the defendant. It is also undisputed fact that completion of incomplete work had commenced almost after two years.

15.2. Though, the rule that plaintiff, in order to succeed in case breach of contract, particularly in case of anticipatory breach of contract, has to show that he has taken all the necessary steps to mitigate the damages is quite flexible rule and much depends on facts and circumstances of the case nonetheless plaintiff cannot afford to ignore or avoid this aspect. In this regard, it may also be noted that in case where whole work originally schedule to complete within 18

months, the plaintiff has taken about 2 years" time in inviting tender for completing incomplete work after termination of contract of the defendant. The contract was terminated by letter/order dated 31-8-1982 and the work order was issued to Samip Construction Company on 4-8-1984. No explanation on this.

16. At the time of hearing, much emphasis was placed on behalf of plaintiff on Clause 3(c) of "Additional instructions to persons tendering". It is at page 333 in the original record. It is standard printed form containing various pages and numerous clauses. Clause 3(c) reads, thus:

3(c) To order that the work of the contractor be measured up and to take such part thereof as shall be unexecuted out of his hands, and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (as to the amount of which excess expenses the certificate in writing of the Executive Engineer shall be final and conclusive) shall be borne and paid by the original contractor and shall be deducted from any money due to him by Government under the contract or otherwise or from his security deposit of the proceeds of sale thereof or a sufficient part thereof.

17. Clause 3(c) cannot help the plaintiff. It provides that it would be open for the Government to recover from original contractor the excess expenses that Government had to incur on account of unexecuted contract left by the original contractor. The case of the plaintiff herein fails because excess expenses is not established by the plaintiff. Clause 3(c) does not dispense with the proof. By taking aid of Clause 3(c), the plaintiff has to establish its case. Case does not stand established by Clause 3(c). The nature of documentary evidence and the oral evidence referred above, failed to show satisfactorily that the amount claimed by the plaintiff in the suit, is the amount of completing incomplete work left by the defendant. It may also be noted that Clause 3(c) speaks of recovering the amount from security deposit. In the present case, the plaintiff has forfeited the security deposit and propriety of this forfeiture is not an issue in the present case.

17.1. It may also be noted - though this aspect is referred above that Sec. 74 or well settled law, viz., when the breach of contract is proved, it is not necessary for the aggrieved party to prove actual damages and that it is permissible for the Court to award reasonable compensation, cannot help much to the plaintiff in the present case for the simple reason that the plaintiff has not taken trouble to place on record what was the work left incomplete by the defendant and what work it had carried out through the another contractor. Besides this, having claimed very specific amount as damages and having tried to justify that amount, the plaintiff cannot fall back on the plea that under the law, it is not required to establish actual damages when he faces failure of the case on account of inadmissible and insufficient evidence.

18. It hardly needs to be stated that if the suit is considered to be the suit based on account, the plaintiff has a worse case in view of Sec. 34 of the Evidence Act. In order to succeed in suit based on account, beside proving the entry made in the account which is produced before the Court, these entries need to be corroborated by independent evidence on record. Neither there is "account" on record nor there is sincere effort to support such specific due by any independent and acceptable evidence. Nature of "account" on record is such that it could not stand to scrutiny even for a moment when same is considered with reference to law laid down by the Supreme Court in this regard (See : Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others, Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., and Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.,).

19. It would not be incorrect to say that from the material on record only fact possible to believe is, defendant has committed breach of contract. Neither termination of contract is clear and specific nor there is any evidence that plaintiff has made any attempt to mitigate the "loss." The circumstances of the case in fact in respect of mitigation of "loss" are to the contrary. Taking liberal view on these aspects, viz., termination of contract and absence of attempt on the part of plaintiff to mitigate the "loss", cannot save the case as the case must fail on the ground that the damages as claimed by the plaintiff is not established. In view of above, the plaintiff has failed to establish its case. Therefore, Special Civil Suit No. 25 of 1985 stands dismissed. Appeal is allowed. In the circumstances of the case, no order as to costs.