

(2012) 08 KL CK 0233

In the High Court Of Kerala

Case No : A.S. No's. 98 and 435 of 1998 and C.M. Application 443 of 2012 and I.A. No's. 1346 and 1347 of 2012 in A.S. No. 98 of 1998

Kattappana Panchayat

APPELLANT

Vs

P.C. Mathew

RESPONDENT

Date of Decision : 08-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34

Citation : (2012) 08 KL CK 0233

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : K.P. Dandapani and Sri. Millu Dandapani, for the Appellant; T.I. Abdul Salam, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—These appeals arise from O.S. 199/94 of the Sub Court, Kattappana filed by the appellant in A.S. 435/98. In the other appeal, A.S. 98/98 by the defendant, the captioned interlocutory applications are filed seeking condonation of delay of 3387 days in applying to set aside the abatement of that appeal following the death of the sole respondent, plaintiff. The other interlocutory applications are for setting aside such abatement and also for impleading the legal representatives of the deceased respondent in that appeal. The aforesaid interlocutory applications are objected to by the legal representatives of the deceased plaintiff on the ground that in the plaintiff's appeal A.S. 435/98, his legal representatives were brought on record in time and memo was filed in A.S. 98/98 at that point of time, however that, there is no explanation for the enormous delay in submitting the interlocutory applications to set aside the abatement and to bring the legal representatives on record. By such memo, the appellant in A.S. 98/98 stood notified of the death of the respondent in that appeal, it is argued. Though it may be true that the copy of the memo was served on the counsel for the appellant in AS. 98/98, the

defendant, a grama panchayat, did not promptly apply for impleadment or to have the abatement set aside. However, both the appeals, A.S. Nos. 98/98 and 435/98 arise from one suit and those two appeals are against a decree and its judgment. Under such circumstances, we are inclined to accept the submission of the learned senior counsel for the appellant in A.S. 98/98 that by virtue of the impleadment of the legal representatives of the plaintiff in A.S. 435/98, AS. 98/98 should be taken as duly represented. In support, the decision of the Apex Court in N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool, is profitably cited. We are of the view that such precedent supports the plea for impleadment of the legal representatives in A.S. 98/98. Accordingly, C.M. Appln. 443/12, IA Nos. 1346/12 & 1347/12 are allowed.

2. On to the merits, the plaintiff was awarded a contract to lay a road. The agreement between him and the panchayat was executed on 14.2.1991. The work was to be completed within a period of six months. But the fact of the matter remains that even as per the deposition of DW1, the panchayat's witness and the Level Field Book Ext.B4 and the entry B4(a) therein, the initial levels were approved by the concerned authorities only much after the period fixed for the completion of the work and the work was commenced only on 10.1.1992. Within six months, the plaintiff completed the work except the work of tarring. 6mm and 12 mm metals for tarring were stocked by the plaintiff and DW1 conducted check measurements of that also. The defense witness, DW1, stated in cross examination that he believes that the plaintiff had done the work with good speed and enthusiasm. Going by the materials, the panchayat made part payments with the progress of the work. Clause 7(b) of Ext.B1 contract document provides for part payments. The panchayat committee, from time to time, resolved and authorised part payments.

3. With the aforesaid facts, it cannot be ignored that the defendant panchayat had not terminated the work on any ground attributed to the plaintiff. It is in that premise that the court below had considered each of the claims on the basis of the evidence tendered and concluded that an amount of Rs. 1,77,000/- is due. The court below also granted interest on the due amount at 12% per annum from the date of the decree till recovery. It is also recorded that the plaintiff as PW1 had deposed before the court below that he would be satisfied with the decree of Rs. 1,77,000/- along with interest and costs.

4. Learned senior counsel for the appellant argued that the panchayat cannot be mulcted with any responsibility for the delay in the completion of the work. The court below has held, on the basis of evidence, that the work was not even commenced during the period initially fixed by the agreement. The delay was only due to the non-delivery of the site and fixing the initial level measurements within time. As already noted, the initial levels were taken and certified by the concerned authorities only much after the period originally fixed for completion of the work. On the basis of the fact that the works which were done were to the satisfaction of the officers at different levels, the panchayat had also released

certain part payments. Release of part bills were also in terms of the contract conditions. When a period of contract is fixed and the parties either grant extension of time or permit the work to be carried on, it cannot but be said that the time was not treated as to be of the essence of the contract. In the case in hand, the fact of the matter remains that the work could commence only long after the period fixed for its completion. Revision of rates which came into being were taken note of by the court below and excess adjustments have been appropriately made, as found in paragraphs 14 to 16 of the impugned judgment. We do not find any impropriety in the appreciation of evidence by the court below in that regard. The challenge of the defendant panchayat against the decree, to that extent, therefore fails.

5. In as much as the question of grant of interest by the court below at 12%, the interest claimed by the plaintiff was supported by the plea that he had arranged amounts by borrowals from the Federal Bank and had executed power of attorney in favour of the bank authorising it to collect part bill payments. The rate of interest at 12% has been arrived at by the court below on proper application of mind u/s 34 of the Code of Civil Procedure. We do not find any ground to interfere, in favour of the appellant/defendant panchayat, in that regard.

6. In so far as the plaintiff's appeal is concerned, as already noted, the plaintiff had candidly admitted before the court below during his examination as PW1 that if he get a decree for Rs. 1,77,000/- with interest and costs, he will have no further grievance. Hence his appeal has also to fail. He does not, and, cannot, in this appeal, dispute the statement of the court below in that regard in paragraph 17 of the impugned judgment. He is not entitled to do so in an appeal, that being part of what transpired in a court and has been recorded by it. For the aforesaid reasons, both the appeals fail. In the result, the appeals are dismissed. Having regard to the facts and circumstances, the parties shall bear their respective costs.