(1975) 08 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Second Appeal No. 25 of 1973

Kh.Ghulam Hassan Kakroo APPELLANT

Vs

State of J.and K.and others RESPONDENT

Date of Decision : 12-08-1975

Acts Referred:

Constitution of India, 1950 — Article 299
Evidence Act, 1872 — Section 106
Jammu and Kashmir Limitation Act, 1995 — Article 53, 86

Citation : AIR 1976 J&K 93 : (1975) JKLR 389

Hon'ble Judges : Mian Jalal-Ud-Din, J and MUFTI, J

Bench : Division Bench

Advocate : J.N. Bhan, M.A. Nehvi, Advocates appearing for the Parties

Judgement

Mufti, J.—This is a civil second appeal. It arises out of a suit filed by the appellantplaintiff against the respondent State in the court of Sub

Judge, Baramulla, for the recovery of a sum of Rs. 2252.50 on account of the balance price of shingle supplied by him. The respondentState

resisted the suit on several grounds including the one based on limitation. The trial court raised various issues including the one about limitation and

finding them all in favour of the plaintiff, decreed the suit. On appeal the learned District Judge, Baramulla, dismissed the suit holding that it was

barred by limitation. In that view he did not feel it necessary to go into other points raised in the appeal filed before him. Aggrieved by the decision

of the learned District Judge, the plaintiff has filed the present appeal in this court.

2. The plaintiff's claim is based on a contract entered into by him with the Executive Engineer, Roads and Buildings, Baramulla, representing the

State. The contract was executed on 1711962. It provided for the supply and consolidation of shingle in respect of Mile Ist of Watrigam

Dangiwacha Dandusa Road. The contract provided rates separately for the supply of shingle and its consolidation, adding, that ""the contractor

agrees to execute the work at three per cent above the rates entered herein and to complete the work as under:

a. Supply within one month: and,

b. Consolidation within one month from the date of supply of roller, and to complete the work in all respects in accordance with the PWD

specifications as per time schedule given above failing which contract will be cancelled and work got done departmentally or through some other

agency at the cost of the original contractor.

Thus the intention of the parties was that the price of shingle shall not be claimable as of right on tit date when it was supplied but rather when the

contract was completed or when the contract came to an end.

2A. Art. 53 of the Limitation Act provides:

For the price of goods sold and delivered to be paid for after the expiry of fixed period of credit. Three years When the period of credit expires.

3. On facts stated above, the period of credit expired either when the contract was completed or when the contract otherwise came to an end.

Accordingly the plaintiff could file a suit for the recovery of the price of shingle supplied by him or, for the portion of such price remaining unpaid,

within three years from the date the contract was completed: and, if the contract proved abortive, from the date it was cancelled to the knowledge

of the plaintiff. The case of the State is that the plaintiff did not complete the contract which was, therefore, got completed through some other

agency and his earnest money was confiscated. In other words, the case of the State was that the plaintiff did not complete the contract and as

such the State cancelled the contract to the knowledge of the plaintiff. When exactly was this done, has nowhere been pleaded much less proved

at the trial by the State. The burden lay on the State to prove that the suit was time barred. Moreover the date on which the contract was set aside

by the State was within its special knowledge. As such it was incumbent on the State to prove the particular date on which the contract was set

aside to the knowledge of the plaintiff. In the absence of such proof it cannot be reasonably concluded that the contract was set aside more than

three years before the suit was instituted. Accordingly the point about limitation must be decided against the State and it must be held that the suit

was instituted within time. In that view it will not be necessary to go into the question whether the departmental communications dated 16111964

and 951970 constitute acknowledgment within the meaning of the relevant provisions of the Limitation Act a question, on which lengthy arguments

were addressed before us and so also before the courts below, the trial court holding that they constituted such acknowledgment and the appellate

court taking a contrary view.

4. The trial court has held that the plaintiff's claim was covered by Article 86 of the Limitation Act. That Article provides limitation in respect of

suits ""for compensation for the breach of any contract, express or implied, not in writing registered and not herein specifically provided for."" The

period of limitation is three years starting from the date when the contract is broken, or where there are successive breaches, when the breach in

respect of which the suit is instituted occurs or, where the breach is continuing, when it ceases. This article is a sweeping Article for all cases of

breach of contract not specifically provided for in the Limitation Act. It would apply if no other Article of the Limitation Act is appropriate. In the

view expressed above, the plaintiff's claim is clearly covered by Article 53 and as such, the question of the application of the residuary Article like

Article 86 to it does not arise. The learned District Judge has rightly held that this Article is not applicable to the plaintiff's claim. He has, however,

held that the case was covered by Art.56. That Article reads:

For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment. Three years When the work

is done.

Clearly this Article is applicable to work or labour, be it mental or manual, and not to the supply of material. The learned District Judge was,

therefore, in error in holding that this Article was applicable to the plaintiff's claim and that time started running from the year 1962 when, as he put

it ""plaintiffrespondent completed the work"", meaning thereby when the plaintiff supplied the shingle. Based on this view, his adjudication on the

question of limitation is not sustainable and must be set aside and the case must be sent back for hearing and disposal on other points raised in the

appeal filed before him. Allowing this appeal, I make an order accordingly. The appellant shall be entitled to his costs in this court. The parties are

directed to appear before District Judge, Barmulla on 29th August 1975.

5. MIAN JALALUDDIN, J.: I have had the advantage of going through the judgment prepared by my learned brother Mufti Bahauddin Farooqi

J. I agree with his conclusion that the suit is not barred by limitation. But my view is that the appropriate Article applicable to the facts of the case is

Article 86 of the Limitation Act and not Article 53 of the Limitation Act. The reasons for my holding this view are as under:

The plaintiff's suit as disclosed from the plaint is based on a contract in writing which was executed on 1711962. The contract provided for supply

and Consolidation of Shingle in miles Nos. 1 and 2 of Watrigam Dangiwacha Dandusa Road. There were separate covenants with regard to the

rates for supply of shingle and its consolidation. The plaintiff had to supply shingle within a month and also do the consolidation work within one

month, from the date of supply of roller. In my view it is not a case for the price of goods sold and delivered as contemplated by Article 53 of the

Limitation Act. The plaintiff has claimed an amount of Rs. 2222.50 (exclusive of expenses incurred on notice) on the footing of a contract in writing

executed by him in favour of the Executive Engineer. He has averred that he supplied 31750 CFT Shingle but that he was paid on account only for

22500 CFT. When the final bill came to be prepared the same Assistant Engineer who had earlier checked the stock on spot and had verified its

correctness went against his own commitment and finding and wrongly prepared a minus bill for Rs. 4000.00. This he did on the alleged ground

that the plaintiff had supplied less quantity of shingle on mile No. 1. A dispute, therefore, arose between the plaintiff and the department. The

matter got protracted by correspondence and the claim of the plaintiff remained unsatisfied. There was thus a breach of contract of the terms of the

contract agreement and the suit therefore was covered by Article 86 of the Limitation Act. It could not be a case merely of the price of the goods

sold and delivered. If there were no contract in writing and if there had been no breach of its terms then it could be a case falling under Article 53

of the Limitation Act. The present suit is one seeking to enforce a contractual liability or obligation against the defendant and is based on a

document which is in writing but not registered. The term 'compensation' occurring in Art.86 does not only denote a claim to unliquidated damages

but includes a claim for the recovery of a sum certain (vide AIR 1922 Lah 198) (FB).

6. In AIR 1957 Cal 153, it was held that a suit based on a contract in writing to supply bricks to the Government was held to fall under Article

115 (corresponding to Article 86 of the State Act).

7. The next question that falls for determination is as to when limitation would run. In the present case it appears that when the minus bill was

prepared by the Assistant Engineer, the plaintiff raised a controversy and agitated the matter before the Executive Engineer. It is pertinent to refer

to letter No. 13 dated 16111964 of Mr. Kanshi Nath Safaya the then overseer to the address of the Executive Engineer R. and B. Baramulla. In

this letter the overseer incharge categorically stated that no excess payment had been made to the contractor (Plaintiff). Payments were made to

the contractor and the bill was passed after taking measurements and due check by the Assistant Engineer at site. The overseer has invited

attention of the Executive Engineer to letter No. 17375 addressed by the latter to Shri M.L. Kandhari, the then Assistant Engineer. In the said

letter the Executive Engineer has characterised the act of the Assistant Engineer of preparing a minus bill as an arbitrary act on his part. In the letter

No. 9495 dated 9570 from the Executive Engineer Baramulla R. and B. to the address of Shri M.L. Kandhari the then Assistant Engineer (now

Executive Engineer P.W.D. Jammu) the Executive Engineer Baramulla Division has stated that he supported the claim of the contractor as he has

not been convinced of the action of the Assistant Engineer by turning the final bill into minus. The Executive Engineer has observed that

measurements were taken on spot and on the basis of the check certificate awarded by the Assistant Engineer on the relevant measurement book

which was submitted to the Divisional Officer an account bill was prepared. In the said letter the Divisional Engineer has admitted the claim of the

contractor that a quantity of 31750 Cft was actually supplied by the Contractor on spot. What reply was sent to this letter by Mr. M.L. Kandhari

to the Executive Engineer Baramulla has not been made available by the defendants. The plaintiff cannot therefore be imputed any knowledge as to

when the defendant broke the contract. In fact when the authorities disagreed with the Assistant Engineer and supported the cause of the

plaintiffcontractor and endorsed his claim that he had in fact supplied 31000 Cft his claim was kept alive by correspondence by the overseer and

the Executive Engineer Baramulla. It is not proved as to when the claim was rejected by the defendant. The defendant has not led any evidence on

this point. Time would, therefore, begin to run from the date when the plaintiff served notice on the defendants u/s 80 and the defendants failed to

satisfy his claim. Notice u/s 80 was issued on 1191968 and time would run two months thereafter. The plaint was presented on 1771970 which is

therefore clearly within time.

8. The result is that the suit of the plaintiff is found to be within time. The finding of the learned District Judge on this issue is therefore set aside. The

case will now go back to the Ist Appellate court for deciding the other points raised in the appeal before him I agree that the appellant should be

declared to be entitled to his costs in this court.

