

(2009) 11 BOM CK 0095

In the Bombay High Court

Case No : Appeal No. 343 of 2009 in Suit No. 3902 of 1992

Maharashtra Housing and Area Development Authority, The
Deputy Chief Executive (Works), Mumbai Housing and Area
Development Board and The Executive Engineer, Housing
Bandra Division, Mumbai Housing Area Development Board

APPELLANT

Vs

Pessumal Pamandas Menghrajani carrying on business and
Civil Engineers and Government Contractors, in the firm
name and style of Jeevan Construction as Sole Proprietor
thereof

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Interest Act, 1839 — Section 3

Maharashtra Housing and Area Development Act, 1976 — Section 173

Citation : (2011) 3 BC 211 : (2010) 1 BomCR 805 : (2010) 1 MhLj 610

Hon'ble Judges : R.C. Chavan, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : P.G. Lad, AGP, for the Appellant; Party-in-Person, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—This appeal is directed against the Judgment dated 22nd August, 2008, delivered by a learned Single Judge of this Court whereby the learned Single Judge decreed the respondent/plaintiff's suit for payment of interest over the amount which was denied to the respondent/plaintiff by the appellants.

2. The facts, which are material for deciding this Appeal, are as under:

The appellants had engaged the services of the respondent/plaintiff as a Contractor for carrying out certain civil works. On 28/1/1987 a work order to that effect was issued. The said work was completed on 28/2/1988. The respondent/plaintiff raised certain claims in respect of additional material used and additional works like use of brick bats in place of bricks, use of pumps for de-watering etc.

The claims which the respondent/plaintiff had raised from time to time were not entertained by the appellants-Authorities. Eventually on 26/10/1990 the Deputy Chief Engineer of the appellants held that the plaintiff was entitled to sum of Rs. 1,45,764/- as against the various claims of the plaintiff amounting to Rs. 1,50,535.35. Out of these amounts, a sum of Rs. 1,20,000/- was paid to the plaintiff on 3/12/1991 and further sum of Rs. 25,764/- was paid thereafter on 11/3/1992.

3. Since the plaintiff was kept out of the amounts due, after issuing the notice u/s 173 of the Maharashtra Housing and Area Development Act, 1976, the plaintiff filed the suit for recovery of the amount of interest at the rate of 21% per annum on the amounts denied to the plaintiff from time to time, which came to Rs. 1,31,345.90 on the date of the suit. The plaintiff claimed further interest at the rate of 21% per annum on this sum from the date of the suit till realization.

4. By a Written Statement, the appellants/Defendants denied the liability to pay such interest, though they admitted that they had paid the sum of Rs. 1,45,764/- as against the claim of the plaintiff to the tune of Rs. 1,50,535.35 after the disputes were raised by the plaintiff. It was contended that the contract which the appellants had entered into with the plaintiff did not contain any Clause for payment of any interest. They also raised various other contentions like the suit being not tenable etc.

5. On these pleadings, three issues were struck by the learned Single Judge namely as to whether the plaintiff proves that the due and payable amounts were delayed for a long time from the due dates by the defendants, whether the plaintiff was entitled to the interest on the delayed payment from the defendants, and whether the plaintiff was entitled to payment of Rs. 1,31,345.90 with interest thereon @ 21% p.a. from the date of suit till judgment. The learned Single Judge answered the first two issues in the affirmative and ordered payment of Rs. 1,31,345.90 with interest @ 12% p.a. from the date of suit till realisation, after considering the evidence tendered. The oral evidence comprises of only the testimony of the plaintiff. The appellants had not chosen to tender any oral evidence before the Court. Aggrieved by the judgment, the appellants are before this Court.

6. We have heard the learned AGP Shri P.G. Lad for the appellants/Defendants and the respondent/plaintiff who is present in person. The first point that arises for our consideration is, whether the learned Single Judge rightly held that amounts due and payable were withheld by the appellants without any justification. The learned AGP even questioned the entitlement of the respondent/plaintiff to the amounts already paid. It is submitted by the learned AGP that the Deputy Chief Engineer came to the conclusion of awarding amounts claimed by the plaintiff by liberally considering the plaintiff's claim, though the same was required to be rejected. It would be improper and impermissible to re-open the question of entitlement of the plaintiff to the amounts for various additional items of work carried out by him, since the appellants/Defendants had already

paid those amounts. The elaborate order passed by the Deputy Chief Engineer on 26/10/1990, which has been considered by the learned Single Judge, shows that the Deputy Chief Engineer had found that the authorities were wrong in denying to the plaintiff's various amounts which he had claimed. The learned Single Judge has quoted in Para 48, the observation of the Deputy Chief Engineer that

...this entire case is not dealt properly since beginning in spite of numerous/ constant communication from the Agency and no timely action from the Board which has resulted into embarrassing position and this is liable for creating incident of contractual complications.

In the face of this it is not open to the appellants to re-agitate the question of respondent's entitlement to the amounts claimed.

7. The learned AGP submitted that there was no delay in payment of amounts to the plaintiff, since the amounts had to be first ascertained by an "adjudication" by the Deputy Chief Officer (Engineer), which was concluded only on 26/10/1990. The amounts found due were promptly paid thereafter. This contention has to be rejected for two reasons. Firstly, the plaintiff had been raising his claims right since the work was executed in 1988. "Decision" by the Deputy Chief Engineer of the appellants, to whom the claims were presumably referable under the contract, cannot be equated to an independent adjudication, over which parties may not have any control. The appellant has not been able to show what prevented the Deputy Chief Engineer to promptly decide the claim in 1988 itself. If when the appellant's own authorities chose to sit over the matter for over two years, the appellant cannot take benefit of delay in decision making. And, ironically, even after the decision, the appellant took more than one year to pay the amounts which even according to the appellant's Deputy Chief Engineer, the plaintiff was entitled to.

8. The appellant cannot take advantage of administrative procedural delays since it was an internal matter of the appellants for which the respondent/plaintiff could not be made to suffer. We therefore hold that the learned Single Judge has rightly concluded that the amounts due and payable were withheld without justification.

9. This takes us to next question as to whether this delay entitled the plaintiff to claim interest from the date of completion of work till payment was actually made. The learned AGP Shri Lad appearing for the appellants submitted that the plaintiff had admitted in his cross examination that there was no term in the contract providing for payment of any interest to the plaintiff, and therefore, there was no contractual foundation for the claim of the plaintiff in respect of interest. He further submitted that the interest could not have been paid even under the Interest Act since the sum was not ascertained till the adjudication, i.e. till 26/10/1990, on which date the Deputy Chief Engineer decided that the sum of Rs. 1,45,764/- was payable to the plaintiff. Therefore, he submitted that first, since the sums claimed by the plaintiff were not ascertained, and secondly,

since there was no adjudication ascertaining the sums claimed, there was no liability to pay interest. He also submitted that the judicial pronouncements on this question, right from the Privy Council, would rule out the payment of interest to the plaintiff.

10. For this purpose he relied upon the judgment of the Privy Council in the case of AIR 1929 185 (Privy Council) . In that case, the Board considered the question of paying the interest and observed in the last penultimate para of the judgment as under:

Hart conveyed the property purchased to the defendants. He received from the defendants the stock to be transferred to him, and he accepted from the defendants, as under the contract he was bound to do, covenants under seal to perform certain obligations of a continuing character involving the payment from time to time of sums of money. Upon the stock having been allotted or transferred to Hart and the covenants having been executed, Hart had received all the consideration moving from the defendants to him under the contract. The plaintiff, as Hart's successor-in-title, cannot, and as appears from her statement of claim, does not sue upon the contract, which is fully executed: she sues upon the covenants. Those covenants must be construed according to the ordinary rules of construction : and if so construed, they do not give the plaintiff interest, she cannot claim interest unless it is given to her at common law or under statute. There is no place in the matter for the exercise of equitable jurisdiction and, therefore, no rule of equity in regard to interest can have any application.

11. In the same year, the Judicial Commissioner at Nagpur in the matter of AIR 1929 170 (Nagpur) held that considering the provisions of Interest Act, it was not correct to say that the Courts have power to award interest in all cases where money due is withheld. As the discussion to follow would unfold, the claim in the suit is for compensation for the loss caused due to delayed payment, and "interest" is only a measure to compute the loss. Viewed thus, in our view, the judgments would be unhelpful.

12. Relying on the judgment of the Supreme Court in the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), , the learned AGP Shri Lad submitted that interest would not be payable as of rule unless certain conditions referred to by the Supreme Court in Para 30 of the said judgment were fulfilled. In para 30 of the Judgment, the Supreme Court held as under:

The Interest Act, 1939 applies, as interest is not otherwise payable by law in this kind of case see AIR 1938 67 (Privy Council) , but even if it be assumed that an arbitrator is a "Court" within the meaning of that Act, (a fact that by no means appears to be the case), the following among other conditions must be fulfilled before interest can be awarded under the Act:

- (1) there must be a debt or a sum certain,
- (2) it must be payable at a certain time or otherwise;

(3) these debts or sums must be payable by virtue of some written contract at a certain time;

(4) There must have been a demand in writing stating that interest will be demanded from the date of the demand.

Not one of these elements is present, so the arbitrator erred in law in thinking that he had the power to allow interest simply because he thought the demand was reasonable.

13. Therefore according to the learned AGP, in this case, since sums claimed were not ascertained till the adjudications were completed on 26/10/1990, there is absolutely no question of payment of any interest. This contention is fallacious. It is not that the plaintiff had set his claims to any nebulous amounts. He had quantified his claim on each items right from the beginning and his first salvo to the appellants itself would show that he had claimed certain amounts. Whether this claim was acceptable to the appellants' authorities would not be determinative of question whether the sum was ascertained or not. A reference to the Deputy Chief Engineer's order dated 26/10/1990 would itself show that claims for specific sums had been raised and had been considered by him. The respondent had filed a copy of letter dated 12/10/1988 written by him, (Article No. 5, referred to in Q.No.88 in plaintiff's cross-examination for appellant taken on 4/10/2007). This letter not only specifies the amount claimed, but also raises specific demand of interest at 21% p.a. from 27.5.1988 i.e. after leaving a three months grace period after completion of work on 28.2.1988. Thus the requirements mentioned in the case of Thawardas are complied.

14. In her erudite judgment, the learned Single Judge has carefully considered this aspect and has held that the interest is not only payable if the contract so provides or statute so provides, but also under the Common Law. In this context, the learned Single Judge has considered the provisions of Section 3 of the Interest Act and has found that the interest could have been ordered to be paid since written notice claiming the amount had been given and in spite of this notice the amounts claimed were not paid. It would not have been proper to deny interest to the respondent/plaintiff on the amount which he had claimed to have borrowed for completing the work of the appellants. As early as on 28.12.1988, the plaintiff had, by his letter, claimed interest as compensation. It may be seen that even the appellant's Q.No.61 in the cross examination of the plaintiff on 19/12/2007 would show that interest was claimed as compensation. Therefore, since the respondent/plaintiff had incurred expenditure when the work was completed on 28/2/1988, he would be entitled to be compensated for interest, he was required to pay from 28/5/1988 i.e. after the three months of the grace period. The plaintiff's evidence in this regard was not rebutted since appellant did not choose to tender any evidence. In view of this, there is no substance in the contention of the learned AGP that the learned Single Judge erred in awarding the interest, which was in the nature of compensation for the interest which plaintiff was required to pay on amounts borrowed from his bank.

15. This takes us to the next submission of the learned AGP that the learned Single Judge erred in awarding the interest at 12% per annum as there was no warrant and no evidence for arriving at such a rate. The learned AGP may be right in submitting that there was no witness examined by the plaintiff from his Bank to prove that he had been paying interest on the amount borrowed. But a letter from bank, Article 25, produced by him before the Court has been considered by the learned Single Judge in Para 68 of the judgment, which shows that plaintiff was paying interest at 17.34% p.a. on the credit facilities availed by him. Apart from that award of interest at 12% per annum, on the amounts which had been denied to the plaintiff, could not be called erroneous, considering the prevailing rate of the interest in the market. This was in the nature of compensation for the loss caused, either by being required to actually incur this expense by paying interest to his bank or by being denied the use of these amounts.

16. The learned AGP lastly submitted that the learned Single Judge has also awarded interest on the decretal amount from the date of the suit till realization, which amounts to awarding the interest over interest and such a compound interest could not have been granted in a suit for recovery of money. The proposition that interest would not be awarded on interest is correct. But this is a peculiar case where the plaintiff has been kept out of the money due and therefore he incurred a loss which has been compensated by the interest awarded by the learned Judge. Therefore, award of interest on such amounts, which are in the nature of compensation, and which the plaintiff was deprived of, cannot be termed as interest over the interest. Viewed pragmatically, the plaintiff could be said to have been awarded damages for the tort of being kept out of the amounts which were due. Therefore, interest which is awarded from the date of institution of the suit could be treated as interest on the amount of compensation to which the plaintiff was entitled on being kept out of amount due. In view of this, there is no merit in this Appeal which is accordingly dismissed with costs.