

(2000) 08 BOM CK 0091

In the Bombay High Court

Case No : Writ Petition No. 5449 of 1987

Minu F.D. Mehta

APPELLANT

Vs

Ratnasale Madavrao Vakil

RESPONDENT

Date of Decision : 02-08-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1
Limitation Act, 1963 — Article 18, 7

Citation : (2000) 4 ALLMR 310 : (2001) 1 BomCR 213 : (2001) 1 MhLj 881

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : Madhavi M. Nadkarni, for Yashodan Divekar, for the Appellant; G.S. Godbole, for the Respondent

Final Decision : Allowed

Judgement

T.K. Chandrashekhara Das, J.—The respondent has filed a Summary Suit No. 5187/6181 of 1978 in the Small Cause Court at Bombay against the petitioner to recover a sum of Rs. 10,000/- together with cost of the suit and interest of Rs. 9063.32/- at 6% per annum from the date of the filing of the suit till realisation.

2. The petitioner/defendant contested the suit. The trial Court decreed the suit. The main contention, apart from the merit of the case, has been raised by the petitioner/defendant is that suit is barred by limitation. The trial Court dismissed the suit on the ground of limitation and on merit also the Appellate Court found that the suit is not barred by limitation and going by merit the suit is decreed.

3. In this proceeding I am not concerned about the facts of the case. Because in exercising the writ jurisdiction, this Court normally would not go into the disputed question of facts. Since the question of limitation has been taken differently by the trial Court from that of lower appellate Court, I have to address that question in this writ petition.

4. The case of the petitioner/defendant is that he has entrusted the work of

plumping to the respondent/plaintiff, and the work was completed and the bill was raised of Rs. 19,275/-. Therefore the amount if any under that contract is become payable on 19-2-1975. Three years period of limitation starts from that day. Since the suit was filed on 28-11-1978 the petitioner contended that the suit was barred by limitation. The trial Court accepted that contention. But the lower appellate Court has come to the conclusion that even though the final bill has been raised on 19-2-1975 the payment could not have been made until and unless the architect certifies the work of the bill. Though certain correspondence between the parties indicate that an architect has employed to verify and certify the bill, there is no material available in the Court that the payment could be made only after the architect certifies. It is to be noted here that the entrustment of the work was done orally. There is no written contract between the parties. The controversy between the parties were that as to who had appointed the architect.

5. The learned Counsel for the respondent has argued that the money became payable only when the architect certified and for the purpose of limitation we have to rely on Article 113 of the Limitation Act. I find there is no ground to accept this argument. Of course both the parties were corresponding each other regarding the appointment of architect. But there is no evidence or material that architect's certificate is a sine quo non for the payment of the bill.

6. The learned Counsel for the petitioner submits that the relevant article for the purpose of considering the question of limitation is Article 18, which reads as follows :

"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-has to be reckoned when the work is done."

7. From the evidence available in this case, I have no hesitation to hold that the contract between the plaintiff and the defendant was in the nature of work contract and the relevant Article is 18. The "price of the work" appears in Article 18 will clearly amplify that the article is related for the claim of money due under the works contract. The learned Counsel for the respondent tried to argue that it will not come under Article 18 but comes under Article 7 which deals with the payment of wages. A work is a composite contract where worker, while doing his work, had to purchase some article for the fulfilment of the contract to be used for the work. This is not an acceptable proposition. Merely because under a work contract the work is given to a worker by utilizing his skill as well as involving purchase of some article, the question arises in such circumstances is whether it is a work contract or it is a supply contract depends largely on the nature of the contract. Admittedly the work is entrusted for plumping. While doing the plumping work, the worker has to purchase some material for the purpose of utilizing it in the work.

8. The Supreme Court in Vanguard Rolling Shutters and Steel Works Vs. The

Commissioner of Sales Tax, has dealt with the situation as to when the contract is called a work contract or not. The relevant portion is in para 2.

"2. The assessee's case was that having regard to the circumstances of the present case, the terms and conditions of the contract and the nature of the work done by the appellant the contract in question was out and out a work contract and not a contract for supply of goods or materials. In order to decide this question it may be necessary first to give the salient features of the contract between the parties. A specimen of the contract has been filed by the assessee as Annexure 'A' in the paper book, the relevant portions of which may be extracted thus :

"Please erect at our premisesNos. of of the following dimensions against the contract price of Rs

1. Full payment against delivery prior to despatch or documents by bank. It is clearly understood that there will be no such thing as to make payment after fixing.

2. Material will be carried to the site of work at cost of the party. Our responsibility ceases when the same leaves out premises.

3. xxxxxxxxxxxxxxxxx

4. We do not hold ourselves responsible for any structural damage or dispute with the landlord. Masonry work done by the party at his cost according to our instructions.

5. xxxxxxxxxxxxxxxxx

6. No responsibilities for non-delivery or late despatch of goods due to any reason beyond our control."

It would appear from the terms extracted above, that the assessee was required under the contract to fabricate the rolling shutters in the first instance, to bring them to the site and thereafter to erect the same at the premises. In an application given to the Assistant Commissioner (Judicial), which is Annex, "C" of the Paper Book, by the assessee he explains the various steps which the contractor had to take in order to fix the rolling shutters to the factory premises of the owner. First the different parts and components of the rolling shutters are fabricated. It is only when the various component parts are fitted into one that they constitute the rolling shutter as one unit and taken separately they have no separate existence. It was further explained that the component parts do not constitute a rolling shutter unless they are affixed to and erected in the building in position and in the required manner. It was further alleged that the contract was not concluded merely by delivery of fabricated materials but was completed only after the same were taken to the site and finally erected and affixed to the site of the building. In order to fix them to the premises certain masonry work had to be done by the owner and that too according to the instructions of the

contractor. It was also averred that in erection of the shutters some parts were permanently embedded into the walls and lintels and they become permanent fixtures which are not detachable. The allegations made in Annex have not been controverted by the State either in this Court or before the High Court. Moreover the Indian Standard Specification Book for Metal Rolling Shutters and Rolling Grills the particulars of the fitting of rolling shutters, whose authenticity has not been doubted by Counsel for the parties, clearly shows that rolling shutters consist of curtains, lock plates, guide channels, bracket plates, rollers hood covers, gears, works, fixing bolts, safety device, anchoring rods, central hasp and staple. Each guide channel has to be provided with a minimum of three fixing cleats or supports for attachment to the walls or column by means of bolts or screws. The guide channels are further attached to the jambs, plumb either in the overlapping fashion, projecting fashion or embedded in grooves, depending on the method of fixing. All these operations take place at the site after despatch of the component parts of the rolling shutter. Hood covers are fixed in a neat manner and supported at the top at suitable intervals. This also has to be done at the site. Item 11.1 of the specifications shows that the rolling shutter curtain and bottom lock plate are interlocked together and rolled in one piece, but the other parts like guide channels, bracket plates, rollers etc. are despatched separately. Item 12.1 shows that all the rolling shutters are erected by the manufacturer or his authorized representative in a sound manner, so as to afford trouble free and easy operation, long life and neat appearance. Even after erection is done, grease is applied to the springs and on the sides of the guide channels. Thus the process involved in the fabrication of a rolling shutter and its actual fixing to the premises at the site is a continuous one and is completed only when erection is completed in every way. The price charged by the contractor from the owner of the premises is one lump sum without at all specifying as to what part is meant for the materials used or fabricated and what part for the services or labour put in by the contractor. It is also, clear that in the facts and circumstances of the present case, the transaction is a composite consolidated contract which is one and indivisible comprising labour and services executed for a lump sum. It is also clear that the material are not merely supplied to the owner so as to pass as chattel simpliciter but are actually fixed to an immovable property and after the same are fixed and erected they become a permanent fixture so as to become an accretion to the immovable property. In these circumstances, the conclusion is inescapable that the present contract cannot be said to be a pure and simple sale of goods or material as chattels but is a work contract. It is well settled that a work contract is a contract for construction of bridges, buildings, etc. and includes contracts which combine labour, skill and material executed for a lump sum. The question as to under what circumstances a contract can be said to be a work contract is not free from difficulty and has to depend on the facts of each case. It is difficult to lay down any rule of universal application, but there are some well recognized tests which are laid afford guidelines for determining as to whether a contract in question is a work contract or a contract for supply of goods. One of the important test is to

find out whether the contract is primarily a contract for supply of materials at a price agreed to between the parties for the material so supplied and the work or service rendered is incidental to the execution of the contract. If so the contract is one for sale of materials and the sale proceeds would be exigible to sales tax. On the other hand where the contract is primarily a contract for work and labour and materials are supplied in execution of such contract there is no contract for sale of material but it is a work contract. The circumstance that the material have no separate identity as a commercial article and it is only by bestowing work and labour upon them, as for example by affixing them to the building in case of window-leaves or wooden doors and windows that they acquire commercial identify, would be prima facie indicative of a work contract. So also where certain materials are not merely supplied but fixed to an immovable property so as to become a permanent fixture and an accretion to the said property, the contract prima facie would be a work contract. That is exactly what has happened in the present case."

9. In the aforesaid decision the Supreme Court has relied upon an earlier decision of the Supreme Court in State of Rajasthan Vs. Man Industrial Corporation Ltd., , where it has held thus:

"The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale."

10. Following this principle I have no hesitation to hold that the present contract between the parties is work contract and for the purpose of limitation it is coming under the ambit of Article 18. The argument of the learned Counsel for the respondent that cause of action was arisen against the defendant only when the architect has certified the work, cannot be accepted.

11. As I indicated earlier there is no material, particularly in the absence of written contract that the payment is made only upon the certification by the architect. In a decision of Jullundur Improvement Trust, Jullundur Vs. Kuldip Singh, , the similar situation arose. It has been held in that case that for the purpose of Article 18, the work will be deemed to have done on 17-10-1967 when it was duly entered in the measurement book and on the basis of which the final bill was prepared. The Court held that the cause of action arose when the final bill was prepared and not from the subsequent date where the engineer certified it to be correct.

12. As I indicated earlier the work was completed and the bill was raised on 19-2-1975 and taking that date as the starting point of limitation as rightly pointed out by the Trial Court the suit is barred by limitation.

13. In view of this the writ petition is allowed and the lower Appellate Court's judgment is set aside. The trial court's judgment dismissing the suit is confirmed. The amount deposited as per the interim order is directed to be paid

back to the petitioner.

Stay of this judgment prayed for is rejected. Rule is made absolute accordingly.

Certified copy expedited.

P.A. to issue ordinary copy of this judgment.