

(2011) 10 BOM CK 0039
In the Bombay High Court
Case No : First Appeal No. 173 of 2005

Shri Anand P. Dhavaskar

APPELLANT

Vs

State of Goa and Others

RESPONDENT

Date of Decision : 07-10-2011

Acts Referred:

Citation : (2011) 10 BOM CK 0039

Hon'ble Judges : R. P. Sondurbaldota, J

Bench : Single Bench

Advocate : Shri Sudin Usgaonkar, for the Appellant; Shri Manish Salkar, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Sondurbaldota, J.—The Plaintiff prefers this appeal against the judgment and Order dated 27-1-2005 by which the trial Court decreed his suit only partly. The Respondents to the appeal are the original Defendants.

2. The Appellant, a registered contractor, was awarded the work of "Closure of breaches and repairs of the Bund Zueamovoilo Bund" (Will) at Navelim of Tiswadi Taluka, Goa vide work order dated 21-10-1998 for the amount of Rs. 20,67890.10p. The work was to be completed within 150 days from 6-11-1998 excluding the monsoon. As the Appellant was unable to complete the work despite grant of extension Respondent No. 2 by his letter dated 23-4-2001 terminated the contract and forfeited the security deposit. By the subsequent letter dated 19-7-2001 he demanded return of Rs. 5,35,942/- alleging that it was over-payment made to the Appellant. Additionally by the order dated 26-4-2001, Respondent No. 6, the Superintending Engineer, Water Resources Department levied compensation upon the Appellant for the delay in execution of the work undertaken.

3. The Appellant therefore filed the suit herein to challenge the termination of contract, forfeiture of security deposit and levy of compensation. He also sought

damages of Rs. 26,83,359/- with interest at the rate of 21% per annum. He alleged in the plaint that the Respondents themselves were responsible for delay in execution of the work. Respondent No. 2 failed to take action against illegal fishing activities of "miscreants and lumpen elements" despite the Appellant's letter dated 25-1-2000. He failed to take measures to remedy four breaches in Ghorximo Tarcantor Bund. He also did not take action pursuant to the inspection memorandum-cum-minutes dated 3-1-2001 drawn up by Sanjeev Khirwar, Collector of North Goa.

4. While denying the entire claim made in the plaint, the Respondents contended that the work allotted to the Appellant consisted of repairs of 850 meters length of Bund and closure of four breaches in the Bund. Under Clause 2 of the agreement, in order to ensure the progress of the work, targets were fixed for every one-fourth period of the contract. The Appellant, however, failed to keep the proper progress at every stage of the work and failed to complete the work on the stipulated date of 6-4-1999. Therefore, Respondent No. 2 had to issue a letter of warning dated 12-5-1999 to him calling upon him to complete the work without further delay. The letter, however, had no impact upon the Appellant and with the lapse of time the area remained flooded and the breaches in the Bund widened. The Appellant had applied for extension of time on three occasions totaling to 360 days which was over and above the stipulated period of 150 days. The extension was granted with levy of compensation at the rate of Rs. 5/- per day as provided under the work order. On 3-3-2000, the Appellant stopped the work at incomplete stage. He also stopped to maintain the work already carried out. As a consequence, the work done by him got damaged. By his letter dated 28-3-2001 the Appellant informed that he was required to obtain loan from the Bank for carrying out the remaining work. As he did not re-start the work, notice dated 2-4-2001 came to be issued to him calling upon him to show cause as to why action not be taken against him under Clause 3(a)(b)(c) of the agreement. Even after the receipt of show cause notice the Appellant did not start the work. Therefore, the agreement came to be terminated on 23-4-2001 and the security deposit given by him forfeited. The Appellant had been paid advance amount as and when he furnished the running accounts bills. He had received total amount of Rs. 27,73,546.45p from time to time. On termination of the contract the Respondents called the Appellant to remain present at site for taking final measurements of the work done as stipulated in Clause 3(c) of the contract. He however remained absent. The final measurements taken on 3-5-2001 showed that the amount of work carried on by the Appellant was to the extent of Rs. 22,37,604.30p. This would mean that the Appellant had been overpaid to the extent of Rs. 5,35,942.15p. Therefore, demand for the excess payment to the Appellant was made. As regards allegations of the three lapses on their part the Respondents contended that curbing of illegal fishing activity at the site was not their responsibility. As regards the four breaches in Gharximo Tarcantor Bund the Respondents alleged that the same had been in existence even at the time of award of the contract to the Appellant. Therefore, this fact was known to him at

the time of submission of the tender and it could not be set out as a ground for failure to complete the work within the stipulated period. Thirdly, according to the Respondents, they were not concerned with the inspection memorandum done by Sanjeev Khirwar, the Collector.

5. The Appellant examined his constituted attorney and one Mary Pereira in support of his case. The Respondents examined two of their engineers. On appreciation of the evidence, the trial Court held that the termination of the contract and forfeiture of security deposit by the Respondents was illegal and also their claim of overpayment was not correct. The trial Court however rejected all other claims of the Appellant and directed the Respondents to pay the amount of deposit forfeited minus the compensation of Rs. 3,420/- levied at the time of grant of extension to the Appellant.

6. The trial Court found that the grievances of the Appellant regarding illegal fishing activities and breaches in the Gharximo Tarcantor Bund could not be the hindrances in the way of execution of the work by the Appellant because the same had been raised more than 7 months after the lapse of the stipulated date of completion of the work. Further, the breaches in Gharximo Tarcantor Bund were already in existence at the time of award of contract to the Appellant. As regards the third hindrance of non compliance with the inspection report of the Collector, the trial Court observed that the report dated 3-1-2001 was way beyond the stipulated date of completion of work. During the course of trial at the stage of arguments, further grievances came to be raised by the Appellant in respect of which obviously there was neither any pleading nor evidence. Those grievances have been argued in the present appeal also. It was complained by the Appellant that considering the nature of the work it could be carried out only during the low tide that means during a very short period during the day. The trial Court observed that the low tide comes twice during the course of the day and there was no stipulation against the Appellant carrying out the work during night time. In fact considering the fact that the time available during the day for carrying the work was short, the Appellant ought to have worked even in the night time during low tide. In the alternative the Appellant could have engaged more labourers to do the work. The trial Court noted that there was no evidence whatsoever on record to indicate the efforts made by the Appellant to complete the work during the stipulated time. Therefore though, it held that termination of the contract by the Respondents was not legal, it refused to award compensation of Rs. 5000/- demanded for wrongful termination of the contract.

7. As per the particulars of claim annexed to the plaint, the Appellant had allegedly carried out work to the extent of Rs. 40,88,250/- being the cost of materials, labour, transportation and facilities for the labourers at site. He claimed an amount of Rs. 6,13,238/- at the rate of 15% towards the overheads and profits and 5% towards risk coverage, totaling the claim to Rs. 4936,562/-. The trial Court noted that the receipts produced by the Appellant showed that the last payment made towards purchase of materials was on 27-2-2000. This

would mean that thereafter no purchases had been made. The last payment made to the labour was on 17-2-2000. This would mean that after that date no work was got done from the labourers. Similarly, the last payment to the transport was made on 30-3-2000 which would mean that no expenses for transport were incurred thereafter. Besides the last running accounts bill submitted by the Appellant was dated 3-3-2000. The Appellant had produced various vouchers at Exh.28 colly. of the expenses alleged incurred in the subsequent period. The trial Court noted that the receipts at Exh.28 colly. had been simply tendered in evidence. There is not even a whisper in the deposition of PW1 that the receipts pertained to the execution of the work in question. The vouchers also by themselves had nothing to connect to the suit contract. The persons signing the vouchers had not been examined by the Appellant. Therefore, it was held the Appellant was not entitled to claim any amount based on the receipts at Exh.28 colly.

8. Next was the claim made for escalation in price. The agreement executed between the parties does not provide for escalation. Clause 10(c) of the contract which otherwise provided for escalation was specifically deleted. In view of that the Appellant could not have asked for any amount towards escalation.

9. Shri Sudin Usgaonkar, Learned Counsel for the Appellant submits that the trial Court ought to have appreciated that the work under the contract could be done by the Appellant only during low tide since the work was of closure of breaches in the Bund. During high tide, the area being flooded with water it was impossible to carry out the work. The Appellant cannot be allowed to make a grievance as regards the time available during the course of the day to execute the work since this was obvious to him at the time of submitting his tender. In any case, as has been observed by the trial Court, there is no explanation whatsoever offered by him either for not carrying out the work during the second low tide or for employing more number of workers. As regards the three grievances made in the plaint, the facts of the case show that the same were simply not available to the Appellant. In any case, they had been raised after the expiry of the stipulated date for completion of the work. It has been next argued on behalf of the Appellant that the finding of documents at Exh.28 colly. not pertaining to the suit work is hyper-technical as the claim made in the suit was limited to the suit work. Undoubtedly, the claim in the suit is limited to a single contract, but that alone would not mean that the Appellant had not undertaken any other contract at the relevant time during the course of his business. In any case, it was necessary for the Appellant to lead evidence to show that the vouchers produced by him related to the suit work. In the absence of that evidence, the trial Court was fully justified in rejecting that evidence.

10. There is one more difficulty in the way of the Appellant. He has not personally stepped into the witness box to give evidence. He has examined his son who is his constituted attorney. It is now well established that oral evidence of a constituted attorney is limited to the extent of the work delegated to him or

the facts personally known to him. PW1 in his evidence stated that he was conversant with all the facts of the case as he used to help his father who is an elderly person. He has not elaborated the extent of help extended by him to his father. It is not his evidence that he was carrying on the business along with the father. In that circumstance substantial part of evidence of PW1 would have to be discarded.

11. Perusal of the pleadings and the record shows that all the findings of the trial Court are fully justified by the material on record and the same does not require any interference at the hands of this Court. Hence, the appeal is dismissed with costs.