
(1991) 06 GUJ CK 0040
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Bhayalal Jadavji and Co.

RESPONDENT

Date of Decision : 30-06-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 96

Citation : (1993) 1 GLR 350

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

J.N. Bhatt, J.—By this appeal, the appellant State has challenged the judgment and decree dated 26th August, 1976 passed by the Civil Judge (Senior Division), at Bhavnagar, in Special Civil Suit No. 71 of 1971.

A resume of material facts giving rise to the present appeal, may be narrated, so as to appreciate the merits of the appeal.

2. The present respondent is the original plaintiff and the present appellant is the original defendant and, they are hereinafter referred to as "plaintiff" and "defendant" for the sake of convenience and brevity.

3. The plaintiff is a registered partnership firm which was given a contract for the construction of road and railway, siding road, Akwada Creek, Near Port, Bhavnagar. The defendant had accepted the tender of the plaintiff and the plaintiff was accordingly informed on 4th January, 1965. The plaintiff thereafter deposited the security deposit in connection with the aforesaid work. Initially, the security of Rs. 6,602/- was given by the plaintiff and thereafter further security deposit of the same amount, i.e., Rs. 6,602/- was given. Thus, the defendant had taken two security deposits from the plaintiff.

4. The plaintiff, inter alia, contended that the construction work could not be completed in time for various reasons which were beyond the control of the plaintiff. The final bill was prepared on 13th March, 1969. As per the case of the plaintiff, the defendant had illegally imposed penalty on the plaintiff firm. The

defendant Government had deducted total amount of Rs. 13,445/- towards the penalty from the final bill of the plaintiff. After serving the defendant with a statutory notice u/s 80 of the Civil Procedure Code, the plaintiff filed the above suit for recovery of Rs. 28,000/- the break up of which is as follows:

Rs. 13,445-00 illegally retained amount from the final bills of the plaintiff as penalty. Rs. 10,000-00 towards the damage sustained by the plaintiff. Rs. 4,504-00 by way of interest. Rs. 51-00 notice charges. Rs. 28,000-00 Total

5. The defendant-State appeared and resisted the suit by filing written statement, at Ex. 15. The defendant raised several contentions denying the right of the plaintiff to recover an amount of Rs. 28,000/-. The defendant also contended that the plaintiff firm failed to complete the work in time and, therefore, the penalty was imposed. It was denied that the plaintiff had suffered any loss. It was further contended that the plaintiff was paid the amount of final bill, in full and final settlement of its claim, and, therefore, the plaintiff firm was estopped from challenging the action of the defendant Government.

6. In view of the pleadings of the parties, issues came to be framed, at Ex. 93. The plaintiff firm relied on the evidence of its partner, Keshavlal Girdharlal, Ex. 113. The plaintiff had also placed reliance on the evidence of Rasiklal Vasudev Pandya, Ex. 160, and the evidence of Ramniklal Nanalal Patel, Ex. 176. The defendant relied on the evidence of its Deputy Executive Engineer, Nanubhai Hariram, Ex. 178. A voluminous documentary evidence was produced. After considering the documentary and oral evidence on record, the trial Court was pleased to decree the suit for the recovery of Rs. 13,445-00 Ps. alongwith running interest at the rate of 6% per annum from 14th September, 1971, i.e., the date on which the suit was filed, till the payment, with proportionate costs. Being aggrieved by the said judgment and decree, the original defendant State has, now, come up before this Court in this appeal, by invoking the aids of the provisions of Section 96 of the Civil Procedure Code.

7. The learned Assistant Government Pleader for the appellant/defendant, has raised following contentions in this appeal:

(i) That the suit is barred by limitation. (ii) That the penalty was imposed for slow work, as per contract.

(iii) That time was the essence of the contract and the plaintiff was a defaulter.

(iv) That there was no legal and valid notice u/s 80 of the Civil Procedure Code.

(v) That the plaintiff had no sufficient labour force and vehicles for doing contract work in time.

8. In so far as the first contention of the learned Assistant Government Pleader is concerned, it is contended that the suit is barred by limitation and in that it is urged that the provisions of Article 100 of the Limitation Act, 1963, would be applicable and the period of limitation is one year from the date of the final

decision or order of the Officer of the Government. The trial Court has considered this contention and it is, rightly, rejected. The trial Court reached to the conclusion that Article 113 and not Article 100 of the Limitation Act would apply. Article 113 is a residuary provision in the Limitation Act for filing suit which prescribes a period of three years. The limitation would begin to run under Article 113 of the Limitation Act from the date when the right to sue accrues. The final bill of the plaintiff was paid on 13th March, 1969. The suit came to be filed on 14th September, 1971. The trial Court took the view that the right to sue accrued on finalisation of the final bill on 13th March, 1969, and the period of limitation would be three years under Article 113 of the Limitation Act and, therefore, the suit was held to be not barred by limitation. This contention is reiterated, which may appear, *prima facie*, impressive, but not sustainable.

9. The contention that the impugned orders are passed in 1965, 1966 and 1968, whereby penalty was imposed for delay in execution of the contract work. The suit is filed for the recovery of penalty amount deducted from the final bill and the security deposits of the plaintiff firm. Article 100 of the Limitation Act would be applicable only when the impugned order of an officer of the Government is passed in his "official capacity". The impugned orders in the present case, imposing an amount of penalty, passed by the Director of Ports, cannot be characterised as orders of the officer of the Government in his "official capacity". The plaintiff and the defendant are the contracting parties and the impugned orders, imposing penalty, had been passed pursuant to the contract of construction, and not by virtue of any provision of statute or in the official capacity. Reliance is placed on Clause (2) of the contract which authorises the Superintending Engineer to recover the amount of compensation from the contractor in the event of any delay in execution of contract work. The defendant is not in a position to make any profit out of the said Clause (2) of the contract as the impugned orders are passed "ex contractu" and not in any official capacity. Moreover, the said Clause (2) authorises the Superintending Engineer of the defendant Government to recover compensation from the contractor only. It is an admitted fact that the impugned orders, imposing penalty, came to be passed by the Director of Ports and not the Superintending Engineer. Therefore, the orders passed by the Director of Ports are not in consonance with the provisions incorporated in Clause (2) of the contract. The said orders passed in 1965, 1966 and 1968 against the plaintiff-contractor, are without jurisdiction and, therefore, they are illegal orders.

10. An order required to be set aside for the purpose of Art, 100 of the Limitation Act is one which the officer making it:

(i) has jurisdiction to make it, and

(ii) has the effect of barring the claim for relief unless it is set aside. The aforesaid two conditions are not satisfied for attracting the provisions of Article 100 of the Limitation Act. Therefore, on that count also, the first contention cannot be upheld. Whether, the impugned orders, even if they were passed by

the Superintending Engineer, would amount to recovery of compensation or not, need not be gone into as the said orders are passed by the Director of Ports, without jurisdiction.

11. Apart from that a suit for damages or a suit to recover security deposits, could be filed within a period of three years from the date on which the right to sue accrues under the provisions of residuary Article 113 of the Limitation Act. Essentially, the plaintiff filed the suit for the recovery of the amount of security deposits of Rs. 13,204.00 Ps. from the defendant -Government and also for damages. Therefore, Article 113 of the Limitation Act would be applicable and the period of limitation for filing the suit for damages and for the recovery of security amounts is three years. There is no dispute about the fact that if Article 113 of the Limitation Act is attracted, then, the suit was within time. In the opinion of this Court, on all counts the period of limitation of three years from the date of emergency of right to file the suit under Article 113 would apply. Therefore, the first contention that the suit was barred by limitation is, totally, devoid of any substance.

12. The second contention is that the penalty was imposed for slow work and, therefore, the plaintiff was not entitled to suit dues. The third contention raised on behalf of the defendant State is interlinked with the second point. Therefore, both these points are considered and answered jointly. Third contention is that the time was the essence of the contract and the plaintiff was a defaulter and, therefore, the penalty was, rightly, imposed. Again reliance is placed on Clause (2) of the contract. Penalty for delay in execution of work is imposed by the Director of Ports. The orders passed by the Director of Ports, imposing penalty, are not in consonance with Clause (2) of the contract. Only the Superintending Engineer of the defendant-Government was authorised to recover the compensation from the contractor in the event of delay in the execution of the work. Therefore, the Superintending Engineer was competent to pass any order for recovery of compensation from the plaintiff-Contractor. The impugned orders, imposing penalty, were passed by the Director of Ports, who was not competent to pass such orders. Therefore, the orders passed by him are without jurisdiction.

13. Apart from that, the competent authority could pass the orders imposing penalty only in the event of delay in execution of contract work on the part of the plaintiff-Contractor. Therefore, a question would arise as to whether was there any delay on the part of the plaintiff-Contractor? Having examined the facts and circumstances of the present case and the evidence on record, it cannot be contended even for a moment that there was any delay on the part of the plaintiff-Contractor in the execution of the contract work. It is true that the time is stipulated in the contract. It was for a period of one year. Thus, the construction work was to be completed within a period of one year from the date of contract. It is equally true that the contract work could not be concluded within the stipulated period of one year. Therefore, it could be said that there was a delay in the execution of contract work. But could it be attributed to the

plaintiff-Contractor ? The spontaneous answer, in the light of the evidence on record, would be in the negative. There are various relevant circumstances which contributed delay in execution of the contract work. But they are not referable or attributable to the negligence or indifference on the part of the plaintiff-Contractor. The trial Court has extensively dealt with the aspect and elaborately considered in para 21 to 32 of the impugned judgment. The trial Court has reached to the correct conclusion that there was no any negligence or delay on the part of the plaintiff-Contractor in execution of the contract work. Voluminous documentary evidence is produced on record by the plaintiff-Contractor to show that there was no delay on its part. The circumstances which were responsible for delay in execution of the contract work were beyond the control of the plaintiff-Contractor. It would be pertinent to highlight the admission of the Officers of the defendant-Government with regard to this aspect. The concerned Executive Engineer had admitted in his letter dated 20th January, 1968, Ex. 80, addressed to the Superintending Engineer, that the Railway Department had taken abnormal time in taking decision about the culvert. It may be mentioned that the line and the level had to be decided and notified to the plaintiff-Contractor by the defendant-Government in consultation with the Railway Department. Apart from that, the responsible officers who had the opportunity to supervise the contract work day in and day out had also admitted that the difficulties shown by the plaintiff were most genuine. There were several other circumstances which caused obstruction and impediment in early execution of the contract work for which the plaintiff-Contractor was not at all responsible. From the correspondence exchanged between the parties and produced on record, it becomes crystal clear that there was no any negligence or inaction on the part of the plaintiff-Contractor in execution of the contract work. The finding on this point reached by the trial Court is, fully, justified. There is one another important aspect and which is not in dispute. That the time stipulated in the contract was extended by the defendant-Government. Therefore, though the time was the essence of the contract, it was waived by the defendant-Government. There was no negligence on the part of the plaintiff-Contractor in the execution of the contract work. The reasons and circumstances which contributed to the delay in the execution of the contract work were beyond the control of the plaintiff-Contractor. Therefore, the penalty was wrongly imposed on the plaintiff-Contractor. There was no any default or lapse on the part of the plaintiff-Contractor. The conclusion arrived at by the trial Court on this score is, fully, reinforced by the evidence on record. With the result, the aforesaid second and third contentions raised on behalf of the defendant-Government by the learned Assistant Government Pleader cannot be subscribed to.

14. It brings into consideration the fourth contention of the learned Assistant Government Pleader in this appeal, which pertains to the legality and validity of the notice u/s 80 of the Civil Procedure Code. In the opinion of this Court, all the material requirements of the provisions of Section 80 of the CPC are, fully, satisfied. No material is indicated or no point is spelt out which would affect the

validity of the notice u/s 80 of the Civil Procedure Code. The trial Court has, rightly, held that the suit notice was legal and valid. Office copy of the said notice dated 26th June, 1971, u/s 80 of the CPC is produced on record. Postal acknowledgments are produced at Exhs. 53 and 56. Thus, there is no dispute about the receipt of this notice u/s 80 of the Civil Procedure Code. A plain perusal of the copy of the statutory notice dated 26th June, 1971, leaves no any manner of doubt that it satisfied all the material ingredients of provisions of Section 80 of the CPC and, therefore, the fourth contention pertaining to the legality and validity of the notice, is without any merit and therefore, it must be rejected.

15. Lastly, it is contended by the learned Assistant Government Pleader that the plaintiff-Contractor had no sufficient labour force and adequate vehicles for the effective execution of the contract work. This contention was raised before the trial Court also. The trial Court has, rightly, rejected it. It is reiterated but there is no substance in the light of the evidence on record. This question would not assume any survival value otherwise also as there was no delay or inaction or negligence on the part of the plaintiff-Contractor, as observed hereinbefore. It is noticed from the voluminous testimonials and documentary evidence on record that the plaintiff-Contractor has not committed any breach of contract and he was not at all responsible for the delay in the execution of the contract work. Since there was no any inaction or delay on the part of the plaintiff-Contractor, question as to whether he had sufficient labour force or adequate vehicles, should not be gone into. However, alternatively, it is considered by the trial Court and, rightly, decided against the defendant-State. This finding is, fully, justified and is required to be upheld. Therefore, the last submission is also without any substance and required to be rejected.

In view of the facts and circumstances narrated hereinbefore and considering the evidence on record, this appeal is devoid of any merit and is liable to be dismissed. Consequently, the appeal is dismissed. In view of the facts and circumstances of the case, there shall be no order as to costs.