

(1984) 08 KL CK 0034

In the High Court Of Kerala

Case No : A.S. No. 206 of 1978 and Cross Objection

State of Kerala

APPELLANT

Vs

K. Bhaskaran

RESPONDENT

Date of Decision : 31-08-1984

Acts Referred:

Contract Act, 1872 — Section 73

Citation : AIR 1985 Ker 49

Hon'ble Judges : V. Varghese Kalliath, J;M. Fathima Beevi, J

Bench : Division Bench

Advocate : Govt. Prosecutor, for the Appellant; V. Vyasani Poti and N. Sugathan, for the Respondent

Judgement

Varghese Kalliath, J.—This is an appeal by the State. The trial court granted a decree for Rs. 11,480/- as damages for breach of contract.

2. Plaintiff is a contractor. He entered into a contract with the Government. His tender for the contract work was accepted on 24-6-1972. The contract was for execution of five items of work for flood control in Vamanapuram River. The contract was signed on 4-7-1982. Plaintiff deposited Rs. 6,600/- by way of security. The total amount of the contract was Rs. 1,64,300/- over and above the cost of materials.

3. The agreement provided that the Government has to supply the materials. Ext. B1 gives the details of the work to be done. The time fixed for the completion of the work was before 30-9-1972. Plaintiff states that the Government was bound to supply the required quantity of cement to the plaintiff. Admittedly the work was not commenced. It is the case of the plaintiff that he was not able to commence the work since the Government did not supply the required cement.

4. By Exts. All and A12 letters the plaintiff requested for the release of the required cement, Ext. All is dated 31-7-1972 and Ext. A12 is 16-8-1972. Exts. All

and A12 were not replied. Again in Ext. A20, the plaintiff reiterated his demand for the supply of cement. It is dated 22-3-1973. By Ext. A22 dated 9-5-1973, the Government cancelled the work. The plaintiff was told that the Government will be taking steps to realise from the plaintiff the loss suffered by the Government. When the contract was thus cancelled, plaintiff instituted the suit.

5. It is the definite case of the plaintiff that he was always ready and willing to execute the work. The Government committed breach of an essential term of the contract. By this conduct of the Government, the plaintiff was disabled from executing the work. As soon as the plaintiff signed the contract, realising the fact that the work has to be completed before 30-9-1972, plaintiff by letter dated 31-7-1972 requested the Executive Engineer to release the required quantity of cement for the execution of the work. This letter is Ext. All. He repeated his demand by another letter dated 16-8-1972 evidenced by Ext. A12. In Ext. A12, he told the Executive Engineer : --

"Unless the cement required for the work is issued, I am not able to start the work and hence I should not be held responsible for the delay in completing the work as per the agreement."

Ext. A17 is a letter by the Executive Engineer dated 27-12-1972. In this letter he has stated, that the plaintiff has not commenced the work so far and that he has to commence the work within a week on the receipt of Ext. A17 letter. It has to be noted that even though the Executive Engineer was insisting for the completion of the work expeditiously no cement was released to the plaintiff. Ext. A17 was replied promptly by Ext. A18 wherein plaintiff has said that he had "collected materials but work could not be commenced due to obvious reasons". When Ext. A18 letter was received, the Executive Engineer wrote a letter, Ext. A19 on 15-3-1973 to which a prompt reply . Ext. A20 dated 22-3-1973 was given. On receipt of Ext. A20 it seems Ext. A22 letter was sent cancelling the contract.

6. The defence of the State is that the plaintiff has committed breach of contract in so far as he did not commence the work in time. It is further stated that the Government was not bound to release cement as and when asked by the plaintiff. They are bound to give cement only if they are satisfied that the cement is required for the specific work which has to be carried on. The relevant term in the contract provides that from time to time the required quantity of cement has to be released to the plaintiff.

7. Plaintiff submits that the work that has to be executed was putting up ring bunds, excavation in the river and putting up bunds in rubbles in the river. From the nature of the work it is said that the work has to be done expeditiously and continuously without interruption, since it has to be done at a time when it was monsoon, and the work spot was the river itself. In the context, the plaintiff has to store some quantity of cement also, before the actual commencement of the work. Plaintiff has to store the materials on the bank of the river and that he has

to execute the work without the least delay in the matter. Only after storing the required materials including the cement for the actual and immediate use, the work could be commenced, otherwise it would cause undue hardship and loss to the plaintiff. The plaintiffs further case is that the Government never said that cement was not required at the time when the demand was made. The real reason for not releasing the cement was due to a controversy, a cuss fight between the Executive Engineer and the Superintending Engineer. It is said that the work for which the tender was called and the agreement was signed was not a work properly approved by the Superintending Engineer. The Superintending Engineer wanted to change the estimate and specification of the work. In order to cover up this inter se difference of opinion between the Executive Engineer and the Superintending Engineer, the Executive Engineer purposely did not release the required cement, so as to prevent the contractor from commencing the work.

8. The first question to be answered is whether there was justification for the plaintiff not to commence the work, without getting the cement asked for. The trial court held that the plaintiff was not at fault. The file relating to the contract, marked in this case as Ext-B3, would reveal certain facts which - would probabalise the case of the plaintiff. The time fixed for completion of the work was 30-9-1972. It is seen that no understanding has been reached by the officers of the Department in regard to the specification even by 30-9-1972, the date fixed for completion. The file discloses that the Department never wanted to proceed with the work in accordance with the estimate of the Executive Engineer and wanted that the work had to be done on the basis of the altered specifications as insisted by the Superintending Engineer. From a D. O. Letter, in the file, sent by the Executive Engineer it is seen stated that in case of revision of the estimate there will be necessity for retender of the work. It has to be remembered that this D. O. Letter is one month prior to the date fixed for completion. A re-tender certainly presupposes a cancellation of the earlier contract. In the circumstances the bona fides of the cancellation of the earlier contract are questionable. From the nature of the work and the mode of execution of the work, the request for cement by Exts. All and A12 was quite reasonable. The defendant ought to have complied with the request. The plaintiff was repeating his request, the defendant was not giving proper reasons for denying the request. The trial court very rightly came to the conclusion that the plaintiff was not at fault in not commencing the work. This finding obviously leads to the conclusion that by cancelling the contract the Government has committed breach of contract.

9. The next question that arises for consideration is what is the proper amount of compensation the plaintiff can claim? The plaintiff has made a claim of Rs. 59,228.28 on four counts.

(a) Rs. 29,113.85 -- expenditure incurred in furtherance of the execution of the contract ;

(b) 10% profit of the P. A. C. minus the cost of Departmental materials, i.e. Rs. 11,480.00

(c) Rs. 6,600/- security deposit and

(d) interest on the above amount from 23-1-1974 to 9-3-1976 - Rs. 12,034.43.

The trial court rejected claim (a), allowed claims (b) and (c) in full. In regard to claim (d) interest was allowed only on the security amount of Rs. 6,600/-

10. The learned counsel for the State contended that even on the finding that the Government has committed breach of contract, the measure of damages fixed by the trial court is grievously erroneous. Of course, he admitted very fairly that on the finding., that the Government has committed breach of contract, the plaintiff is entitled to the return of the security amount with interest. In regard to claim(b), the learned counsel urged that the plaintiff is not entitled to such a claim of damage since it is "remote damage". He also contended that even if it is not a "remote damage", there is no data proved in the case necessary to fix the exact amount of loss of profit. He contends that the rules laid down in *Hadley v. Baxendale* have to be applied for determining the compensation payable in this case. The law is concerned with legal obligations only, and the law of contract only with legal obligations created by mutual agreement between contractors -- not with all kinds of expectations. See *Lavarack v. Woods of Colchester Ltd.* (1967) 1 QB 278.

11. Alderson B delivering the judgment of the court of Exchequer in *Hadley v. Baxendale* stated as follows : --

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

((1854) 9 Exch. 341 at 354.)

It is now well settled that Section 73 of the Contract Act reflects in full the principles in *Hadley v. Baxendale*. Section 73 reads thus :

"Compensation for loss or damage caused by breach of contract.-

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage

sustained by reason of the breach."

12. So the question that has to be decided by this court is whether the 10% profit claimed by the plaintiff as a loss of gain prevented can fairly and reasonably be considered as a loss "arising naturally", i.e. according to the usual course of things. We think Section 73 of the Indian Contract Act allows as damages, the loss of reasonable profits arising from a breach of contract. The rule that is applicable can be summarised as follows : --

The defendant is liable only for "natural and proximate consequences of a breach or those consequences which were in the parties' contemplation at the time of contract." The above quoted phrases are words of article and usually represent two ways of expressing a single requirement. Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events -- those which a "reasonable man" or a person of ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase "in the parties' contemplation" normally means in the reasonable contemplation of the defendant. Thus understood, it has got only the same meaning as the companion phrase "natural and proximate". Brevity and clarity are better served by abandoning these traditional phrases of legal article and using "instead the gist of their meaning. We propose the following statement of the rule. The defendant is liable only for reasonably foreseeable losses -- those that a normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probable consequences of future breach.

13. The problem is how to apply this criterion in a case of prospective profits and consequential losses. The claim of the plaintiff in this case is that, the breach of the contract by the Government deprived him of reasonably expected profits. If he satisfied the general standards enabling him a decree for damages, namely reasonable certainty and mitigation - he will succeed. Otherwise, he will not. The breach of contract prevents his gains and thereby he sustains loss. In other words, gains prevented qualify as loss sustained. We think no special rules apply to loss of profits. Claims for such losses are governed by the same general principles that regularly control damages for breach of contract. The real difficulty is in the matter of estimating the loss of profit. What should be the exact measure of damages in this case is a matter for proof which gives formidable difficulty for the plaintiff.

14. Counsel for the appellant strongly contended that there is absolutely no legal justification for fixing 10% of the contract amount as loss of profits suffered by the plaintiff, He contends that there is no proof that the plaintiff has suffered a loss of profit amounting to 10% of the total amount.

15. The measure of damage no doubt is the amount of profit lost to the contractor by the breach. This is a measure of compensation for the loss which arose in the usual course of things. This can be stated as the loss which the

parties knew when they made the contract, as likely to result from the breach of it. When the plaintiff entered into the contract, he agreed to complete the work for the stated amount reckoning a sum for his profit also. The learned counsel, Shri Krishnamoorthy, submits that that estimate of loss should be reasonably certain for the court to accept and that in this case the 10% profit estimate lacks in that reasonable certainty. The 10% has been estimated on the general assumption that the contract rate is fixed allowing a margin of 10% profit. The counsel submits that this general assumption of margin of profit estimated or determined at the time of calling for tenders cannot be taken as a measure of damages which will have that qualification "reasonable certainty". He relies on an unreported decision -- A. Section No. 572 of 1971. In this case a Division Bench of this court held : --

"But, it cannot be said that in every case where a contractor undertakes to do a work for a lump sum he will be able to make a profit. It is not like the case of a contract for the supply of goods where the goods have a market and the market fluctuates. The profit that one may expect to make can be measured; if the prevailing market rate for the goods agreed to be supplied is known that profit will be the difference between the agreed price and the market price.

This method of assessment of profits is not possible in the case of a contract to execute a work which requires a period for completion. Generally before the tenders are invited an estimate will be prepared by the employer (the person for whom the work is to be done). This will be after taking into account the reasonable profit which may be expected by a contractor. No doubt, D. W. 1 the Corporation Engineer examined on behalf of the defendant has stated that in preparing the estimate, 10% of the actual cost of the work will also be added as the contractor's profit and rates quoted. This is generally done on the basis of the market price and the labour charges prevailing at the time of preparing the estimate."

In this unreported case, the claim of the plaintiff for 10% profit as damages was refused on the specific peculiarities of that case. We would quote the relevant portion of the judgment where the learned Judges have considered the peculiar circumstances involved in the case which suggested the court to refuse the claim of 10% profit.

"The tender was submitted in March 1969. The agreement was executed by the plaintiff in September 1969. Even before one month was over the plaintiff began to complain, as is seen from Ext. P3 letter to the defendant on 13-10-1969, that the rates have gone up. The relevant portion of Ext. P3 reads thus : --

"I may point out in this connection that the cost of materials and labour charges, etc., are soaring high. If the commencement of the work is delayed the work cannot be completed within the stipulated time for completion and I will have to sustain heavy loss due to the increase in prices as pointed above."

There is no case for any of the parties that what is stated in Ext. P3 is incorrect.

The matter does not stop there. In the suit notice, Ext. P5, he has repeated that the cost of materials and labour charges have gone up. In another letter, Ext. P10, which was sent in reply to the letter of the defendant requesting the plaintiff to proceed with the work he stated that there is a general increase in the price of materials and labour charges subsequent to the date of the agreement and unless a total increase by 25% of the original tendered rate is allowed he will not be in a position to carry out the work. This letter was also within the period of 18 months stipulated for the completion of the work. These show that even if the plaintiff had been allowed to commence the work immediately after the execution of the agreement he would not have been able to carry out the work for the contract amount and make a profit."

The decision really turned on the peculiarities of the case, namely that in Ext. P3 in that case the plaintiff himself admitted that the cost of materials and labour charges were "soaring high". In another letter, the plaintiff in that case admitted that there was a general increase in the price of materials and labour charges subsequent to the date of agreement and unless a total increase by 25% of the original tendered rate is allowed, he will not be in a position to carry out the work. The plaintiff in that case sent this letter within the period of 18 months stipulated for the completion of the work. These special features of the case persuaded the court to disallow the claim of 10% provided in that case.

16. In the case which we have to consider, such peculiarities are absent. So the decision which turned on the specific peculiarities cannot serve as a precedent for our decision and cannot serve as a rule or guide of conduct. Before we can find the import of the general principles or rule, we must exclude the peculiarities of the case to which it was applied, and must consider how the court would have decided the case if its decision had not been modified by those specific differences. Considering the decision in this light, we think that the 10% profit claimed was rejected on account of the admission of the plaintiff that within the period stipulated for the completion of the work the "prices soared high". We cannot decide this case entirely on the ratio of the decision in A. Section 572 of 1971.

17. The learned counsel for the respondent referred to us a decision reported in Union of India (UOI) and Others Vs. Sugauli Sugar Works (P) Ltd., (at P. 1418), where it has been held :

"One of the principles for award of damages is that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach. Therefore, the principle is that as far as possible the injured party should be placed in as good a situation as if the contract had been performed. In other words, it is to provide compensation for pecuniary loss which naturally flows from the breach. The High Court correctly applied these principles and adopted the contract price in the facts and

circumstances of the case as the correct basis for compensation."

He also cited a decision reported in *Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh*, . This was a case of breach of contract wherein the trial court allowed 15% damages and the Supreme Court upheld the same observing : --

"We are not able to discern any tangible material on the strength of which the High Court reduced the damages from 15% of the contract price to 10% of the contract price. If the first was a guess, it was at least a better guess than the second one. We see no justification for the appellate court to interfere with a finding of fact given by the trial court unless some reason, based on some fact, is traceable on the record. There being none we are constrained to set aside the judgment of the High Court in regard to the assessment of damages for breach of contract." The Supreme Court found that it was not justifiable for the High Court to make a shot, abrogating the guess work made by the trial court. . 18. In the light of the above decision, if we are not prepared to accept the estimate of the trial court in the matter of assessment of damages, we are thrown to a more difficult zone, where the assessment of damages may be more arbitrary and uncertain when the plaintiff fails to give any evidence of loss and proves only breach of contract by the defendant, certainly nominal damages are allowed. But, it by no means follows that in every such cases, only nominal damages are recoverable. A distinction has to be drawn between a case of lack of total evidence which renders it impossible to quantify damages and cases which present difficulty in assessing damages because of the nature of the damage to be proved, and the difficulty in assessing it is not a ground for refusing substantial damages. Courts are bound to try to get at that sum of money which put the wronged party in the same position as that in which he would have been, if he had not sustained the wrong which entitles him to claim damages. A judge has got to assess damages as best as he could on the materials available. He is not justified in declining to estimate the damage merely because the plaintiff could not adduce the best evidence but has to decide what the proper measure is, having regard to all the attendant circumstances and proved facts in the case. Of course in the matter of granting reasonable compensation when it is proved that one of the parties to the contract has committed breach of contract, a degree of arbitrariness is always likely to be present. To what extent the arbitrariness can travel is the crucial question. The answer is, the assessment must have the character of fairly reasonable certainly.

19. The plaintiff must prove his case. Plaintiffs seeking damages for breach of contract are no exception. They have to bear the burden of proving the financial loss for which they seek recovery. Here the courts face the same dilemma that confronts them when they apply the rule in *Hadley v. Baxandaie*. To be sure, defendant has broken a contract, he should be and he is liable. Simple justice, however forbids saddling him with liability for claims that rest on conjecture and speculation rather than real proof. On the other hand, tender concern for him

should not be carried so far as to penalise the plaintiff. Fairness forbids requiring too much, of him. After all, defendant did make the contract and did commit the breach which bore the controversy. Sensitive to these conflicting equities, the courts adopt a compromise -- the requirement of reasonable certainty. This standard requires plaintiff to prove with fair certainty first, that defendants breach did cause plaintiff a loss and second the amount of or extent of that loss. Of course the qualifier "reasonable" is the key to the requirement. Plaintiff is obliged to prove with reasonable certainty, not with fatalistic sureness that defendant's breach prevented gains or otherwise resulted in loss for the plaintiff, nor is he bound to prove with mathematical exactitude the amount of gain or loss in question. Thus if the plaintiff sues to recover profits lost, he need show convincingly that in the normal course of events, he would have realised a gain which he estimates, had the defendant performed his part of the contract. In the context, he has to produce the best estimate of the amount allowed by the circumstances. Fairly persuasive evidence, the most convincing and best available under the particular circumstances of the case will suffice.

20. The plaintiff has clearly stated in the plaint that the estimate amount of the contract was made, reckoning a profit of 10%. This fact has not been denied by the State in their written statement. Nowhere it is stated in the written statement that the damage claimed is excessive, arbitrary or unjustifiable. It is admitted that normally a 10% profit also is taken as an element in the preparation of the estimate of contract.

21. Considering the overall circumstances of the case and the fact that the trial court has granted a decree estimating the loss sustained by the plaintiff only at 10% of the total amount of the contract, we do not want to interfere with that conclusion. In the result, we have to dismiss the appeal filed by the State. We dismiss the appeal. No order as to costs. Now the Cross Objection : --

22. The plaintiff has filed a cross objection in regard to his claim for Rs. 29,113.85 as expenditure incurred by the plaintiff in furtherance of the execution of the contract up to 22-9-1973. The court below disallowed this claim on an appreciation of the evidence. The claim is made as stated earlier, on the ground that he has actually expended the amount claimed in furtherance of the execution of the contract work. He has adduced some evidence relating to purchase of bamboos, cadjan leaves, rubbles etc.

23. On a careful perusal of the evidence of the witnesses, we find it difficult to believe them. It is the definite case of the State that the plaintiff has not expended any amount for the execution of the contract work. The burden is on the plaintiff to adduce clear evidence, to establish, the actual expenditure he has incurred. The evidence produced cannot stand the scrutiny of a closer examination. The plaintiff was not able to produce any authentic records to prove that he has expended money for the execution of the work. The trial court has rejected the claim. We think no interference is called for. The cross-objection fails and it is dismissed. No order as to costs.