
(2008) 04 KL CK 0007
In the High Court Of Kerala
Case No : A.S. No. 407 of 1992

State of Kerala

APPELLANT

Vs

T.E. Mohammed Kunju

RESPONDENT

Date of Decision : 01-04-2008

Acts Referred:

Contract Act, 1872 — Section 55

Citation : (2008) 04 KL CK 0007

Hon'ble Judges : V.K. Mohanan, J;P.R. Raman, J

Bench : Division Bench

Advocate : R. Lakshminarayanan, Government Pleader, for the Appellant; K.L. Varghese, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Raman, J.—Defendants are the Appellants. The suit O.S. No. 286 of 1989 was filed by the Plaintiff, the Respondent herein, for realisation of damages. The Plaintiff/Respondent had entered into a contract with the Government of Kerala in respect of the work of construction of building for Regional Chemical Examiners Laboratory at Thrikkakara No. 41/SECCA/82-83. The contract was reduced in writing as evidenced by Ext. B-1 agreement dated 8-2-1983. The original period for the completion of work was 24 months from the date of handing over of the site. The site was handed over to the Plaintiff on 7-3-1983. According to the Plaintiff, even though he made all necessary arrangements for the completion of the work in time, but on account of the delay on the part of the department in handing over the site, various other obligations are required to be performed as per the contract, and hence, there was delay in completing the work. According to him, from time to time, the Plaintiff had brought to the notice of the department regarding the hindrances caused in performing the work. It was pointed out by the Plaintiff that there was delay in giving structural designs of foundation and basement. There was also delay due to the want of designs and details of super structure. The Plaintiff had to go to the Chief Engineer's

office at Trivandrum 14 times for getting approval of the revised designs. There was total change of structural designs. Thus the Plaintiff had to do 51 numbers of extra items, but no additional time was given. There was physical hindrance also in the site. The electric post with live lines were not removed from the site. The Plaintiff had stopped the work and the electric posts were not removed even by November 1983. All along the Plaintiff's machinery, materials and his supervisory staff were kept idle in the site. By the time, there was also increase in the cost of construction including labour charges, which should be compensated by additional payment of Rs. 40,000 above the agreed rate. There was also delay in payment of running account bills as agreed upon. The Plaintiff claimed compensation for the works done beyond the stipulated time and the brake up figures were furnished.

2. In the written statement filed by the 2nd Defendant, they denied the plaintiff claim. Further according to them, the final bill was accepted by the Plaintiff in full and final settlement of all amounts due to him under the contract, and therefore he is estopped from making any claim whatsoever, including any damages. It was also their case that even after taking charge of the site, the Plaintiff could not do any work. Structural design was received by him in September, 1983. But he had completed the collection of materials only in July, 1983. The indent for supply of departmental materials was placed with the District Store always only in July, 1983. The work was delayed due to the slackness and negligence on the part of the Plaintiff. The period of the original agreement was extended as requested by the Plaintiff. The structural design for the foundation and masonry wall were approved by the Chief Engineer in September 1983. The design was changed for the proper completion of the work and it never caused any hindrance to the progress. As per the agreement, Plaintiff is bound to carry out items of work which are not expressly or impliedly described in the tender schedule, but which are found necessary for the proper completion of the work, for which payment was also made as agreed upon. Necessary arrangements were made in time for the shifting of electric post According to them, at the time of receiving the final bill, he had written that it was received in full and final settlement of all the claims and hence he cannot claim any further amount for this work.

3. The Court below framed necessary issues including as to whether the Defendants committed breach of contract as contended by the Plaintiff, and whether the Plaintiff is entitled to any compensation.

4. The evidence consisted of the oral testimony of P.Ws. 1 and 2 and D.W. 1; Exts. A-1 to A-5 and Exts. B-1 to B-16.

5. The Court below found that acceptance of the final bill by the Plaintiff in the light of Exts. A-1 and B-6 will not create any bar nor is there any estoppel for claiming damages and according to the Court below, the Plaintiff was justified in claiming compensation. This finding was seriously attacked by the learned Government Pleader Sri R. Lakshminarayanan appearing on behalf of the State.

True, that the work was not completed within the original period as agreed upon. This was extended from time to time as per supplemental agreements. Last of the supplemental agreement however is for extra items which occasioned according to the change in the design. In the supplemental agreement for extra items, there is a specific clause that the contractor is not entitled to claim any enhancement of rates and he is bound to do the work strictly in accordance with the agreed rate as provided relating to supplemental items. Admittedly, no claim is made for compensation or damages for extra items done since he is bound by the terms and conditions in the supplemental agreements. But the position is different as regards other two supplemental agreements which is merely for the purpose of extending the original period. True, that except in the matter of extending the period of the contract, there was no other terms specifically altered by the supplemental agreements. Ext. A-1 is a detailed letter/notice sent by the contractor prior to the signing of the supplemental agreement. As per Ext. A-1, he raised the claim for damages for various reasons mentioned therein. Ext. A-1 is dated 8-8-1984 whereas the subsequent agreements made on 18-4-1985 and 29-12-1987. In the supplemental agreement dated 29-12-1987 for extra items there is a specific clause that the contractor shall not claim any enhanced rate or compensation whatsoever for or on account of such extra items due to the increased rate of labour or materials or on any other ground. In the supplemental agreement of the same date for the extension of the original contract, it is merely stated that the period for the completion of the work under the principal agreement is extended and the period is mentioned therein and further stated that the parties have agreed that the said extension should be secured by a supplemental agreement modifying the said period specified in the principal agreement. That apart, the Plaintiff had issued notice to the principal claiming damages vide notice Ext. A-1, and it is thereafter that supplemental agreements were entered into between the parties, so the awardee of the contract who is very well aware of the claim did not exclude the claim of any damages in the supplemental agreement. The Apex Court in *State of Kerala v. Mathai* 2007 (2) KLT 513 as also in *General Manager Northern Railways and Another Vs. Sarvesh Chopra*, held that if, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e., the contractor, cannot claim compensation for any loss occasioned by the nonperformance of the reciprocal promise by the employer at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. Thus, in spite of there being a contract between the parties whereunder the contractor has undertaken not to raise any claim for enhancement for damages for the delay of performance of the obligations by the employer may be entertainable in the following situations: (i) If the contractor repudiates the contract exercising his right to do so u/s 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the

employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms. Thus the case on hand is covered by the 3rd principle stated in the above decision.

6. The Court below found on an analysis of the evidence in this case that the contractor is entitled for an amount of Rs. 2,71,793 and the rest of the claim made by him was rejected. The principal amount however carried only nominal interest at 6% from the date of the suit till realization. The Court below before quantifying damages also entered into a finding on facts that there was delay on the part of the principal in performing their obligation under the contract by reference to the various pieces of evidence adduced in the case as revealed by the discussion contained in the various paragraphs of the judgment in appeal. Thus Court below has rightly reached the conclusion on appreciation of the facts. The view taken by the Court below warrants no interference. There is no merit in the appeal suit. In the result, the appeal suit is dismissed. There is no order as to costs.