

(1994) 04 GAU CK 0017
In the Gauhati High Court
Case No : Civil Revision No. 34 (H) of 1983

State of Meghalaya and Others

APPELLANT

Vs

Joinmanick Nosmel Giri

RESPONDENT

Date of Decision : 08-04-1994

Acts Referred:

Administration of Justice and Police in the Khasi and Jaintia Hills Rules, 1937 — Rule 36
Civil Procedure Code, 1908 (CPC) — Section 115
Contract Act, 1872 — Section 73
Evidence Act, 1872 — Section 34, 61

Citation : AIR 1995 Guw 23

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

Bench : Single Bench

Advocate : N.M. Lahiri, General, A. Sarma and M.Z. Ahmed, for the Appellant;
D.N. Choudhary and H.N. Sarma, for the Respondent

Judgement

J.N. Sarma, J.—This application under Rule 36 of the Rules for the Administration of Justice and Police in the Khasi Hills has been filed against the judgment and order dated 22-2- 1983 passed by the District Judge-cum- Additional Deputy Commissioner, Shillong, Meghalaya, in Money Appeal No. 16(T) of 1979 dismissing the appeal filed by the State of Meghalaya and affirming the judgment and decree dated 16-8-1979 passed by the Assistant to the Deputy Commissioner, Shillong in Money Suit No. 35(T) of 1978 with a minor modification of the decretal amount.

2. It is settled law as decided by the Full Bench of this court that though it is a revision, this court has the power to consider the evidence adduced by the parties 1969 A LR 92

3. The brief facts are as follows:

One J.N. Giri who is the contractor under the P.W.D. and Agriculture Department, Govt. of Meghalaya filed this suit for realisation of Rs. 6,2107.47 p. The facts are that in response to a tender notice issued for construction of Irrigation Head

work, at Tyrso Valley, East Khasi Hills the petitioner submitted tender and the tender and the rate of the plaintiff was accepted by the defendants. Thereafter the work order was issued on 14-3-1975 and necessary agreement was executed between the parties. According to tender notice, the estimated value of the work was Rs. 6,46,359.22. The plaintiff started the work on and from 15-3-1975 as per instruction of the Sectional Officer. The plaintiff completed the preliminary works such as removal of trees, bamboo camps, removal and blasting of floating and embedded boulders from river bed and did work for an amount of Rs. 3,99,627.20 within March, 1976. A payment Rs. 3,24,379.89 was made by the defendants accepting the measurement submitted by the plaintiff. It is the case of the plaintiff that no regular measurement book was maintained by the defendants and the defendants used to rely on the measurement duly recorded by the plaintiff and payments were made accordingly. Thereafter on 13-3-1976 the modified plan was submitted reducing the length of the Dam from 74 meters to 51 meters and the plaintiff had to proceed with the work on the basis of modified plan and as per verbal instruction given from time to time, though at that time the plaintiff already completed the preliminary work as per original plan. It is the claim of the plaintiff that during the period from April, 1976 to March, 31st, 1977, the plaintiff did the volume of work of Rs. 4,96,253.12 out of which he received an amount of Rupees 1,20,000.00 on 26-3-1977 and another Rs. 1,171,840.00 being the value of the cement. The total being Rs. 2,04,413.12. Up to 31-3-1977 the outstanding was Rupees 2,04,413.12. Rs. 75,247.31 being the previous year outstanding amount. After April, 1977, the plaintiff did further work on the site the value of which as per his own measurement comes to Rs. 1,60,477.35 out of which Rs. 22,000/- is to be deducted being the value of the cement and the balance due to him is Rs. 1,38,477.35. In addition to it, the plaintiff also claimed the following amount:

(a) Rs. 15,939.00-- for Cement carriage. (b) Rs. 24,150.00-- being the charge of excess recovery for cement cost. (c) Rs. 95,000.00 -- Losses suffered by the plaintiff on account of delay caused by the defendants.

Thus, in all the plaintiff claimed a sum of Rs. 5,53,226.78. The plaintiff also claimed interest @ 12 1/2% for illegal detention of money. The plaintiff claimed that he did work in all for a value of Rs. 11,91,447.67 and demanded the defendants to complete the measurement. The plaintiff also submitted his own measurement to the defendants, but the defendants did not complete the measurement. The plaintiff issued a notice u/s 80 of the CPC and the notice was duly served on the defendants. As the payment was not made, so this suit has been filed.

4. A written statement was filed on behalf of the defendants. Their defences are as follows:--

(i) The total value of the work is Rs. 5,78,220.00 and it is not correct to say that the value of the work is Rs. 6,46,359.22.

(ii) The work was started on 14-3-1975 as per site report dated 17-3-1975.

(iii) the expenditure of actual work done by the plaintiff according to the recorded measurement up to March, 1976 including preliminary work was Rs. 3,25,179.89 and this measurement was duly accepted by the plaintiff without any objection whatsoever.

(iv) The actual amount which was paid to the plaintiff for the work done up to March, 1976 was Rs. 3,25,179.89. It is also denied that no measurement book was maintained. It is stated that measurement book is always duly maintained by the Department as usual and all works whatsoever done by the plaintiff was duly measured and on that basis payment was made.

(v) the length of the Dam was reduced from 74 meters to 51 meters without modification of the design whatsoever and because of this modification, an additional foot bridge had to be constructed costing a sum of Rs. 36,000/- only and it was incorporated in the revised estimate and the bridge was to be completed within a period of one month from the date of notification.

(vi) the defence denied that plaintiff completed the preliminary works within time schedule as per work order and did not do the preliminary works even within six months and was praying for extension of time and took 4 1/2 years to complete the preliminary works.

(vii) the entire works done by the plaintiff was measured and recorded and on that basis the payment was made. The so-called measurement book maintained by the plaintiff without the signature of the departmental officer cannot be accepted as the valid measurement. The plaintiff was made over payment of Rs. 1,41,717.31 for all the works done by him and the plaintiff is liable to refund to the Government a sum of Rs. 1,41,717.31.

(viii) it was denied that the plaintiff did work to the tune of Rs. 11,91,446.67 as claimed by him. It is contended that the total value of the work when completed was found to be only Rs. 7,32,000/- and the plaintiff abandoned the work with effect from 15-7-1977 and he was paid a sum of Rs. 1,20,000/- to enable him to complete the outstanding work within schedule time as per assurance given by him to the defendants as contained in Memorandum dated. 25-3-1977. The site was verified by the officers of the department in presence of Shri W. Giri, Plaintiff's brother and representatives and the finding of the enquiry officer is as follows:

"I may point out that a joint inspection was carried out on 3-11-1977 purely on compassionate grounds. Sri W. Giri, representative of the contractor, who attended the inspection was himself at a loss, as he did not attend the site when earthwork for foundation was carried out. Nothing tangible came out in support of the claim."

(ix) It is denied that the plaintiff is entitled to a sum of Rs. 5,53,276.78. On the other hand it is claimed that the defendants are entitled to get back a sum of Rs.

1,41,717.39. The work was abandoned by the plaintiff. The contract was finally rescinded and another contractor was engaged for completing the work and the contract in the meantime has been completed.

(x) That it is claimed in the written statement that a sum of Rs. 1,41,717.29 was paid in excess. In the written statement, there is no prayer for refund of this amount, nor any counter claim has been made as required by law. So, that aspect of the matter need not be considered in this case.

5. The following issues were framed in the suit.

(i) cause of action.

(ii) Barred by limitation.

(iii) Validity of notice u/s 80, C.P.C.

(iv) Whether the tender value of work is Rs. 5,78,220.00 or Rs. 6,46,359.22? What is the extent of work completed by the plaintiff till the date of filing the suit as per measurement book?

(v) Whether there was modification of plan and Additional work completed within scheduled time limit?

(vi) Whether the plaintiff has been paid excess amount of Rs. 1,41,717.39 and it is to be refunded?

(vii) Whether the plaintiff is entitled to get Rs. 5,53,226.78?

(viii) Whether the plaintiff is in negligence in completing the work of defendants.

(ix) To what reliefs the plaintiff is entitled to?

6. The following witnesses were examined.

(i) P.W. 1 J.N. Giri.

(ii) P.W. 2 Sri P.C. Mech, E.E. (R&V), P.W.D., Assam.

(iii) P.W. 3 Hadson. (iv) P.W. 4 Sri W. Giri.

(v) Sri Debaprasad Sarma.

(vi) Sri A. Rahman. (DW-1). The following documents are exhibited. Ext. 1 -- Tender notice.

Ext. 2 -- Copy of the tender submitted by the plaintiff.

Ext. 3 -- Copy of the letter accompanying the tender.

Ext. 4 -- Copy of the F-2 form.

Ext. 5 -- The letter dated 13-3-1975 from the Sectional Officer Sri A. Rahman.

Ext. 6(1) & 6(2) -- Receipt registers regarding payment made to the labour

Sardar Hadson.

Ext. 7 -- Letter dated 2-4-1975 written by Sri Gutpal for collection of explosive etc.

Ext. 8 -- Letter dated 8-4-1973 written by the Secretary, Agricultural for supply of explosive.

Exts. 9, 10, 11, 12 & 13 -- letters from Agriculture Department with regard to explosive.

Ext. 14 -- Annexure-6 showing the works done for the period from 16-3-1975 to 31-3-1976 prepared by the plaintiff.

Ext. 15(1) & 15(2) -- are the 2 note books regarding the works done on the basis of such Ext. 14 was prepared.

Ext. 16 -- is the Accounts book to show the value and volume of the works done by the plaintiff.

Ext. 17 -- Statement showing the loss suffered by the plaintiff.

Ext. 18 -- Details of works done since April, 1977.

Ext. 19 -- The Album containing photograph of the works done in connection with said contract works with negatives.

Exts. 20 to 43 -- Are the letters written by the plaintiff to the M.L.As with regard to the works.

Ext. 44 -- Is the notice u/s 80, C.P.C.

Ext. 45 -- Are the postal registered receipt and the A.D.

Exts. 47 to 54 -- Are the challans for cement...

Ext. A -- M.B. of the defendants containing the signature of the plaintiff.

Ext. D, E, F, G, H, I, J -- letters from the Department to the plaintiff complaining non-completion of the work in time.

Ext. B -- with enclosures B1, B2, B3 bills of Rs. 2,58,280.44 which were received by the plaintiff on 20-9-1976.

Ext. B-4 -- Signature of the plaintiff.

Ext. C -- With enclosures C-1 and C-2 regarding Rs. 8,099.45 p.

Ext. K -- The revised estimate prepared by Sri Rahman showing revised value of the work at Rs. 7,32,000.00.

Ext. L -- Details of works done by the plaintiff and the value thereof till the plaintiff abandoned the works.

Ext. M -- Revised estimate of works.

Ext. N -- Details of works which was not recorded in the M.B.

Ext. O, P, and Q -- are the plan and sketch of revised estimate.

7. The learned Asstt. to Deputy Commissioner on consideration of materials on record, took Issue No. 1 first for decision and found that there is cause of action for the suit. Regarding Issue No. 2, the learned Assistant to Deputy Commissioner found that the suit is not barred by limitation. Regarding Issue No. 3 the learned Asstt. to D.C. found that a valid notice u/s 80 was issued. Though he found that there is some defect between the claim made in the notice and in the suit, yet relying on two decisions i.e. AIR 1958 SC 905 and AIR 1959 Andh Pra 192, he found that where there is no substantial difference between the relief mentioned in the notice and in the plaint, the notice is not invalid on that ground. The 2nd part of Issue No. 4 is the most important. Regarding the 1st part of the issue, he found that the estimated value of the works originally was Rupees 6,62,859.22 and as such he found that the claim of the defendants that the value of the works was Rs. 5,78,220.00 is not correct. Regarding 2nd part of the Issue, first he took up the points of which the parties are not at variance. The points are as follows:

(i) There is no dispute that the plaintiff was entrusted with the construction of the Head work of Tyrso Valley Irrigation Project.

(ii) The work was started on 15-3-1975 according to the plaintiff and on 17-3-1975 according to the defendant.

(iii) The length of the Dam originally was 74 meters and the same was reduced to 51 meters.

(iv) That from March, 1975 the plaintiff was doing the preliminary work for the original dam. The payments were made on different dates.

(v) The price of cement was not deducted from the running bills.

(vi) The plaintiff was supplied with 435 kg. of blasting materials and 9860 bags of cement.

Thereafter the learned Munsiff took the points on which the parties are at variance and considering the deposition of PW-1 to PW-2, PW-3 and DW-1 and relying on the discussion on the book. "The Fundamental principles of Irrigation Engineering", he found that the original site was shifted from the earlier site to narrower point. He found that Ext. A the Measurement Book cannot be relied on he came to the following finding." In view of this position, I hold that no person can place any reliance on Ext. A which is only evidence of defendant about measurement account maintained by him. So, if Ext. A is disbelieved, there is no reliable evidence from the side of the defendant to rebut the plaintiff's claim as regards the actual work done and as proved by Expert PW-5" and thus having rejected the Ext. A relied on exts. 14, 15, 16, 17, 18, 19, 36 and 39. The court accepted the claim of the plaintiff regarding the work done in the 1st phase, 2nd

phase and 3rd phase and decided 2nd portion of this issue in favour of the plaintiff and accepted the claim of the plaintiff.

8. Regarding Issue No. 5, the learned Asstt. to Deputy Commissioner held as follows:

"So I hold that in the instant contract work. Department waived the time limit and never pressed it as they felt it was practically not possible to adhered to."

9. Regarding Issue No. 6, the payment of excess amount, the learned court held that to be out and out an evasive claim of defendant and Deptt. totally failed to prove it by adducing reliable evidence in this regard. The learned court also found that this question does not arise at all, as no counter claim has been filed.

10. Regarding Issue No. 8 regarding negligence of the plaintiff, he found that it was the department who was negligent and the plaintiff is not at fault for delay in execution of the work. In this connection, he rejected the Ext. L, Ext. A and Ext. N. It was found by the learned Asstt. to Deputy Commissioner that Ext. N was prepared by D.W. 1 on 26-10-1978 and it was further found that this was prepared for the purpose of the case. It was further found by the court that permissible financial help was not granted to the plaintiff as per provisions of P.W.D. code and it cannot be expected that the plaintiff could have completed the project work in relevant time without necessary financial help at that stage. It was further held by the learned court because of that the delay, the plaintiff had to suffer loss both mentally and financially.

11. Coming to Issue No. 7 the learned court on the basis of decision of 2nd part of Issue No. 4 assessed the amount due and decreed the suit for Rs. 4,35,201.78 with interest @ 10% per annum. In the 1st portion of the judgment, the learned court referred to four cases on which the learned Asstt. to Deputy Commissioner placed reliance. But there is no discussion of these cases.

The cases relied on by the learned Asstt. to the Deputy Commissioner are as follows:

- (i) AIR 1962 SC 366;
- (ii) AIR 1965 SC 1981;
- (iii) AIR 1967 SC 378;
- (iv) AIR 1918 PC 149

There is no discussion regarding these cases. It is not known on what point these cases were relied on by the learned Asstt. to Deputy Commissioner.

12. There was an appeal being Money Appeal No. 6 of 1979 with cross-objection before the learned District Judge-cum-Addl. Deputy Commissioner at Shillong; During the pendency of this appeal the defendant filed an application under Order 41, Rule 27 for admitting three documents i.e. site Register for daily use of cements, the plaintiff's letters dated 23-3-1977 and 29-3-1977 and prayed for

adducing additional evidence in respect of the work done by the plaintiff from April to 15-7-1977. The plaintiff also filed an application for allowing him to amend the plaint to include a claim for further sum of Rs. 97,633.90. The learned Judge kept these two applications pending to be disposed of along with the main appeal. The learned Judge also discarded Ext. A holding inter alia as follows;

"All these facts and circumstances make the M.B. (Ext. A) doubtful and unreliable and so no reasonable man would like to accept it as correct."

The learned Judge discarded the evidence of P. Ws. 2, 3 and 4 on the ground that they were closely connected with the plaintiff and are, therefore, keen to support the plaintiff's case at any cost. The learned Judge decided to decide the whole matter on the basis of evidence of PW 1, 5 and D.W. 1. He accepted the evidence of PW 5 and accepted the measurement recorded by him and held as follows:

"The erasers cancellation and corrections also render the M.B. (Ext. A) doubtful. I find that the department did not properly maintain the M.B. even for the 1st phase of the work and they did not maintain it for the 2nd and 3rd phase of the work."

In paragraph 11 of the judgment of the learned appellate court took up the application of the appellant/ defendant for adducing the additional evidence and he rejected the same holding that the appellant's signature in the application was not the signature of the plaintiff and it was a running bill and as such he rejected the same and also in the same manner he rejected the plaintiff's application for amendment of the plaint. Regarding the claim of the plaintiff for realisation of money, the learned Judge took up the matter phase by phase. Regarding the 1st phase he held that the plaintiff is entitled to get Rs. 74,447.49 only. Regarding the 2nd phase (from April 1976 to March, 1977) and 3rd phase (from April, 1977 onwards) relying on Ext. 15 and discarding Ext. A and accepting the evidence of PW 5 he accepted the measurement of the plaintiff to be correct and he decreed the entire claim of these two phases.

13. Regarding the interest, the learned Judge found it to be legal. The learned Judge rejected the cross-objection filed by the plaintiff and thus he dismissed the appeal. Hence, this revision under Rule 36 of the Rules for Administration of Justice.

14. As stated earlier, limitation of Section 115 of the CPC is not there in an application under Rule 36 and this Court can look to the evidence and decide the matter afresh by discussing evidence. Both the learned counsel Sri M.N. Lahiri for the petitioner and Sri D.N. Choudhury, for the Respondent addressed this court and referred to the evidence as well as the Exhibits. Now, let us have a look first at the judgment of the appellate court.

15. Sri Lahiri urged the following points:

i) that there is no allegation in Section 80, C.P.C. notice and in the plaint that by the modified plan the defendant had shifted the site of construction from the

earlier site that the plaintiff completed the preliminary work and after shifting he had to do preliminary work again and suffered loss. The finding of the appellate court on this point is that there is no shifting of the site in the modified plan and the plaintiff did not have to incur more expenses on that account.

ii) The M.B. maintained by the department is for the entire period and on that basis the payments were made. The finding of the court below that Ext. A was not properly maintained is perverse.

iii) The finding that statements made in paragraphs 6 and 7 of the plaint and Annex-lire VI of the plaint were not denied specifically perverse.

iv) Exts. 14, 15, 16, 18, and 45 on the basis of which the total volume of work was done by the plaintiff was determined, is absolutely perverse as Exts. 14, 15, 16 and 18 are mere exercise books maintained by the plaintiff and Ext. 45, the report of the PW 5. Regarding measurement of the work is also absolutely vague and has no evidentiary value.

v) Drawing of adverse inference for non-examination of defendant No. 5 is erroneous.

16. Section 73 of the Contract Act provides for compensation for loss or damage caused by breach of contract. In the instant case, the plaintiff claimed Rs. 95,000/- as amount of loss suffered by the plaintiff on account of delay in carrying out of their goods by the defendant and agents and servants. He also claimed interest for Rs. 48,880.69 being 12 1/2% per annum from 16-2-1978 to 31-10-1978 and future interest at the same rate on the decretal sum till realisation from the defendant.

17. The law on the point of damage is settled. The breach of contract has to be proved before any enquiry can be conducted into the quantum of damages, so where it is impossible to say who is entitled for damages, no question of compensation can arise. The following circumstances are relevant in assessing the damages.

i) whether the damages naturally arose in the usual course of things from such breach.

ii) whether the plaintiff had the means of remedying the inconvenience and has neglected to avail himself of it.

18. It is settled law that when damages arise, the court is not assessing the pecuniary liability which already exists. The court for the first instance must decide that the defendant is liable and then it is to proceed to assess that that liability is. But till the determination there is no liability settled upon the defendant. A claim for damages for a breach of contract is therefore, not a claim for a sum presently due. Union of India (UOI) Vs. Raman Iron Foundry,

A suit for damages u/s 73 would only lie if there is breach of contract by the defendant. The Rule with regard to the measure of damages is that the damages

which the party suffered ought to receive in respect of such breach of contract should be charged as may be formally and reasonably be considered either the result naturally i.e. according to the terms of contract particularly such breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both the parties at the time when they made the contract as the practicable reason for the breach of it.

19. In *The Firm Styled G.L. Kilikar Vs. The State of Kerala*, it was pointed out that the plaintiff's claim must fail where on the evidence led it is found that it was the plaintiff's breach of obligations under the contract which led to the termination of the contract by the defendant and therefore the cancellation is not wrongful."

20. It is also settled law that in a civil suit, the burden of proof lies on the plaintiff to substantiate his claim, but when both the parties led evidence the concept or consideration of onus is immaterial. The truth has to be adjudged on the evidence of the parties. Regarding non-production of available evidence, the law is settled. For non-examination of defendant No. 5 adverse presumption has been drawn by both the courts below. The law is stated by the Apex. Court of the land as follows:

(i) *Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others*, the Supreme Court in paragraphs 11 and 13 of the judgment has pointed out as follows:

"The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is not evidence on the record."

(ii) *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, it was pointed out by the Supreme Court as follows:

"Drawing of adverse inference for non-production of available evidence, to support his case is always optional. Such a presumption u/s 114 of the Evidence Act has to be drawn as one of fact depending upon the whole state of fact and it is not obligatory."

Now let us have a look at the Exhibits 14, 15, 16 and 18, Ext. 15(1) is a exercise book containing some entries. Also it contain some slips of papers. There is no page number in the exercise book. Each and every entry was not proved by any of the witnesses. It is not understood as to why this book was admitted in the evidence without proving entries made therein. This Ext. does not come within the definition of Section 34 of the Evidence Act. It is not understood as to why both the courts below accepted this exercise book with some entries made therein along with some slip papers to thrust the liability on the plaintiff. No doubt, this book was exhibited without objection from the defendant. But that did not take away the right of the court to question and/or scrutinize the evidentiary value of the same, Section 61 of the Evidence Act provided that contents of documents may be proved either by primary or by secondary

evidence. Here the contents of the exhibits were not proved either by primary or by secondary evidence. So these exhibits must be brushed aside. These Ext. 15(1) and 15(2) are mere scrap of papers. They were not kept in the regular course of business and the same could never be admitted as evidence under the provisions of law. The said measurement book did not bear any signature of the departmental officers and that were never seen or submitted prior to the same being exhibited in court. Ext. 14 is a typed copy which claims to be the work done from March, 16, 1975 up to 31st March, 1976. It gives the nature of work carried out and engaging average labour strength of 150 numbers daily and it also gives the volume and value of work. This also has no evidentiary value at all. Ext. 16 is another sheet which claims that it is the work done from April, 1976 up to 31st March, 1977. It shows the nature of work carried out and also volume and value of the work. It does not bear the signature of anybody. The typed copies were exhibited by the plaintiff, Exts. 17 and 18 are other two typed copies of the same nature. All these exhibits have no evidentiary value whatsoever and they cannot thrust any liability on any person. The way these exhibits are sought to be utilised to thrust the liability on the defendant, may give rise dangerous precedent in the field of civil litigation.

21. In (1991) 1 G LR (NOC) 16 (D. Agarwalla v. B. Devi Agarwalla) this court in connection with Section 34 of the Evidence Act pointed out that entries in the Book of accounts regularly kept in the course of business are relevant, but such entries shall not alone be sufficient evidence to charge any person with liability as laid down u/s 34. In this case, these exhibits are not entries in the book of accounts, but mere scrap of typed papers. In the same decision it was further stated that the burden of proof lies upon the person who is to prove the same and it never shifts. But onus of proof shifts. The shifting of onus is a continuous process in the evaluation of evidence. In that case, the plaintiff claimed that the defendant was a tenant and the burden was placed on the plaintiff to prove it.

22. The trial court rejected Ext. N. the document produced by the department regarding construction of head work at Turso Valley, This contains the signature of the departmental officers which were exhibited as Ext, N-1 and N-2. This document was rejected on the ground that it was prepared in the year 1978. Be that as it may, if Exts. 15, 16, 17 and 18 the typed copies produced by the plaintiff can be accepted, there is no earthly reason as to why this Ext. N should be brushed aside. The trial court as well as the appellate court erred in law in brushing aside Ext. N. The same yardstick should be applied in deciding the fate of the plaintiff: and defendant. If some scrap of papers of the plaintiff can be accepted as having evidentiary value, it is not understood as to why the Ext. N should be discarded. The next question is regarding Ext. A. No doubt, Ext. A has not been maintained as required by PWD Code. But on that ground this Exhibits cannot be brushed aside. On the basis of this Ext. A the bills Exts. B and C were prepared which were duly signed and admittedly accepted by the plaintiff without any demur and now it does not lie in his mouth to question the Ext. A 1 find that Ext. A was wrongly discarded by both the courts below and if Ext. A is accepted

to be a valid document, the whole claim of the plaintiff falls through. The another aspect of the matter which was not considered by the courts below was that the original value of the work was from raised from Rs. 5,78,220.00 to Rs. 7,32,000.00. So, the absurd claim of the plaintiff that he did work for Rs. 11,00,000/- cannot be accepted as it is settled law that no work beyond the estimated value can be done by the contractor without the written order from the Department. The quantum of work left undone and ultimately completed by another contractor was valued at Rs. 2,10,000/- and that was not taken into consideration by any of the courts below. The appellate court did not accept the story of additional work because of the shifting of the site and that being the position, the appellate court erred in law in decreeing the suit for the alleged additional work claimed to be done by the contractor. The Trial Court relied on a book as indicated above, but the reliance on that book is absolutely without any basis as the reference book was regarding a storage dam and not to a diversion dam. In placing reliance on the evidence of PW-5, Dabe Prasad Sarma both the courts below mis-read it inasmuch as this witness admitted as follows:

(i) The measurement records produced by the defendant were done according to PWD Code. The Department produced a bounded measurement book.

(ii) My report stating that the value of the work left to be done is Rs. 2,10,000/- is on the basis of the documents shown by the department.

(iii) If the contractor maintained M.B. and the defendant does not maintain any M.B. payment cannot be made.

(iv) When contractor accepted any payment, it is presumed that the work is measured. If he got any objection, he is to raise such thing in the relevant time and payment should be under protest on the body of the bill. I found work worth Rs. 2,10,000/- remained to be done to complete the project work.....

(v) If contractor said that work worth to Rs. 75,000/- remained undone it will not be correct.

(vi) Except Exts. 14, 15, 16 and 18, the plaintiff did not produce any other document when there is such reduction of length the value of the work also will be reduced.

(vii) The contractor is not to maintain the M.B. in letters and words as it is not obligatory on his part. The department need not verify it. If the M.B. contains the signature of the contractor against any work on payment, it is to be presumed that payment was made and accepted. If the date is entered wrongly it can be corrected.

23. DW 1 deposed as follows :

(i) At page 56 of M.B. Ext. A RCC work has been shown.

(ii) For the first phase of the work plaintiff received full payment for the 2nd phase of work commenced from April, 1976 to March, 1977. In Annexure-C of

the written statement and Ext. E I have shown the total value of work done by the plaintiff.

(iii) In Ext. L I shown the details of work done by the plaintiff and value thereof till the plaintiff abandoned the work.

(iv) Details of work which was not recorded in M.B. are available in Ext. N. Ext. N-1 is the signature of the Asstt. Engineer and Ext. N-2 is my signature.

24. Regarding the book of accounts, u/s 34 of the Evidence Act, the Supreme Court in Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., has pointed out as follows (para 6):

"No person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them."

That was observation made by the Supreme Court with regard to the books of account maintained by the Bank. In the instant case Exts. 14, 15, 16 and 18 are mere scrap of papers maintained by the plaintiff and their correctness was not admitted by the defendant. But even then the courts below accepted them to be genuine evidence and decreed the suit.

25. Before I part with the record, let us have a look (at) the cases mentioned by the learned Asstt. to Deputy Commissioner in his judgment. The learned Asstt. to Deputy Commissioner did not discuss the cases. The cases relied on by the learned court are :

i) Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, That was a case u/s 73 of the Contract Act. The Supreme Court pointed out as follows:

"The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he 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; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and, debars him from claiming any part of the damages which is due to his neglect to take such steps. These two principles also follows from the law as laid down in Section 73 of the Contract Act read with the explanation thereof."

The facts of that case were that a contract had been entered into between A and B for sale of certain canvas at Re. 1 per yard. The delivery was to be through railway receipt for Calcutta F. O. R. Kanpur. This was, however not done. Therefore, B brought a suit for damages against A for breach of contract. The ratio of this case as laid down therein does not apply to the present case.

26. In *Karsandas H. Thacker Vs. The Saran Engineering Co. Ltd.*, that was also a case relating to Section 73 of the Contract Act. That also was a case for sale of certain parts of scraps iron for which control price had been fixed. That case also is not applicable to the facts of the present case.

27. In *Bungo Steel Furniture Pvt. Ltd. Vs. Union of India (UOI)*, That was a case under Arbitration Act and in the majority of the judgment, the Supreme Court pointed out that decision of the Umpire cannot be challenged nor it can be said that the decision of the umpire is based on no evidence. That case also does not apply to the facts of this case.

28. In AIR 1918 PC 149 (*A.V. Joseph v. R. Shew Bux*). That suit was brought for damages for non-taking delivery of a quantity of slippers. The defendant disputed the breach, disputed the regularity of the contractual process necessary for the assessment of damages, and disputed that there were any damages. On the facts of that case, the Privy Council pointed out that where in a suit for damages, the court finds in favour of the plaintiff that there was a breach then simply because the plaintiff has not given sufficient evidence to show certain details of damages and that he has made one or two small misstatement as regards some of his expenses, it is not proper to grant only nominal damages.

The facts of this case also do not apply to the present case. In all these cases, it is the question of damages which was considered. The learned Asstt. to Deputy Commissioner did not decree the suit for damages, but decreed the suit holding that the plaintiff did the work and he was to receive money. So, it is not understood how these cases were found to be relevant by the learned Asstt. to Deputy Commissioner for decision of the case.

29. Considering the matter from all the angles, the judgment passed by the learned Asstt. to Deputy Commissioner, Shillong in Money suit No. 35(T) of 1978 and affirmed in Money appeal No. 6(T) of 1979 by the learned District Judge-cum-Additional Deputy Commissioner at Shillong are set aside. The suit of the plaintiff is dismissed. In the facts and circumstances of the case. I leave the parties to bear their own costs.