

(1991) 01 KAR CK 0010
In the Karnataka High Court
Case No : Regular First Appeal No. 13 of 1981

Tungabhadra Steel Products Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-01-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Limitation Act, 1963 — Section 113, 14, 15 (2)

Citation : (1991) ILR (Kar) 1137 : (1991) 1 KarLJ 286

Hon'ble Judges : N.D.V. Bhat, J;D.P. Hiremath, J

Bench : Division Bench

Advocate : B. Gopalaiah, for the Appellant;

Final Decision : Allowed

Judgement

Hiremath, J.—The appellant sued the respondent for recovery of Rs. 3,27,582-94 ps. as amount due on the contract that was entered into between the appellant and the respondent, the appellant undertaking to supply the Hoist bridge, Electrically driven rope drum hoist, Fixed parts, wall plate with stainless steel clad flat and anchor girders and Gate leave consisting of skin plate assembly in different sets for Dantiwada Project undertaken by the respondent in the year 1965-66. Different rates were quoted by the appellant and the quotation accepted by the respondent was for Rs. 25,70,700/-. It was a part of the contract that the respondent should make payment as and when the running bills were presented and the balance amount would be claimed in the final bill. Thus on running bills Rs. 22,52,658-32 ps. were paid by the respondent The final bill was preferred by the appellant dated 20-3-1975 for the balance amount adding the sales tax of Rs. 9,541-26 ps. This bill was rejected by the respondent stating that it was not liable to pay the balance as demanded by the appellant. The suit notice u/s 80 CPC followed and thereafter the appellant filed the suit before the trial Court presenting the plaint on 25-3-1978. Various contentions were raised by the respondent including the plea of limitation. The correctness of the final bill

was also disputed. Even technical pleas like competence of the Managing Director of the plaintiff to file the suit as well as the Court's jurisdiction to entertain the suit were raised. Having negated the technical pleas of competence and jurisdiction, the trial Court found that the respondent was liable to pay to the appellant Rs. 2,86,113-10 ps. including the sales tax of Rs. 8,333-40 ps. at 3% on the balance amount. Even though the amount due to the appellant on this contract was determined by the trial Court, it dismissed the suit holding that the suit is barred by time. It is the correctness of this Judgment and Decree that is now challenged in this appeal.

2. The respondent though duly served is not represented in this appeal. Therefore, we have heard the learned Counsel for the appellant. The appellant's Counsel has challenged the finding of the trial Court that the suit is barred by time contending that the trial Court failed to take notice of the date of filing of the suit and the date of the final bill and also a stipulation to the effect that the balance amount would be claimed in the final bill. The trial Court according to him committed an error in holding that Article 14 of the Limitation Act is attracted and not Article 55. Therefore, the point for determination in this appeal is, whether the suit is in time.

3. It may be noted at the outset that the respondent has not challenged the finding of the trial Court that Rs. 2,86,113-10 ps. is due from the respondent on this contract. The final bill as already stated is dated 20-3-1975 and the relevant clause in the agreement regarding the mode of payment is as follows:

"Bills will be preferred every month based on the number of tonnes erected in position charging at Rs. 550/- per metric tonne. The balance amount will be claimed in the final bill."

Ex.P-9 is the letter of the appellant to the respondent in which this claim is made and Ex.P-12 was addressed to the appellant by the Ministry of Industry and Civil Supplies in which the Government of India appears to have directed the appellant to get the matter settled in Court of Law. In its letter dated 7-7-1977 the respondent stated that the claim of the appellant regarding the additional payment for increase in weight of the item of Hoist cannot be considered and it was decided by the respondent that it cannot be agreed to. Section 80 notice as per Ex.P-1 is dated 28-11-1977 and having issued this notice the suit came to be filed.

4. The trial Court it may be stated at the outset was not correct in classifying the suit as one falling under Article 14 of the Limitation Act. That Article relates to a suit for the price of goods sold and delivered. Where no fixed period of credit is agreed upon, three years limitation is prescribed from the date of delivery of goods. Learned Counsel for the appellant in this behalf invited our attention to the agreement and urged that it was not a simple case of sale of the items stipulated to the respondent but it was a case of the appellant undertaking to manufacture, fabricate and then erect at the Project and therefore this is a case

of supply of goods as well as of rendering service of erecting and fabricating. The appellant's Counsel in this behalf invited our attention to a decision of the Supreme Court in the case of Sentinel Rolling Shutters and Engineering Company (Pvt.) Ltd. Vs. The Commissioner of Sales Tax, wherein a contract of this nature came up for consideration though under the Bombay Sales Tax Act. The assessee Company therein was carrying on business as engineers, contractors, manufacturers and fabricators and they entered into business contract in 1972 with the Company for fabrication, supply, erection and installation of Rolling shutters in the sugar factory. Detailed specification of the Rolling shutters and their prices inclusive of erection at the site were given in the contract. Terms and conditions were set out in the contract. The assessee having carried out his part of contract, question arose whether the contract was a contract of sale or a contract for work and labour. It was held therein that the erection and installation of the Rolling shutters cannot be said to be incidental to its manufacture and supply. It is a fundamental and integral part of the contract because without it the rolling shutter does not come into being. The rolling shutters come into existence as a unit when the competent parts are fixed in position on the premises and it becomes the property of the customer as soon as it comes into being. There is no transfer of property in the rolling shutter by the manufacturer to the customer as, a chattel. It is essentially a transaction for fabricating component parts and fixing them on the premises so as to constitute a rolling shutter. The contract was thus clearly and indisputably a contract of work and labour and not a contract for sale,

5. In another case of Hindustan Aeronautics Ltd. Vs. State of Karnataka, the Supreme Court took a similar view in a contract of a similar nature. In that case the Supreme Court observed that in the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it some time before delivery and the property therein passed only under the contract relating thereto to the other party for price. In every case it is necessary for the Courts to find out whether there was any agreement to work for a stipulated consideration. If that was so, it would not be a sale because even if some sale may be extracted that would not affect the true position. The nature and type of the transactions are important and determinative factor. What is necessary to find out is the dominant object. A reading of the terms of the contract at hand clearly gives an indication that the dominant object of the contract was not a mere sale of certain manufactured goods by the appellant but actually to installments them at the project. The trial Court has thus missed the dominant object of the contract in finding that Article 14 of the Limitation Act is applicable.

6. Article 55 of the Limitation Act has been pressed into service before this Court as well as before the trial Court. It relates to a suit for compensation for the breach of any contract, express or implied not herein specially provided for. Three years limitation is prescribed from the time when the contract is broken or when the breach in respect of which the suit is instituted occurs or where the

breach is continuing, when it ceases, in finding that Article 55 is not attracted, the trial Court while discussing issue No. 4 on limitation observed that in the plaint, there is no specific claim for compensation as such. But alternatively, it pointed out that even if the Superintending Engineer wrote letter Ex.P-10 on 6-1-1975 finally negating the plaintiff's claim, still it has to be noted that the present suit should have been filed within 3 years of 6-1-1975 the date of Ex.P-10. Even if 30 days notice period u/s 80 CPC is excluded the suit becomes time barred. It appears 30 days referred to under the notice u/s 80 C.P.C. is only a mistake, 60 days being the time allowed u/s 80 CPC. We are not in agreement with the trial Court's observation that the limitation started from 6-1-1975. Even in respect of taking 6-1 -1975 as the date from which the limitation started running against the plaintiff in our view the trial Court has committed an error. The plaint as contended by the appellant's Counsel at the concluding part of para No. 6 makes a clear averment that the final bill dated 20-3-1975 was forwarded to the respondent and this fact is not denied by the respondent in its written statement. It was further brought to our notice that the respondent itself produced the original of this bill at Exs.D-11 and D-12. The reply to this final bill was sent by the respondent as already pointed out on 7-7-1977 contending that the same cannot be agreed to. The same is at Ex.P-21. In that letter the respondent stated thus:

"With reference to your aforesaid communication I am directed to inform you that the claim of M/s. Tungabhadra Steel Products Limited regarding additional payment for increase in weight of the item of "Hoist" for Dantiwada Reservoir Project has been carefully considered by this Government and it has been decided that the same cannot be agreed to. Earlier also in August 1974 the then Adviser to the Governor had informed the Secretary, Heavy Industries Department, Government of India accordingly. A copy of his letter which explains the position is enclosed."

It thus follows that after the appellant sent the final bill dated 20-3-1975 the respondent came forward with a specific reply that it was not agreeable to pay the sum claimed. Therefore even though there was intermediate correspondence till this final bill came to be presented as required by an agreement it cannot be said to be a starting point for limitation as 6-1-1975,

7. The next point for consideration would be whether Article 55 of the Limitation Act is attracted. The trial Court though adverted to this point explained it away by stating that even if it is assumed that Article. 55 is attracted in view of the starting point of limitation taken by it the suit becomes time barred. The error to the trial Court's Judgment thus stems from the date it took as the starting point for limitation though it did not say with certainty that the suit does not fall under Article 55 of the Limitation Act in this behalf reference may be made to a decision of the Bombay High Court in the case of GANESH KRISHNA v. MADHAVRAV RAVJI 1882 ILR Bom 75 . The learned Judges of the Division Bench held therein that a suit to recover a specific sum of money due upon a registered

bond or other written contract is a suit for breach of contract in writing registered, within the meaning of Article 116 of Schedule II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered. The learned Judge who spoke for the Bench pointed out that the general remedy for breach of contract is a suit for compensation "for any loss or damage" sustained by the plaintiff; and the suit is none the less a suit for compensation, because it is brought for the specific sum due on a bond. The decisions of the Calcutta and Allahabad High Courts reported in 3 II.L.R. All 276 : ILR Cal 94 were cited with approval. Even in the case of GOVINDA SABAT v. STATE OF ORISSA AIR 1964 Ori 183 in a similar situation the learned single Judge of the High Court referring to the terms of the agreement that the balance of the bid amount was to be paid in three equal instalments and in default of the payments the defendant was to be charged 12% interest on instalments due, the defendant having failed to pay the last instalment which as per the term was to be paid on 1-10-1955, the State of Orissa having succeeded to the properties of the District Board in view of the abolition of the Board having brought a suit against the defendant for recovery of the balance due together with the interest thereon at the agreed rate, held that the nature of the contract between the parties in substance was that the defendant was to collect toll from the market for the official year 1955-56 commencing from April 1, 1955 and ending on March 31, 1956. The defendant paid in advance 1/4 amount as per terms of the agreement and the balance was to be paid in 3 equal instalments at stated dates. It was not in the agreement that if the defendant failed to pay any one instalment, his right to collect toll would get automatically terminated. Having regard to the real nature of the agreement for collection of the tolls for the entire official year ending on March 31, 1956 the agreement was not a bond payable by instalments and therefore this *Gaurishanar v. Sarju 5. Nebo Coomar Mookhopadhaya v. (SIC) Mullick* case did not fall under Article 74 of the Limitation Act nor did it come under Article 110 because the money due under the agreement was not rent though the right to collect the toll was leased out. The suit according to the learned Judge was governed by the Article 115 as in fact it was a suit for compensation for a breach of the contract, and as under the agreement the defendant was to pay the total sum for his toll collection work for the entire period of the official year 1955-56 by 31-3-1956, the question of breach of the contract by him only arose on 31-3-1956 when the agreement period ended and therefore as the suit was filed within three years from the said date it was filed within time. It thus follows that under Article 55 of the Limitation Act the suit need not be confined only to unliquidated damages. Even specific sums claimed for the breach of contract would attract Article 55 of the Limitation Act. Even otherwise it may be said that if the final bill under the contract was presented on 20-3-1975 if there is no other provision of the Limitation Act to govern the limitation and the case falls under residuary Article 113 of the Act, the suit would well be within time. The notice u/s 80 C.P.C. was issued on 28-11-1977 as per Ex.P-1 and if 60 days allowed u/s 80 CPC are excluded the

suit would be well in time keeping in view Section 15(2) of the Limitation Act. Therefore in our view the trial Court was not justified in dismissing the suit on the ground of limitation having found that the respondent is due to pay Rs. 2,86,113-10 ps. In our view the Judgment and Decree of the trial Court dismissing the suit cannot sustain. The appellant's Counsel has not now challenged the finding of the trial Court that the respondent is due to pay only Rs. 2,86,113-1 Ops.

8. In that view of the matter for the foregoing reasons we allow this appeal, set aside the Judgment and Decree of the trial Court dismissing the suit and decree the suit for Rs. 2,86,113-10 ps. with costs throughout. The respondent is also liable to pay current and future interest at 6% per annum on the said amount i.e., from the date of suit till the date of payment.