

GAHC010214812023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/186/2023

M/S SIGMA CONSTRUCTION
REPRESENTED BY ITS PROPRIETOR PRAHLAD KHANIKAR,
AGED ABOUT 54 YEARS, SON OF LATE PUSPADHAR
KHANIKAR, RESIDENT OF VILLAGE RATANPURIA, PO MORABAZAR, PS
AMGURI, SIVASAGAR, ASSAM

VERSUS

UNION OF INDIA AND 6 ORS.
MINISTRY OF RAILWAYS, RAILWAY BOARD, NEW DELHI

2: THE GENERAL MANAGER

NF RAILWAY
MALIGAON
GUWAHATI

3: THE DIVISIONAL MANAGER

NF RAILWAY
MALIGAON
GUWAHATI

4: THE SENIOR DIVISION ENGINEER (C)

NF RAILWAY
MALIGAON
GUWAHATI

5: THE DIVISIONAL ENGINEER

NF RAILWAY
TINSUKIA DIVISION
TINSUKIA.

6:THE ASSTT. DIVISIONAL ENGINEER
L
NF RAILWAY
TINSUKIA DIVISION
TINSUKIA.

7:THE SENIOR SECTION ENGINEER
NF RAILWAYS
MARIANI DIVISION
JORHAT

Advocate for the Petitioner : MR. R BARUAH

Advocate for the Respondent : DY.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 11-10-2023

Heard Mr. R. Baruah, learned counsel for the appellant as well as Mr. R. Gogoi, learned CGC appearing for all the respondents.

2. This appeal under section 100 CPC is directed against the judgment and decree dated 10.07.2023 passed by the learned Addl. District Judge, Jorhat in Money Appeal no.1/2023, by which the appeal was dismissed and the judgment and decree dated 31.03.2015 passed by the learned Civil Judge, Jorhat in Money Suit no.4/2011 was dismissed.

3. The appellant as plaintiff had filed money suit for recovery of a sum of Rs.8,14,007/- with interest @ 12% per annum from the date of institution of the suit till realisation. The suit was registered as MS no.4/2011 which was adjudicated before the Court of learned Civil Judge, Jorhat. The appellant was

given the work order related to NIT no.04/TSK of 2004 for the work of improvement of "Officer rest house" at Mariani, Jorhat. The tender submitted by the appellant was accepted by the authorities of the NF Railway vide acceptance letter dated 16.07.2004.

4. The case of the appellant is that the said work site was handed over to the appellant on 07.09.2004 and it was then found out that the cost of requisite building materials for construction of buildings had not been entered item wise, cost of dismantling of roof of the old building, dismantling of RCC works i.e. to remove RCC beam of the old building from the work site, dismantling brick works i.e. dismantling of old walls and removal of them from the work site, dismantling of floor and removal of old marble, tiles, cement casting and brick soiling from the work site were not mentioned in the schedule. Accordingly, the appellant had issued letter dated 08.10.2004 to rectify and amend the said errors and anomalies and to do the needful in terms of the contract agreement. However, the correction of the schedule was not done and the appellant was verbally asked to do the work.

5. The appellant had issued another letter dated 13.10.2004 to the ADEN, (could be Additional Engineer) Mariani Railway to pass necessary direction to the said Senior Section Engineer to do the needful. Nothing was done but by letter dated 13.09.2005, the appellant was apprised that the joint verification of the work be done on 24.09.2005. Without considering the grievance of the appellant, a joint verification was conducted, allegedly in a perfunctory manner and the appellant was asked to sign the joint verification. The appellant claims that the acceptance was made under protest by signing

the measurement book and the work done by the appellant was fixed at Rs.3,94,270.20. However, after the re-verification pursuant to the order of this Court, the value of works was increased to Rs.4,66,399.83.

6. Another joint verification was to be made on 05.04.2006 which could not be done and despite request of the appellant the joint verification was not done and therefore the appellant had to stop the remaining work. Thereafter the appellant issued a notice dated 22.10.2008 under section 80 CPC and thereafter the joint verification was scheduled to be held on 05.11.2008. In course of measurement, although the claim of the appellant was found correct nothing was found in the joint verification report and the appellant was provided with a letter dated 03.12.2008, aggrieved by which the appellant had approached this Court by filing WP(C) 1033/2009 and this Court by order dated 26.03.2009 disposed of the said writ petition and directed the respondents for joint re-verification of the work and to release the payment at the earliest. Although the measurement was done, but as no payment was made, the appellant had again approached this Court by filing WP(C) 948/2010.

7. This Court by order dated 28.04.2010 observed that the issues involved required adjudication before the Civil Court. The Court closed the said WP(C) 948/2010, by granting liberty to the appellant to approach the competent Civil Court with his grievance and therefore, the Money suit no.4/2011 was filed.

8. The appellant in support of his case had examined two witnesses including owner of the firm and exhibited the following documents: NIT (Ext.1), Letter of acceptance (Ext.2), Letter dtd. 08.10.2004 (Ext.3), Letter

dtd.13.10.2004 (Ext.4), Letter of ADEN dtd. 13.09.2005 (Ext.5), Letter dtd. 16.09.2005 (Ext.6), Letter of ADEN dtd. 20.09.2005 (Ext.7), Measurement book No.644 (Ext.8), Letter dtd. 21.03.2006 (Ext.9), letter dated 04.09.2006 (Ext.9A), Notice u/s 80 CPC (Ext.10), Letter of defendants (Ext.11), Notice dtd. 23.12.2008 (Ext.12), Order of High Court in WP(C) 1033/2009 (Ext.13) and Order of High Court in WP(C) 948/2010 (Ext.14).

9. Although the respondents had examined one DW but no document was exhibited. The learned trial Court had framed the following issues for trial:

- (i) *Whether there is any cause of action for the suit of the plaintiff?*
- (ii) *Whether the plaintiff is entitled to get the decree as claimed?*
- (iii) *To what other relief/ reliefs the parties are entitled?*

10. All the issues are taken up together. The learned trial Court had discussed the evidence on record and held that there was no document and/or expert opinion to judge the claims or counter claims of the respective parties. The learned trial Court disbelieved the claim of the appellant to have completed 80% of the work because of the failure of the appellant to produce any papers of the last verification done by the respondents. It was held that the mere oral testimony of the appellant (PW-1) supported by his employee PW-2 was not sufficient to prove the claim. It was also observed that merely by glancing through the schedule A of the plaint, Ext.8, the Court was not in a position to assess the claim submitted by the appellant or hold it to be correct and the learned trial Court had also observed that the appropriate authority who were the respondents, who are expert in their field and the Court did not have the technical knowledge to ascertain the quantum of work assessed by the

respondents. Accordingly, issues were decided against the appellant and the suit was dismissed on contest with costs.

11. The appeal against the dismissal of the suit was preferred which was registered as Money Appeal no.1/2023. The learned appellate Court had formulated the following point of determination i.e. whether the learned trial Court is justified in dismissing the suit and whether the impugned judgment and decree passed by the learned trial Court needs interference in this appeal.

12. In this regard the learned first appellate Court revisited the evidence on record including examination-in-chief and cross-examination of witnesses.

13. From the issue no.1, it was observed that the appellant had asserted facts which was traversed by the respondents and accordingly it was held that there was a cause of action in the suit and the decision of the learned trial Court was reversed. In respect of issue no.2, the learned first appellate Court had observed that despite knowledge about the errors in the schedule which was annexed to the letter of acceptance (Ext.2), the appellant continued his work. It was observed that as per Ext.2, which was the letter of acceptance dated 16.07.2004, the work was to be completed within two months i.e. 15.09.2004. As per the contract agreement, the contract work was to be completed by the appellant on or before 15.09.2004, extended upto 31.12.2004 and it was also observed that the appellant has not been able to produce any completion certificate in accordance with clause 48(1) of the General Conditions of Contract. Therefore, the learned appellate Court disbelieved the contention of

the appellant to have completed 70% to 80% of the work in view of the contention of respondent that the appellant had completed 40-50% of the work till 28.12.2004. The work was stopped on 12.01.2005. As per the contents of the letter dated 13.09.2005 (Ext.5) the prayer for extension of time made by the appellant was forwarded to the Divisional office with observation that the appellant would complete the work within 30.09.2005.

14. The learned First Appellate Court had referred to clause 20(3) of the Standard General conditions of Contract to hold that the existing contractor would not have a right to be entrusted with execution of extra works. It was also observed that there was no pleading or evidence to hold that the respondent authorities had consented to such additional/ extra work and that the parties had not signed any additional agreement regarding any additional work. Accordingly, it was held that the appellant was not entitled to payment against any alleged extra work done. Accordingly, the appeal was dismissed by holding that the appellant had foreclosed his right to claim a sum of Rs.8,14,007/- in absence of any cogent oral or documentary evidence.

15. By referring to sections 75 read with section 73 and 74 of the Contract Act, it was observed that by breach of trust one must have suffered some loss or damage but in this case it was observed that every breach of contract need not necessarily result in actual loss or damage and accordingly the Court did not find fault with the finding on issue no.2 decided by the learned trial Court. In respect of issue no.3, by referring to the provisions of section 101 and 102 of the Evidence Act, it was held that the burden to prove the case was not fulfilled by the appellant and accordingly, it was held that the issue no.3 was rightly

decided by the learned trial Court and accordingly, the appeal was dismissed on contest with costs.

16. The learned counsel for the appellant had submitted that before termination of the work by letter dated 16.09.2005 and 04.09.2006, the appellant had requested the respondent authorities to make a joint verification and do the needful. It is submitted that reference to the said letters dated 04.09.2006 and 16.09.2005, there is practically no response from the respondents on the averments made and therefore, it is submitted that the Courts should presume that the additional work was done within the scope of the contract and thus, on completion of the additional work, the appellant would be entitled to get the amount due on such work.

17. It was submitted that the said letters are sufficient to prove to indicate that there was further scope of work apart from the contract work allotted to the appellant. It was submitted that the value of the work was enhanced from Rs.394270.20 to Rs.466399.83, there was an admission of some extra work being done by the appellant. It was submitted that the respondents have not only accepted the work done by the appellant but the work was put to beneficial use and therefore this was an appropriate case where the principle of section 70 of the Contract Act would be invoked and as the work was not done gratuitously, the appellant would be entitled to the value of the additional work which was done by the appellant with interest. In support of the submission of the entitlement of the appellant to value the non-gratuitous act, reliance is placed on the decisions of the Supreme Court of India in the case of *State of West Bengal v. M/s. B.K. Mondal and sons*, AIR 1962 SC 779.

18. It is the case of the appellant that the tender was awarded to the appellant by issuing letter of acceptance dated 16.07.2004. It is not in dispute that the appellant vide letter dated 08.10.2004 (Ext.3) had requested the respondent authorities to rectify and amend the anomalies because as per the appellant certain works were not included in the scope of the contract. The appellant issued another letter dated 13.10.2004 (Ext.4), requesting the Senior Section Engineer to do the needful. However, the respondents did not act in accordance with the said request. It appears that the contract agreement between the appellant and the respondent authorities was signed on 15.12.2004. The contract agreement has not been exhibited by the appellant.

19. Therefore, it is not in dispute that prior to entering into the contract agreement dated 15.12.2004, the appellant was aware of the anomalies. Nonetheless the agreement was signed on 15.12.2004. The appellant did not move the Court for rectification of the agreement which is envisaged under section 26 of the Specific Relief Act. Therefore, the agreement as it stood on 15.12.2004 continued to remain so as an un-rectified agreement on the date the suit was filed.

20. From the materials available on record specially from the copy of the evidence and affidavit by PW-1 which is produced by the PW-1, it is seen that as per the evidence tendered by the appellant, two joint verification of the work was done and the first verification was done on 24.09.2005. According to the appellant, the entries made in the measurement book were done in a casual and perfunctory manner. Nonetheless the appellant has signed the

measurement book under protest but no prayer was made for amendment of the measurement book. Be that as it may, the value of the work was enhanced from Rs. 3,94,270.20 to Rs. 4,66,399.83. Thereafter joint verification was again made on 05.11.2008. However, the evidence, regarding the joint verification was not tendered. Instead, the appellant has exhibited notice under section 80 CPC. It appears that in respect of the additional work done, no evidence was tendered. Moreover, it is the pleaded case of the appellant that the entries made in the measurement book no.644 was erroneous. Nonetheless such measurement book was exhibited as Ext.8 and the record of re-verification was not called or proved.

21. The observation made by the learned trial Court that the Court is not an expert in the field has to be held to be appropriate. In the absence of the primary proof of the work not being done merely from the copies of the letters and correspondence and the notice, it would be impossible for the Court to arrive at a decision that additional work was done. Coming to the scope of provision of section 70 of the Contract Act, the Court finds that there is no pleading for it in the suit. There appears to be nothing on record to show that when there is a written contract agreement with specification of work, it was permissible for the appellant to do some work which is beyond the scope of the contract and claim money merely because the Govt./NF Railway had used it on the ground that they were enjoying non-gratuitous work, done beyond the scope of contract, and that they were under legal obligation bound to make compensation to the parties, who are otherwise bound by the contract alone.

22. It would also be relevant to refer to the provision of section 50 of the

Contract Act which prescribes that the performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. Therefore when there is a contract agreement between the parties, it was not open to the appellant to chalk out his own manner in performing his part of the contract even when the contract agreement did not contain in its schedule the nature of extra/ additional work which had to be done.

23. In the present case in hand, the foundation or pleadings relating to the invocation of the principle of *quantum meruit* is absent. In this regard, the Court is of the considered opinion that in the absence of the Contract Agreement itself being proved by tendering it in evidence, the clauses contained in the contract agreement was not proved.

24. It is hard to envisage that the contract agreement will contain a clause which would permit a contractor to carry out any additional work which he thinks or deems appropriate. There would be some clause to state that there must be some competent authority who would give a sanction for doing the additional work. Those relevant facts were not pleaded in the plaint because it is not stated that which specific authority had permitted the appellant to do the additional work because the contract agreement itself was signed at a later point of time on 15.12.2004 and that by then, the letter of acceptance envisaged completion of the work. If we examine the decision of the Constitution Bench of the Supreme Court of India in the case of *M/s. B.K. Mondal and sons (supra)* cited by the learned counsel for the appellant, from para-1 and 2 of the said judgment, it appears that in the said case the foundational pleadings were there in the plaint. In the said paragraphs it has

been mentioned that *"in the alternative it was alleged that if the contract in question was invalid then the respondents claim fail under section 70 of the Indian Contract Act. The respondents have lawfully done such works not intending to act gratuitously in that behalf and the appellant had adjured the benefit thereof."*

25. It was further mentioned in para-2 of the said judgment that the offer of the respondents in the said case was to put up temporary storage godown at Arambagh in the district of Hoogli which was accepted by the Civil Supplies Department in the State of West Bengal by letter dated 12.02.1944. The respondents have completed the construction and bill raised was duly paid in July 1944. In the meanwhile on 07.04.1944, the respondents was requested by the Sub Divisional Officer, Arambagh to submit estimate for certain extra works for construction of kacha road, guard room, office kitchen and room for clerks at Arambagh for the Department of Civil supplies. The Addl. Deputy Director of Civil Supplies visited Arambagh on 20.04.1944 and instructed the respondents to proceed with the work. Therefore, the basic foundational facts appears to have been pleaded in the said case and that the scope of the additional work was also spelt out because the initial contract work was not only completed but was paid and thereafter, the Sub Divisional Officer required the respondents to submit its estimate and the Additional Deputy Director of Civil Supplies had visited the site and instructed the respondents to proceed with the construction work. The said pleadings are absent in the present case in hand. Therefore, in this case while discussing the provision of section 70 of the Contract Act, it was also referring to the fact that a person should lawfully deliver something to other. Paragraph 2, 3 and 16 thereof is quoted below:

2. The respondents case was that on February 8, 1944, it offered to put up certain temporary storage godowns at Arambagh in the District of Hooghly for the use of the Civil Supplies Department of the State of Bengal and that the said offer was accepted by the said department by a letter dated February 12, 1944. Accordingly the respondent completed the said construction and its bill for Rs. 39,476/- was duly paid in July 1944. Meanwhile, on April 7, 1944, the respondent was requested by the Sub-Divisional Officer, Arambagh, to submit its estimate for the construction of a kutchra road, guard room, office, kitchen and room for clerks at Arambagh for the Department of Civil Supplies. The respondent alleged that the Additional Deputy Director of Civil Supplies visited Arambagh on April 20, 1944 and instructed the respondent to proceed with the construction in accordance with the estimates submitted by it. Accordingly the respondent completed the said constructions and a bill for Rs. 2,322/8/- was submitted in that behalf to the Assistant Director of Civil Supplies on April 27, 1944. Thereafter the Sub-Divisional Officer, Arambagh required the construction of certain storage sheds at Khanakul and the Assistant Director of Civil Supplies wrote to the respondent on April 18, 1944, asking it to proceed with the construction of the said storage sheds. This work also was completed by the respondent in due course and for the said work a bill for Rs. 17,003/- was submitted. In the present suit the respondent claimed that the two bills submitted by it in which the respondent had claimed Rs. 2,322/8/- and Rs. 17,003/- respectively had remained unpaid and that was the basis of the present claim.

3. The appellant denied all the material allegations made by the respondent in its plaint. It alleged that the requests in pursuance of which the respondent claims to have made the several constructions were invalid and unauthorised and did not constitute a valid contract binding the appellant under S.175(3) of the Government of India Act, 1935 (hereafter called the Act). It pleaded that there was no privity of contract between the respondent and itself and it denied its liability for the entire claim. The written statement filed by the appellant was very vague and general in terms and no specific or detailed pleas had been set out by the appellant in its pleading.

* * *

16. It is true that S. 70 requires that a person should lawfully do something or lawfully deliver something to another. The word "lawfully" is not a surplusage and must be treated as an essential part of the requirement of S. 70. What then does the word "lawfully" in S. 70 denote? Mr. Sen contends that the word "lawfully" in S. 70 must be read in the light of S. 23 of the said Act; and he argues that a thing cannot be said to have been done lawfully if the doing of it is forbidden by law. However, even if this test is applied it is not possible to hold that the delivery of a thing or a doing of a thing the acceptance and enjoyment of which gives rise to a claim for compensation under S. 70 is forbidden by S. 175(3) of the Act; and so the interpretation of the word "lawfully"

suggested by Mr. Sen does not show that S. 70 cannot be applied to the facts in the present case.

26. That is another aspect of the matter. The plea of the value to be paid for non-gratuitous act as envisaged under section 70 of the Contract Act has not been specifically pleaded before the learned trial Court. From the first appellate judgment, it does not appear that the plea of section 70 of the Contract Act regarding the principle of *quantum meruit* was pressed before the first appellate Court.

27. Therefore with the foundation facts being absent, it would not be permissible for this Court in exercise of power and jurisdiction under section 100 CPC to take up a totally new issue for the first time in the absence of the foundational pleadings and to entertain and admit the second appeal on this count.

28. In view of the discussions above, the Court finds that there is no substantial question of law which arise for a decision in this appeal and therefore, the appeal is dismissed at the "admission stage" without issuance of notice on the respondents.

29. The Registry shall transmit a copy of this order to the learned Courts below for retaining it as a part of the record of Money Suit no.4/2011 and Money Appeal no.1/2023.

JUDGE

Comparing Assistant