

GAHC010091642009



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

Case No. : RSA/49/2009

OIL and NATURAL GAS CORPORATION LTD.
HAVING ITS REGISTERED OFFICE AT JEEVAN BHARATI TOWER-II,
CANNAUGHT CIRCLE, NOW INDIRA CHOWK, NEW DELHI-110001 HAVING
ITS REGIONAL OFFICE FOR EASTERN REGION AT NAZIRA, REPRESENTED
BY THE DEPUTY GENERAL MANAGER LEGAL, ONGC LTD. ERBC, NAZIRA,
ASSAM.

VERSUS

BIREN BARUAH
S/O- LATE CHANDRA NATH BORUAH, LAKOWA, SIVASAGAR PRESENTLY
RESIDING AT MOTHURAPUR, VIA-SUFFRY, P.O.- MOTHURAPUR,
SIVASAGAR.

For the appellant : Mr. B.K. Das, Advocate.
For the respondents : Mr. D. Senapati, Ms. K. Sarma, Advocates.
Date of hearing : 11.01.2024.
Date of judgment & order : 08.04.2024.

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

JUDGMENT AND ORDER

(C.A.V.)

Heard Mr. B.K. Das, learned counsel for the appellant and Ms. K. Sarma, learned counsel appearing on behalf of Mr. D. Senapati, the learned Advocate for the respondent.

2. The appellant herein is the defendant no.1 in Money Suit No. 12/1997. The suit was instituted by the respondent. The suit was filed for recovery of money amounting to Rs.4,49,754/-, out of which (a) the balance contractual dues was Rs.2,59,550/-, (b) and a sum of Rs.1,40,180/- was claimed towards interest @18% p.a. from 13.03.1994 till filing of the suit, (c) a sum of Rs.20,000/- was claimed towards refund of earnest money deposit, and (d) a sum of Rs.30,020/- was claimed as refund of the security deposit. There were two defendants in the suit, i.e., (1) the appellant ONGC Ltd., and (2) Deputy Superintending Engineer (Civil), R.D.S. North Bank (Sonari) Division, ONGC Ltd., Sivasagar.

3. The case of the respondent-plaintiff, in brief, is that he was awarded civil work at drill site SRF vide work order dated 29.02.1992. The respondent claimed that he had completed the work as per specification and out of total amount of Rs.11,74,310/- due to the respondent for the said work, a part payment of Rs.5,06,520/- was made on 11.12.1994 and a further sum of Rs.4,08,240/- was paid on 13.03.1994 and that the balance due of Rs.2,59,550/- remained unpaid despite repeated demands and earnest money and security deposit also not returned. By issuing advocate's notice dated 13.12.1996, sent by registered post, the respondent made a demand of the balance dues together with 12.04.1994 i.e. date of completion till payment.

4. The appellant no.1 and the defendant no.2 had jointly filed their written statement and had denied the liability to pay the balance amount by stating that the date of commencement of the contract work was 06.05.1992

and as per the terms and conditions of the contract, the contract work was required to be completed within 3 (three) months from the date of commencement of the work. It was projected that in respect of the remaining portion of the contract work, they had issued two letters dated 09.11.1993 and 28.12.1993, which was followed by a telegram dated 04.12.1993. However, the balance work was never resumed and the contract work was not completed as per specification within the time fixed by the appellant. It was also claimed that there was no question of releasing the earnest money deposit and security deposit without finalization of the bill.

5. The following issues were framed for trial:

- (i) *Whether the suit is maintainable in law?*
- (ii) *Whether there is cause of action for the suit?*
- (iii) *Whether suit is barred by law of limitation?*
- (iv) *Whether the plaintiff completed the work within time fixed by defendants?*
- (v) *Whether the plaintiff is entitled to the amount claimed in the suit?*
- (vi) *Whether the plaintiff is entitled to decree as claimed?*
- (vii) *To what relief or reliefs the parties are entitled to under law and equity?*

6. The respondent-plaintiff had examined 2 (two) witnesses, namely, Biren Boruah, the plaintiff (PW-1), and Golap Dutta (PW-2), and the following documents were exhibited, viz., Letter of Acceptance dated 29.02.1992 (Ext.1); Work Order dated 06.05.1992 (Ext.2); Advocate's Notice dated 13.12.1996 (Ext.3); Postal Receipt dated 09.01.1997 (Ext.4); Reply dated

22.09.1997 by Dy. Superintending Engineer (C), ONGC, Sivasagar (Ext.5); summons issued to PW-2 (Ext.6); Work Order dated 07.04.1992, issued to PW-2 (Ext.7); Work Order dated 08.06.1992 to PW-2 (Ext.8); and Letter dated 16.03.1996 by the respondent-plaintiff to the Superintending Engineer (C), RDS Divn., ONGC Ltd., Sivasagar (Ext.9).

7. The appellant-defendant had examined 3 (three) witnesses, being Prabhat Ch. Kalita (DW-1), Shyam Raj (DW-2), Atul Ch. Borah (DW-3) and had exhibited the following documents: Work Order dated 06.05.1992 issued to the respondent-plaintiff (Ext.Ka); Letter dated 09.11.1993 by the Dy. Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Kha); hand written letter dated 28.12.1993 by Shyam Raj (DW-2) of Civil Engineering Section, RDS Divn., Sivasagar to the respondent (Ext.Ga); Memo of Telegram sent on 04.12.1993 by the Dy. Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Gha); Letter dated 22.09.1997 by Dy. Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Unga); and Letter dated 17.03.1997 by the Executive Engineer (C), Housing Divn., thereby handing over charge to Atul Ch. Borah, EE (Civil) (Ext.Cha).

8. The learned Trial Court, in its judgment had discussed all the issues framed for trial. In brief, the discussion on the issues was as follows:-

- a. In respect of issue no.1, the evidence of the respondent-plaintiff as PW-1 was referred to and in light of Ext. nos. 1, 2 and 3, it was held that the appellant and the defendant no.2 could not prove that the respondent- plaintiff did not complete the contract work and had abandoned it. Accordingly, as the respondent had emphasized that work was completed by March, 1994, it was held that the suit was maintainable in law.

b. In respect of issue no.2, the learned Trial Court had taken into consideration the fact that the work order (Ext.2) was issued on 06.05.1992, and as the respondent claimed that the work was completed by March, 1994, it was held that there was cause of action for the suit.

c. In respect of issue no.3, the learned Court considered the claim of the respondent that he had completed the contract work by March, 1994 and the appellant had made the last payment to the respondent on 13.03.1994, it was held that Article 19 of the Limitation Act would be applicable and the period of limitation was till 13.03.1997 and that the suit was filed on 12.03.1997. Thus, it was held that the claim was not time barred.

d. In respect of issue no.4, the learned Trial Court had held that although there were contradictions regarding whether the work was completed by the respondent by March, 1993 or April, 1994, for which respondent was not sure, but the appellant did not produce the measurement book. Moreover, there was no evidence for cancellation of contract, and there was no handing-over and taking-over of the work. The Court also took into consideration the statement of DW nos. 1, 2 and 3 that they were not aware if the respondent had completed the work, and it was held that these circumstances were fatal to the appellant. On the strength of the evidence of PW-2 that the respondent had completed the work earlier than him in respect of Ext.7 and Ext.8, it was held to have proved that the respondent had completed the work and it was held that the appellant had failed to show documentary evidence that the respondent had never completed the work.

Accordingly, the said issue no.4 was decided in favour of the respondent.

e. In respect of issue no.5, as part payments were made to the respondent on 11.12.1992 and 13.03.1994, it was held that the appellant and defendant no.2 had indirectly approved the work done by the respondent by paying two running bills without cancelling the contract. In view of the evidence of the PW-1 that completion certificate was prepared by the appellant is usually not given to the contractor, the learned Trial Court had drawn adverse inference against the appellant under Section 114 *Illustration (g)* of the Evidence Act, 1872 and it was held that the respondent had completed the work and as such he was entitled to be given full payment.

f. In respect of issue nos. 6 and 7, it was held that the respondent was entitled to decree as prayed for.

9. Accordingly, the learned Trial Court had decreed the suit for (i) a sum of Rs.2,59,550/- towards balance amount; (b) Rs.20,000/- against earnest money; and (c) Rs.30,020/- against security deposit. It was held that the respondent was not entitled to interest.

10. Aggrieved by the impugned judgment and decree dated 17.09.2001, passed by the learned Trial Court in M.S. No. 12/1997, the appellant alone had preferred an appeal. The appeal was initially filed before this Court, which was registered and numbered as RFA 115/2001. On receipt of notice, the respondent had filed a cross-objection, which was registered as Cross Objection No. 2/2002. Due to enlargement of pecuniary jurisdiction, the appeal was preferred by the appellant along with the cross-objection by the respondent was transferred to the Court of District Judge, Sivasagar.

11. Thus, although there were two defendants in the suit, only the appellant had filed an appeal against the judgment and decree passed by the learned Trial Court in the suit. However, in so far as the defendant no.2, i.e. Deputy Superintending Engineer (Civil), R.D.S. North Bank (Sonari) Division, ONGC Ltd., Sivasagar is concerned, the judgment and decree passed by the learned Trial Court had attained finality.

12. The learned District Judge, Sivasagar, on receipt of the records of RFA 115/2001 from this Court, registered the appeal preferred by the appellant as Money Appeal No. 3/2006. The cross objection filed by the respondent was initially registered as Misc. (J) Case No. 99/2006. However, pursuant to order dated 29.03.2008, passed by the learned Additional District Judge (FTC), Sivasagar, the said Misc.(J). Case No. 99/2006 was re-registered as Money Appeal No.1/2008.

13. The said two cross appeals were heard and decided by the learned Additional District Judge (FTC), Sivasagar by common first appellate judgment and decree dated 07.11.2008, in Money Appeal No.3/2006 and Money Appeal No.1/2008. The appeal preferred by the appellant was dismissed and in the appeal filed by the respondent, he was granted relief of interest @6% p.a. on the sum of Rs.2,59,550/-; Rs.20,000/-; and Rs.30,020/- from 12.03.1997 i.e. date of institution of suit till realization.

14. It may be mentioned herein that the point of determination was not framed by the learned first appellate Court. However, the learned first appellate Court had independently examined issue no.4 afresh.

a. The learned first appellate Court took into consideration the evidence of the respondent PW-1 and evidence of Golap Dutta (PW-2) and opined that PW-2 could complete the work allotted to him only

after execution of the work allotted to PW-1 was completed and accordingly, it was held that the evidence of PW-1 finds corroboration from PW-2.

b. The learned first appellate Court also took into consideration the claim of PW-1 that no final bill is prepared until and unless "Rig" is installed. The Court had also relied on the evidence of PW-1 to the effect that the work site allotted to him was regarded as low priority zone and no drilling was made to install "Rig". It was also held that the evidence of PW-1 as to low priority zone was supported by PW-2, DW-1 and DW-3.

c. The said learned Court had held that supporting the evidence of PW-1, the PW-2 had stated that after the respondent had completed the work at site field, he had constructed the chemical shed and office shed and PW-2 had also stated that due to public protest, the works allotted to PW-1 and him had to be stopped for about one year.

d. Moreover, the learned first appellate Court had referred to the cross-examination of DW-3, who had stated that if a contractor failed to complete the allotted work, earnest money and security deposit are returned to the contractor with a "Nil Final Bill". Thus, it was held that in this case neither "Nil Final Bill" was raised nor the earnest money and security deposit was returned to the respondent. Therefore, as the DW-3 had stated in his cross-examination that till payment of second running bill, the work was not completed, but he could not say without going through the record whether the same was completed at the time of his retirement, the Court took an adverse view as to why the appellant had not produced the official records maintained in respect of

the work allotted to the respondent and on their failure to produce the measurement book. An adverse view was also taken that despite failure to complete the work by the respondent, the work was not cancelled and remaining part of the contract was not exhibit by the contractor and further adverse view was drawn because if the work was not complete than how the appellant was contemplating to install a "Rig" when there was no material on record that the work was completed through other contractor or agency.

e. Referring to the exhibits of the appellant, it was held that Ext.Ga and Ext. Gha were not relevant documents. Moreover, on the prayer made by the appellant for calling the measurement book under Order XLI Rule 27(b) CPC, it was held that in the Trial Court, such a prayer was never made and that such power could only be invoked only if their list of evidence was found necessary and accordingly, it was held that as it was nowhere stated by the appellant that after issuing Ext.Ga and Ext. Gha, measurement of work was taken, the prayer for calling for the said record was rejected.

f. Relying on several decisions referred in the order, it was held that the order of the learned Trial Court to refuse payment of interest was liable to be set aside.

15. Resultantly, Money Appeal No. 3/2006 filed by the appellant-defendant no.1 was dismissed and the Money Appeal No.1/2008 filed by the respondent- plaintiff was allowed by granting interest @6% p.a. from 12.03.1997 till realization.

16. The appellant- defendant no.1, being aggrieved by the concurrent finding on principal dues and first appellate judgment and decree passed in

respect of interest at the rate of 6% per annum from 12.03.1997 till realization, has filed this appeal under section 100 CPC. This appeal was admitted for hearing on the following substantial question of law:—

Whether on the facts and circumstances of the issue involved in the suit and materials available on record, the finding arrived at by the learned Court below that the work was presumed to be completed by the plaintiff is perverse?

17. It is noticed that an incidental issue of law has arisen in this appeal. Therefore, it has necessitated the Court to formulate a second substantial question of law, which is as follows:-

Is the present appeal maintainable?

18. The learned counsel for the appellant and the respondent had made oral submissions and they have both filed their memorandum of submissions. The same are made a part of record.

Second substantial question of law:

19. The second substantial question of law is taken up first. It is seen that the present appeal is directed against the judgment and decree dated 07.11.2008, passed by the learned Addl. District Judge, Sivasagar in Money Appeal No. 3/2006, by which the judgment and decree dated 17.09.2001, passed by the learned Civil Judge (Senior Division), Sivasagar in Money Suit No. 12/1997 was affirmed.

20. It is reiterated that the learned First Appellate Court had passed a common judgment and decree in Money Appeal No. 3/2006 and Money Appeal No. 1/2008. The decree in Money Appeal No. 3/2006 was for (a) a sum of Rs.2,59,550/-, being the balance contractual dues; for (b) a sum of Rs.20,000/- towards refund of earnest money deposit; and (c) a sum of Rs.30,020/- towards refund of the security deposit. Thus, the total decree in Money Appeal No.

3/2006 was for a sum of Rs.3,09,570/- Rupees Three lakh nine thousand five hundred seventy only). The decree in Money Appeal No. 1/2008 was for the interest on the aforesaid sum of Rs.3,09,570/- at the rate of 6% (six percentile) per annum from the date of filing of the suit i.e. 12.03.1997 till realization.

21. Thus, it is seen that the appellant had not filed any appeal against the judgment and decree dated 07.11.2008 in Money Appeal No. 1/2008, although the decree was passed in common in both the appeals, i.e. Money Appeal No. 3/2006 and Money Appeal No. 1/2008. Resultantly, the decree in Money Appeal No. 1/2008 for interest on Rs.3,09,570/-, had attained finality.

22. The other glaring defect that is noticed in this appeal is that there were two defendants in Money Suit No. 12/1997. It is reiterated at the cost of repetition that the two defendants in the suit were - (1) Oil and Natural Gas Corporation Ltd., represented by its Deputy General Manager (Legal), ONGC Ltd., ERBC, Nazira, and (2) Deputy Superintending Engineer (Civil), R.D.S. North Bank (Sonari) Division, ONGC Ltd., Sivasagar. However, the first defendant in the suit, i.e. Oil and Natural Gas Corporation Ltd., represented by its Deputy General Manager (Legal), ONGC Ltd., ERBC, Nazira had preferred the first appeal, i.e. Money Appeal No. 3/2006 as well as the present appeal. Thus, the money decree passed by the learned Trial Court in Money Suit No. 12/1997 had attained finality in respect of the second defendant, i.e. Deputy Superintending Engineer (Civil), R.D.S. North Bank (Sonari) Division, ONGC Ltd., Sivasagar. It may be stated that in both the appeals, the second defendant has neither joined as a co-appellant, nor the defendant no.2 has been arrayed as a proforma respondent. The decree in Money Suit No. 12/1997 is joint and several against both the defendants.

23. Therefore, Court is inclined to hold that the joint and un-severable decree in respect of second defendant has attained finality. The second defendant is jointly and severally liable to satisfy the decree for (i) principal sum due, (ii) earnest money, (iii) security deposit, and (iv) interest. Hence, notwithstanding that the appellant alone has preferred an appeal, the decree is enforceable against the defendant no.2. In other words, the second defendant had accepted the decree and did not file any appeal.

24. Moreover, in this case the principle of merger of the decree would apply. The decree dated 17.09.2001, passed by the learned Trial Court would get merged with the first appellate decree dated 17.09.2001, passed by the learned First Appellate Court. Therefore, the second defendant has accepted the joint and un-severable decree dated 17.09.2001, passed by the learned Trial Court in Money Suit No. 12/2006, and the first appellant has accepted the first appellate decree passed in Money Appeal No. 3/2006. Therefore, the said two common judgment and decrees is not liable to be interfered with.

25. Accordingly, the second substantial question of law is answered by holding that the present appeal is not maintainable on facts and on law.

First substantial question of law:

26. There is a concurrent finding of fact that the respondent had completed the contract work and therefore, he was liable to be paid.

27. The PW-2, Golap Dutta had stated in his examination-in-chief that on the work site being completed by the plaintiff, he had carried out the construction of chemical shed and office shed. That part of his evidence remains uncontroverted and could not be demolished during cross-examination. Moreover, the DW-3, Atul Chandra Borah had stated in his cross examination

that if the contract work remains incomplete, then the contractor is informed of "nil final bill" and the EMD and SD are returned, which was not done so in this case. No evidence has been brought on record by the appellant to show that (i) the PW-2 was allotted a different work-site and that his work was not done over the work completed by the respondent; (ii) if the work site of the respondent and PW-2 was the same, in that event the appellants got the work completed by another contractor and then handed over the site to the PW-2; (iii) the incomplete work of the respondent was measured.

28. The appellant has exhibited their correspondence with the respondent, being (i) letter dated 09.11.1993 by the Deputy Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Kha); (ii) hand written letter dated 28.12.1993 by Shyam Raj (DW-2) of Civil Engineering Section, RDS Divn., Sivasagar to the respondent (Ext.Ga); (iii) Memo of Telegram sent on 04.12.1993 by the Deputy Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Gha); and (iv) letter dated 22.09.1997 by Deputy Superintending Engineer (C), ONGC, Sivasagar to the respondent (Ext.Unga). However, the last part payment was made to the respondent on 13.03.1994 and then the respondent had served advocate's notice dated 13.12.1996 to the appellant. In response to the advocate's notice, the defendant no.2 had sent a written reply stating therein that there was nothing outstanding against the respondent. Thus, it was not the initial response of the appellant of denying that the respondent had completed the work. The DW-3, Atul Chandra Borah could not say whether the respondent had completed the work.

29. Thus, the preponderance of probability is found to be in favour of the respondent because on one hand the PW-2 had corroborated the evidence of PW-1 as he had stated that he and the respondent were working in almost

the same time and that the respondent had completed the work before him and on the other hand, the appellant could not show that the respondent had abandoned the work in an incomplete state.

30. Therefore, the Court does not find that the learned Trial Court and the learned First Appellate Court had committed any perversity in appreciation of the pleadings and evidence on record.

31. One of the submission by the learned counsel for the appellant was that the DW-1 had wanted to exhibit the measurement books, but there was objection by the respondent and even at the appellate stage, the appellant had moved an application under Order XLI, Rule 27 CPC to allow them to submit additional evidence and to prove the measurement books, but the prayer was rejected. In this regard, on the examination of plaint, there is no pleading as regard to the measurement book. Moreover, the records do not show that before the commencement of trial, any effort was made to produce the measurement book. It is only at the stage of evidence of DW-1 that measurement book was intended to produce by the DW-1 and therefore, objection was made by the learned counsel for the respondent. The appellate Court had assigned reasons as to why additional evidence was not required for deciding the appeal. At the second appellate stage, we cannot substitute our view over the considered decision of the learned First Appellate Court. Hence, the plea raised by the learned counsel for the appellant cannot be accepted.

32. Therefore, in light of the discussions above, the first substantial question is answered in the negative and against the appellant by holding that under the facts and circumstances of the issue involved in the suit and materials available on record, the finding arrived at by the learned Courts below that the work was presumed to be completed by the respondent- plaintiff cannot be held

to be perverse.

33. In the case of *State of Rajasthan v. Shiv Dayal*, (2019) 8 SCC 637, the Supreme Court of India had held that in second appeal, interference is permissible only in case of perversity of concurrent finding. Thus, as the finding cannot be held to be perverse, this appeal fails and the same is dismissed.

34. Resultantly, the First Appellate judgment and decree dated 07.11.2008, passed by the learned Additional District Judge, FTC, Sivasagar in Money Appeal No. 3/2006 and the judgment and decree dated 17.09.2001, passed by the learned Civil Judge (Senior Division), Sivasagar in Money Suit No. 12/1997 are both affirmed.

35. It is clarified that no appeal was filed by the appellant against the judgment and decree dated 07.11.2008, passed by the learned Additional District Judge, FTC, Sivasagar in cross-objection filed by the respondent, which was re-registered as Money Appeal No. 1/2008.

36. Let the second appellate decree be drawn up.

37. Let the LCR be sent back together with a copy of this judgment and decree, as and when it may be drawn-up.

JUDGE

Comparing Assistant