IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 224 OF 2007
WITH
CROSS OBJECTION NO. 15 OF 2008

1) State of Goa,
through Chief Secretary
having office at Secretariat,
Porvorim – Goa.

2) The Executive Engineer,
W. D. VII (NH) P.W.D.,
Panaji, Goa. …. Appellants
(Original Defendants)

Versus

Shri C. M. Abdul Khadar,
S/o K. Mohamed, Age 59 years,
Indian Inhabitant,having office at A/3,
Surendra Bldg., Khadpaband,
Ponda, Goa – 403 401;
represented by his Power of
Attorney Holder Shri Shraju
S/o C. M. A. Kadar,
R/o. Ponda Goa. ….. Respondent
(Original Plaintiff)

Mr. D. Lawande, Government Advocate for the appellants.

Mr. S. D. Padiyar, Advocate for the respondent.

Coram:- R. M. BORDE &
F. M. REIS, JJ.

Judgment Reserved On : 19th November, 2014

Judgment Pronounced On : 24th December, 2014

<u>JUDGMENT</u> (Per F. M. Reis, J)

Heard Mr. D. Lawande, learned Government Advocate appearing for the appellants and Mr. S. D. Padiyar, learned counsel appearing for the respondent.

2. The above appeal challenges the judgment and decree dated 22.01.2007 passed in Civil Suit No. 338/2004 whereby the suit filed by the respondent was partly decreed and the appellants were held liable jointly and severally to pay an amount of Rs.5,53,538.60 plus Rs.1,61,077.80 i.e. Rs. 7,14,696.40 with interest at the rate of 8% per annum with effect from 17.01.2000 and an amount of Rs.1,99,975/- plus Rs.67,000/- i.e. Rs.2,66,975/- with interest at the rate of 8% per annum with effect from 17.01.2001 till the actual payment. After being served with the summons in the above appeal the respondent has filed cross objections inter-alia challenging a sum of Rs.34,78,000/- towards idling charges, Rs.7,50,018.40 towards escalation charges and Rs.3,50,000/- for loss of profit suffered by the respondent.

3. Briefly, the facts of the case are that the item rate tenders were floated by the appellant no.2 for the work of "improvement of junction on Mapusa by- pass at km 9.60 and km

13.90 on NH- 17 of Panaji- Panvel section". The tender of the respondent was accepted at Rs.28,70,105/- and accordingly, the work order was issued on 03.06.1998. An agreement was signed between the parties whereby the work had to be completed within 180 days including the monsoon period i.e. from 18.06.1998 to 14.12.1998. By letter dated 09.11.1998, the respondent informed the appellants that he is unable to execute the work of embankment due to monsoon. The appellants thereafter informed by letter dated 08.01.1999 that there is no difficulty to start the work immediately for widening at km 13.90 Karaswada junction as there is scope for widening without cutting trees. It was also made clear to the respondent that NOC from the Forest Department has been sought for and in the meantime they should start the work to complete it by March end. After the work was completed there were claims raised by the respondent on different counts. As the claims put forward by the respondent were not accepted by the appellants, the suit was filed by the respondent inter-alia claiming that on account of delay in getting the forest permission to cut the trees there was delay in starting the work and consequently the work could not be completed within the stipulated time. It is further the contention of the respondent that as the appellants delayed in getting such permission for more than one year, the machinery as well as the workers hired by the respondent to carry out the work had remained idle. It was also his case that as the cost of the work escalated in the meanwhile it entitled the respondent for extra amount. On all such counts, the respondent inter-alia sought for the following reliefs.

(a) that the defendants, jointly and severally be ordered to pay to the plaintiff a sum of Rs.57,26,071.20 as detailed below along with interest of 24% from the due dates till date of realisation:

(i) Towards idling of men and machineries - Rs.34,78,000.00 with interest of 24% per annum from 13th January, 2000, till date of realisation.

(ii) For work done of Rs.7,14,615.80 as per measurements recorded by the defendant no.2, and Rs.1,66,462.00 towards measurements for works done, but not recorded aggregating to Rs.8,81,077.80 with interest of 24% per annum from 17th January, 2001 till reaslisation.

(iii) Towards security deposit of Rs.1,99,975.00 deducted from RA bills, and EMD of Rs.67,000.00 both refundable after one year of the completion of the works, aggregating to Rs.2,66,975.00 with interest of 24% per annum from 17th January, 2002 till realisation.

(iv) Towards increase in the rates computed at 20%

of the work done totaling to Rs.7,50,018.40 with interest of 24% per annum from 17th January, 2001 till payment or realisation.

(v) Towards or compensation for the delay in handling over the site and reduced profitability computed at Rs.3,50,000.00 with interest of 24% from 03.06.1998 to 13.01.2000 plus pendente lite and future interest till payment or realisation.

(vi) Towards pre suit or past interest from the due date till date of filing the suit, and pendente lite interest from the date of filing of the suit till decree, and future interest from the date of decree till realisation, @ 24% per annum.

(b) That the defendants, jointly and severally, be directed to pay to the plaintiff the costs of the suit.

(c) For such further and other reliefs as this Hon'ble may deem fit and proper.

4. The appellants filed their written statement disputing the claim put forward by the respondent. It was the contention of the appellants that the suit was barred by limitation as the work was completed on 17.01.2001 and the suit came to be filed somewhere on 10.11.2004 which was according to the appellants

hopelessly barred by limitation. It is further the case of the appellants that there was no delay which entitled the respondent for any of the claims sought in the suit. The appellants also disputed the manner in which the work was conducted by the respondent and further stated that though the permission to cut the trees was obtained after a period of one year, there was enough space which would allow the respondent to carry out substantial work of the work contract. For other reasons as stated in the written statement, the appellants submitted that the suit deserves to be dismissed.

5. The learned Judge after recording of evidence and hearing the parties by the impugned judgment has partly decreed the suit in terms as mentioned herein above. Being aggrieved by the said judgment, the appellants have filed the above appeal and the respondent has filed cross objections claiming the reliefs which were refused by the learned Judge by the impugned judgment.

6. Mr. D. Lawande, learned Government Advocate appearing for the appellants has essentially pointed out that the only objection of the appellants to the impugned judgment is that the claim of the respondent was barred by limitation. The learned counsel has pointed out that in terms of Article 18 of the Limitation

Act, the suit for recovery of the amount for the work done is to be filed within three years from the date of doing such work. In the present case, the averments in the plaint itself suggest that the work was completed in January, 2001 and the suit was filed only in November, 2004 which was much beyond the time prescribed and as such the suit was liable to be dismissed. The learned counsel further pointed out that the learned Judge has misconstrued the material on record to come to the conclusion that the suit filed by the respondent was not barred by limitation.

7. On the other hand, Mr. S. D. Padiyar, learned counsel appearing for the respondent has disputed the said contention. The learned counsel has pointed out that besides the amount which has been awarded by the impugned judgment the respondent is also entitled for damages sustained by the respondent on account of idling charges. The learned counsel further pointed out that there was an inordinate delay which prevented the respondent to start with the work immediately as the appellants delayed in getting the requisite permission from the Forest Department to cut the tress. The learned counsel further pointed out that the delay was more than one year which forced the respondent to keep the machinery as well as the workmen idle which entitled the respondent for compensation on account of

idling charges. The learned counsel further pointed out that when the work was actually started, there was an escalation in the cost of material to be used to perform the work order which entitles the respondent for an extra amount of Rs.7,50,000/- towards escalation charges as well as Rs.3,50,000/- and odd towards loss of profit. The learned counsel further pointed out that the delay cannot be attributed to the respondent and as such the appellants are liable to pay the compensation on that count. The learned counsel further pointed out that the record clearly discloses that the final bill was prepared within the period of three years from the date of filing of the suit which itself shows that the suit is not barred by limitation. The learned counsel as such points out that the appeal be dismissed and the cross objections filed by the respondent be allowed.

8. On the basis of the rival contentions, the following points for determination arise in the present appeal.

POINTS FOR DETERMINATION

1. Whether the suit filed by the respondent is barred by limitation ?
2. Whether the respondent is entitled for compensation towards idling charges, loss of profit and escalation as claimed in the cross

objections ?

9. With regard to the contention of the learned Government Advocate appearing for the appellants that the suit is barred by limitation, we find it is undisputed that the final bill was accepted by the Government within the period of three years from the date of the filing of the suit. The cause of action for filing a suit for recovering of the amount payable towards the work contract would not arise until and unless the final bill is prepared and accepted by the appellants. The cause of action for disputing such bill and to recover the amount payable to the contractor would not accrue to the contractor only after the final bill is finalized by the appellants. In the present case, the learned Judge while examining the said aspect has noted that as the final bill was not accepted until the filing of the suit, the question of holding that the suit was barred by limitation would not arise. In fact, in the present case, this Court while examining an application under Order 7 Rule 11 of the Civil Procedure Code to reject the plaint on the basis that the suit was barred by limitation has observed at para 5 thus :

> "Apparently, the plea raised by the plaintiff-respondent, that the final bill was not prepared by the defendants and, therefore, the cause of

> action would continue till preparation of such final bill in relation to the works carried out by the plaintiff-respondent, has not been challenged nor denied. Even, otherwise, when the work is entrusted by the Government to a contractor on acceptance of his tender, certainly, the cause of action to claim the money for the work carried out would arise only after issuance of final bill in the matter which should be preceded by taking joint measurements of the work carried out and finalization of the calculations regarding the dues and the question of cause of action for the contractor to demand the money prior thereto cannot arise."

10. Considering the facts and circumstances of the case, we find that the learned Judge in the impugned judgment has also noted that the amount payable to the respondent were reflected in the books of account of the appellants herein. In such circumstances, the findings of the learned Judge that the suit is not barred by limitation cannot be faulted. Hence, the contention of Mr. D. Lawande, learned Government Advocate appearing for

the appellants that the suit is barred by limitation has no basis and deserves to be rejected. The first point for determination is answered accordingly.

11. With regard to the second point for determination, the respondent has claimed in his cross objections that he is entitled for a sum of Rs.34,78,000/- towards idling charges. The learned Judge while appreciating the evidence on record has come to the conclusion that the respondent has failed to produce any documentary evidence to show that in fact his machineries had remained idle at the site and that his engineers, supervisors, and staff were idle at the site for the said period. In the present case, the work order was issued on 03.06.1998. The record also reveals that by letter at Exhibit PW1/F dated 08.01.1999, the Forest Department was informed to issue no objection certificate as early as possible. In such circumstances, after the said date the respondent was aware that no work could be started as requisite NOC to fell the tress was not obtained from the Forest Department. As there was no evidence on record nor any material produced by the respondent to substantiate his contention that the machineries and the personnel were left idle during the interregnum, the learned Judge was justified to reject such claim put forward by the respondent. Mr. Padiyar, learned counsel

appearing for the respondent fairly conceded that there was no material produced on record to substantiate such claim put forward by the respondent.

12. The only aspect to be examined is with regard to the claim by the respondent towards loss of profit of Rs.3,50,000/- and a sum of Rs.7,50,000/- towards escalation cost. It is the contention of Mr. Lawande, learned Government Advocate appearing for the appellants that such claim is not found in the contract executed between the parties and as such, the respondent is not entitled to claim any amount on those counts. But however, on examining the whole gamut of facts and the correspondence produced by the respondent one would have to ascertain the nature of the agreement between the parties and whether the respondent would be entitled to any such amount. As observed by the learned Trial Judge in the impugned judgment, the fact that there was a delay in starting with the work as the requisite permission was not obtained to cut the trees is attributed to the appellants herein. The rates quoted by the respondent were as on the date when the quotations were submitted by the respondent. The work was supposed to start in June, 1998 and complete on 14.12.1998. But however, on account of delay in obtaining the permission to cut the trees, it could start only in January, 2001

when the forest clearance was obtained by the appellants. The delay was of almost 1½ year in starting the work. The agreement entered into by the parties was predicated on the factual situation as it stood as on the date of the agreement and without considering the subsequent facts which delayed the commencement of the work tendered which was beyond the control of the respondent/contractor. The work to be performed by the respondent, no doubt, would require hiring of the machinery and labours and other requisite material for completing the work tendered. The rates contemplated were as prevailing on the date of the agreement between the parties which apparently would not prevail at the time when the work was actually started by the respondent on account of delay in obtaining the requisite permission by the appellants. It cannot be disputed that escalation is a normal incident arising out of gap of time in this inflationary age, in performing the work which was the subject matter of the agreement between the parties herein. The wages of the workers would also increase during the period of such delay. In fact that the rates had changed and/or wages had also increased in the interregnum was not seriously disputed by the learned Government Advocate appearing for the appellants. It is also well settled position of law that the contractor is not expected to complete the work on the basis of original rates for indefinite period of time beyond the time stipulated for its completion. In the present case, the respondent had to complete the work for a period beyond 1½ year on account of delay on the part of the appellants in obtaining the permission to fell the trees.

13. In this connection, the Apex Court in the judgment reported in ***(2009)16 SCC 504*** in the case of ***Union of India V/s Saraswat Trading Agency and others,*** has observed at paras 21, 22 and 23 thus :

> "**21.** Mr. S. Wasim Qadri, learned counsel appearing on behalf of the appellant, submitted that in the absence of any escalation clause in the agreement the respondent's claim for enhanced payments for the period 3-8-1991 to 31-12-1992 during which the agreement was in force was quite unfounded and both the arbitrator and the Division Bench of the High Court were in error in granting the claim for that period. The submission made by Mr. Qadri is fully answered by the decision of this Court in *Tarapore & Co. vs. State of M.P.,* (1994) 3 SCC 521, (noticed

both by the arbitrator and the Division Bench of the High Court).

22. In paragraph 27 of the judgment in *Tarapore & Co.* this Court observed as follows: (SCC p. 533)

> "27. But then, the terms at hand did require the appellant (who is the contractor) not to pay less than fair wages as would appear from what has been stated in Para 2.10 and Para 1 of Annexure-B. The Explanation to latter para states that where fair wages have not been notified these wages would be the one "prescribed by the PWD (Irrigation Department) for the division in which the work is done". Now these wages were being increased from time to time as would appear from the decisions of the wage committee referred to above; and if the appellant was being required to pay wages as per these decisions, we do read a meeting of mind insofar as the claim of escalated payment on account of increase of fair wages is concerned. It has to be assumed that when the appellant was required to pay fair

wages at increased rates, the authorities did visualize that the appellant would not do so by cutting down its profit. By asking the appellant to give tender by taking into account the fair wages notified at the time of inviting tenders, the authorities did give an impression that fair wages to be paid would be the one then notified/prescribed, a 1a the Explanation to Para 1. In such a situation, if rates of fair wages were raised afterwards, the tendered sum cannot be taken to be agreed amount for completing the contract, in the face of the directions of the authorities requiring the appellant to pay wages at rates higher than those prescribed or notified at the time of inviting tenders. On this fact situation, we hold that the State had by necessary implication agreed to reimburse this increased payment."

23. In a more recent decision in *Food Corporation of India vs. A. M. Ahmed & Co.,* the Court reiterated the same view and in para 32 of the judgment observed as follows: (SCC pp. 794-95)

"32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The Arbitrator by awarding wage revision

> has not mis-conducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion."

In the judgment of the Apex Court reported in ***AIR 1989 SC 1034*** in the case of ***P. M. Paul V/s Union of India,*** the Apex Court did not find error in awarding 20% of the value of contract towards the compensation on account of escalation and/or delay charges.

14. Taking note of the said observations of the Apex Court and as there was delay of 18 months in commencement of the work by the respondent on account of default on the part of the appellants in obtaining the requisite permission and the fact that there was an escalation in the prices of the material and wages of the workers during the said period cannot be disputed and taking note of the nature of the agreement between the parties and the nature of the work agreed to be performed by the respondent, we find that the respondent is entitled for compensation due to escalation in the prices and delay in executing the work. Though the respondent has not produced any appreciable evidence to substantiate such claim but taking note of the fact that the respondent is entitled for escalation, we find that a reasonable

compensation on that count could be worked out at 10% of the value of the contract which was a sum of Rs.28,70,105/-. In such circumstances, we find that the respondent is entitled for compensation towards escalation and delay in executing the work for a sum of Rs.2,90,000/-. The learned Judge as such was not justified to refuse the claim put forward by the respondent towards the compensation on account of delay and escalation cost. To that extent, the impugned judgment passed by the learned Judge deserves to be modified. Needless to say that the said amount would carry interest at the rate of 8% per annum from the date of the filing of the suit up to the actual payment. The second point for determination is answered accordingly.

15. In view of the above, we pass the following :

O R D E R

(i) The appeal stands dismissed.

(ii) The cross objections are partly allowed.

(iii) The appellants are directed to pay a sum of Rs.2,90,000/- together with interest thereon at the rate of 8% per annum from the date of filing of the suit up to the actual payment. The impugned judgment stands modified accordingly.

(iv) Decree to be drawn accordingly in above terms.

(v) The appeal stands disposed of accordingly with no order as to costs.

F. M. REIS, J **R. M. BORDE, J**

at*