

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 312 OF 2008

Shri Ram Gangadharan,
son of Keshav Krishna Gangadharan,
aged 68 years, occupation Contractor,
resident of H. No, 1762,
Behind Goa housing Board Office,
Bardez, Goa.

..... Appellant

V e r s u s

1. State of Goa,
through the Chief Secretary,
with office at Vidhan Sabha Complex,
Porvorim, Goa,.
2. Water Resources Department Works
Division VII, GTIDC,
through the Executive Engineer,
with office at Goa Tillari Irrigation
Development Corporation,
Dhargal, Pernem, Goa.
3. Goa Tillari Irrigation Development Corporation,
a Government Company
incorporated under the Companies Act, 1956,
through its Managing Director,
with office at Junta House, Annexe
Panaji, Goa.

..... Respondents

Mr. Sudesh Usgaonkar and Ms. Marie Rosette Pereira, Advocates for the Appellant.

Mr. Vivek Rodrigues, Government Advocate for the Respondents.

Coram :- **F. M. REIS, J**

Date : **5th February, 2016**

JUDGMENT

Heard Shri Sudesh Usgaonkar, learned Counsel appearing for the
Appellants and Shri Vivek Rodrigues, learned Government Advocate appearing for

the Respondents.

2. The above Appeal challenges the Judgment and Decree dated 28.04.2008, whereby, Civil Suit bearing no. 35 of 2007, filed by the Appellant was partly decreed and the Respondents were directed to pay a sum of Rs.24,039/- to the Appellants along with interest thereon at the rate of 6% per annum from 19.10.2001 till the date of actual payment.

3. Briefly, the facts of the case are that the Appellant is engaged in the business of executing construction contracts for the departments of the Appellant no. 1 and its undertakings in the State of Goa and also business of executing the construction contracts of other State Governments in their states and, as such, is a registered Contractor with the Respondent no. 2. According to the Appellants, the Respondent no. 2 for and on behalf of the Respondent no. 3, issued a public tender notice dated 30.08.2001 inviting tenders from the registered contractors of Irrigation department of Respondent no. 1 for construction of a Tail Minor from Ch 1380-2580 mts. of B-1 distributory of Right Bank Main Canal of Tillari Irrigation Project at Ibrampur Village in Pernem Taluka at an estimated cost of R.9,01,654/-. Accordingly, the Appellant submitted a tender for the aforesaid said work at Rs.9,07,770/- which was accepted by the Respondent no. 2 by letter dated 19.10.2001 and the Appellant executed the Agreement on 19.10.2001 and paid a sum of Rs.22,539/- as earnest money deposit with the Respondent no. 2 on 19.10.2001. It is further the case of the Appellant that the stipulated date for commencement of work as per the tender notice was from the 10th day after the

date of the work order which was 28.10.2001 and the time allowed for completion of the work was 170 days including the monsoon and, as such, the date of completion was 16.04.2002. It is further the contention of the Appellant that immediately after the civil work Order, he approached the Assistant Engineer for taking possession of the site but, however, the possession of the site was not handed over and he was informed that the land where the work was to be executed required to be acquired by the Respondent no. 1 which proceedings were not completed. According to the Appellants, he visited the office of the Assistant Engineer many times in November and Decembet2002 but the site was not handed over to him. It is further his case that in anticipation of getting such work once the possession of site was handed over and considering the time within which such work had to be completed, the Appellant had incurred substantial expenditure on account of different heads as mentioned in the plaint. It is further his case that he learnt in the month of January, 2002 that acquisition proceedings were expected to conclude in February, 2002 and since half of the stipulated period had lapsed without the site being handed over to him, the Appellant insisted with the Respondent no. 2 to hand over the site as the Appellant was incurring heavy losses in keeping his men and machinery idle. It is further his case that by letter dated 08.02.2002, the Assistant Engineer called upon the Appellant to depute his representative along with the qualified technical staff for joint survey work of fixing D.W.C. Alignment, taking initial ground levels. It is further the case of the Appellant that Respondent no. 2 suo motu extended the validity of the contract from 16.04.2002 till 31.12.2002 and the said extension was communicated by the Respondent no. 2 by letter dated 15.04.2002. It is further his case that such

extension was necessitated solely on account of the breach committed by the Respondent no. 2 by not handing over the possession of the sit. It is further his case that it was falsely stated in the letter dated 12.11.2002 that the Appellant has no intention in the work and the Appellant was requested to do the needful so that maximum area is brought under irrigation. It is further his case that by Order dated 16.01.2003, the Appellant extended the validity of the contract up to 31.01.2003 and even during the extended period, the Respondent no. 2 failed and neglected to acquire the land for contract work and by its order dated 23.04.2003, the Respondent no. 2 again extended it for the third time till 31.12.2003 and it was admitted that the site could not be handed over to the Appellant owing to the land acquisition difficulties. It is further his case that the Respondent did not complete the acquisition proceedings within a period of three extensions and the work could not commence. It is further their case that the Respondents utilised the services of the workers of the Appellants to carry out re-survey work for the purpose of acquisition though such work was not within the scope of the tender contract. It is further his case that he had engaged technical persons to carry out the work and who were paid wages during the whole period which the Respondents are liable to compensate the Appellant. It is further his case that on account of the breaches and inaction on the part of the Respondents, the work could not be started before 31.12.2003 which resulted in heavy losses to the Appellant. It is further his case that by letter dated 18.10.2004, the Appellant showed his readiness and willingness to execute the work provided the site was handed over to him and the extension of time was allowed. But, however, the Respondent by letter dated 25.01.2005 informed the Appellant that the scope of the work under the Agreement has

changed on account of site condition and, therefore, under Clause 13 of the Agreement, the work is withdrawn and the contract is closed w.e.f. 12.01.2005. Consequently, the suit was filed for compensation and damages as, according to the Appellant, after a period of four years from the date of the work order without any work having been commenced, the Appellant suffered immense damages and, as such, the Appellant claimed a sum of Rs.26,88,320.07 along with interest at the rate of 18% per annum from the receipt of the notice dated 25.05.2005 until actual payment.

4. The Respondents filed their written statement admitting that the tender was issued to the Appellant for a sum of Rs.9,30,777/-. It is further their case that though the land acquisition was not completed, major portion of the land where the work was to be executed had the NOC of the concerned land owners for starting the work and that the Appellant had informed the Respondents that he could start the work only after the whole land was handed over to the Appellant. It is further their case that the Appellant failed to appoint any technical staff nor he submitted any documents in connection with the employment of such technical persons. It was further their case that the Appellant was called upon by the Respondents to fix the program of completion of the work on the basis of the time which would be taken by the land acquisition and that extension of time was given to enable the Appellant to complete the work. It was further pointed out by the Respondents that upon actual survey, it was noticed that the scope of the work was to be altered slightly to derive maximum benefit for irrigation facilities to the fields and due to non-finalization of the Agreement and the land acquisition proceedings

having been delayed, the Respondents submitted that the suit deserves to be dismissed.

5. After recording of evidence and framing of issues, the learned Trial Judge upon appreciating the evidence on record has come to the conclusion that the Appellant has failed to establish that he is entitled for any damages as also that he had spent Rs.15,000/- for pre-tender studies. Being aggrieved by the said Judgment, the Appellant have preferred the present Appeal.

6. Shri Sudesh Usgaonkar, learned Counsel appearing for the Appellant, has pointed out that the work could not be started by the Appellant on account of the failure on the part of the Respondents to handover the site to the Appellant for commencing the work. It is further his contention that as the Respondents were unable to complete the acquisition proceedings within the stipulated period, there was delay in commencing of the work. Learned Counsel further pointed out that the work had to be completed within a period of 170 days and that the work which was entrusted to the Appellant would entail specialised machinery work force and the Appellant had to pay advance to keep ready such machinery. Learned Counsel further pointed out that the machinery was not readily available and in order to ensure that the machinery would be provided by the hirer, the Appellant had to make deposits with such persons. Learned Counsel further pointed out that such amounts were forfeited as the work could not commence on account of the inaction on the part of the Respondents. Learned Counsel further pointed out that in anticipation of the commencement of the work, the Appellant had also paid

advances to the contract workers in order to ensure that workers were readily available. Learned Counsel further pointed out that workers were hired by the Appellant to carry out joint inspection at the instance of the Respondents and, in such process, the workers were kept at the site by erecting temporary structures in order to complete the joint survey work. Learned Counsel further pointed out that for such works, the Appellant had suffered expenses which the Respondents are bound to repay. Learned Counsel further submits that the work contract itself was a sum of more than Rs. 9,00,000/- and, as such, the minimum profit which the Appellant could expect was atleast 25%. Learned Counsel further submits that the Appellant had also hired technical staff who were asked to visit the site from time to time to ensure that the work would be immediately completed. Learned Counsel further pointed out that the payments of such staff has been established by the Appellant on the basis of the receipts produced on record which have been duly proved. Learned Counsel further pointed out that the work could not be completed only as the Respondents wanted to re-align the route for irrigation and, as such, the Appellant is entitled for damages from the Respondents. Learned Counsel has thereafter taken me through the material as well as documents produced on record to point out that the Appellant has established his claim for damages. Learned Counsel further pointed out that the learned Trial Judge has erroneously awarded the refund of the earnest money and the cost of the tender forms only without directing payments towards compensation and damages suffered by the Appellant.

In support of his submissions, the learned Counsel has relied upon the Judgment reported in **AIR 1995 Kerala 140** in the case of **C. T. Xavier & Ors. v. P. V. Joseph & anr.** and the Judgment of the Apex Court reported in **(1999) 3**

SCC 500 in the case of **Dwaraka Das vs. State of M. P. & anr.**

7. On the other hand, Shri Vivek Rodrigues, learned Government Advocate, appearing for the Respondents, pointed out that the claim put forward by the Appellant is fictitious, exaggerated and without any basis. Learned Government Advocate further pointed out that the tender was for the sum of Rs.9,00,000/- and the alleged damages claimed by the Appellant is more than Rs.22,00,000/- which itself shows that the claim is without any substance. Learned Government Advocate further pointed out that though delay was caused as the acquisition proceedings were not completed, nevertheless, the Appellant had failed to provide the technical staff to do the survey work. Learned Government Advocate further pointed out that the question of hiring machinery or contract workers much before handing over the possession of the site is unacceptable as no contractor carries out such exercise. Learned Government Advocate further submits that the Appellant had not hired any staff nor workers and, as such, the contention of the Appellant on that count deserves to be rejected. Learned Counsel further submits that the claim for wages of workers who have carried out inspection is exaggerated as hardly two or three workers were provided by the Appellant to carry out such work. Learned Government Advocate further submits that the Appellants have failed to carry out the work as the Respondents on account of technical difficulties and, as such, the Appellant is not entitled for any claim for damages. Learned Counsel further submits that in terms of the Agreement executed between the parties, the Appellant is not entitled for any damages. Learned Counsel further pointed out that the Appeal be rejected.

8. Upon hearing the learned Counsel and on perusal of the records, the following points arise for my determination :

(1) Whether the learned Trial Judge was justified to award only a sum of Rs.25,000/- to the Appellant⁶ being the amount paid towards earnest money and the cost of the tender form ?

(2) Whether the learned Judge was justified to refuse any amounts towards compensation/damages claimed by the Appellant ?

9. On perusal of the records as well as evidence and considering the submissions of the learned Counsel, the records reveal that the Appellant was awarded a tender contract to carry out the work specified in the tender form which could not be started on account of the fault by the Respondents. The acquisition proceedings were not completed and, as such, the Respondents have failed to hand over the possession of the site to the Appellant. In fact, the learned Trial Judge whilst examining issue no. 1 on that count has come to the conclusion that the delay in starting the work was on account of the Respondents. Hence, the claim of the Appellant would have to be examined in the context that the Respondents were unable to hand over the site to the Appellant to commence the work awarded by the tender contract in terms of the Agreement.

10. With regard to the claim of the Appellant on account of payment of wages to the workers, I find that it is not disputed that in fact the Appellant had

supplied workers to the Respondents to carry out such work though the work was in connection with the acquisition proceedings. It would be pertinent to note the details of the claim of the Appellant for damages incurred as referred to in the plaint states thus :

“a) entered into contracts for hire of heavy earth moving machinery, namely, Poclain for the execution of the work and paid advance amount of Rs.15,000/- to S. Kumar Builders.

b) Entered into contract for supply of granite stones and paid advance amount of Rs.10,000/- to M/s. S. Kumar Metals.

c) Entered into contract for hiring 5 trucks for execution of work and paid and amount of Rs.15,000/- as advance to Shyam Shree Santeri Prassad Garage.

d) Hired 12 labourers for 15 days through labour contractor and paid advance of Rs.22,500/- to the contractor towards their wages, for making sheds for the workers and for purchasing the utensils.

e) Entered into contract for supply of additional labour gangs with labour contractors and paid advance amounts of Rs.24,740/- to various labour contractors being Rs.12,240/- to Ashok, Rs.6500/- to Basappa and Rs.6000/- to Ramu.

f) Engaged services of Civil Engineer on monthly

remuneration of Rs. 6,000/- per month from November, 2001 to January, 2005.

g) Engaged services of supervisor on monthly remuneration of Rs.2,500/- per month from November, 2001 to January, 2005.”

11. In support of such claim, the Appellant has produced some receipts which are at exhibit 31 collectively. The Appellant has also produced another receipt at exhibit 32 collectively which is the amount allegedly paid for hire of heavy earth moving machinery and the contract for granite stones which is at exhibit 33 and towards hire charges of trucks at exhibit 34. On perusal of the said documents, I find that such receipts have not been duly proved. The persons who have received the amount and the witnesses who have been examined in support thereof have not categorically admitted the receipt of the amounts and the reason even assuming the payments are to be believed, why the amounts were not refunded to the Appellant when admittedly their services were not utilised by the Appellant. The learned Trial Judge has rightly taken note of the admission of Pw.1 in the cross examination that apart from the receipts which have been prepared by him, there is no other material to support the payment of such amounts. Even on perusal of such receipts, I find that all the receipts are emanated from the office of the Appellant and, as such, the learned Trial Judge has rightly discarded the said receipts to come to the conclusion that the Appellant was not entitled to any of the amounts referred to therein. The learned Judge also rightly appreciated the evidence of Pw.2, wherein in the cross examination it is admitted that he does not have any document to show that the Appellant had appointed him at the site or to

show that he was paid by him Rs.120/- per day. The alleged payment to the witnesses, Pw.2, Pw.3 and Pw.4 have not at all been established by the Appellant as no document was produced on record except the receipt at exhibit 31 to show that such amounts were paid by the Appellant. The learned Judge has also examined the evidence of Pw. 5 who had admitted that no granite stones were supplied to the Appellant and had not justified why such amounts were not refunded to the Appellants when admittedly, no such stones were supplied to the Appellant. So also the claim of the Appellant of Rs.15,000/- on account of hire charges of five trucks has also not been established as the Appellant failed to prove that such amount was in fact paid by any reliable evidence on record. As pointed out herein above, admittedly, no work was carried out by the Appellant at the site as the site itself was not handed over to the Appellant and, consequently, the question of paying hire charges or purchasing granite stones to carry out the work appears to be remote. The learned Trial Judge has rightly appreciated the evidence on record to come to the conclusion that the Appellant has failed to establish any of the payments referred to therein. In any event, no doubt, the Respondents have taken benefit of some of the workers to do the re-survey for the purpose of acquisition proceedings. On that count, the Appellant may be entitled for some amount of compensation for the work done, but the number of workers engaged for such work has not been established by any material on record.

12. The only aspect to be examined as such is whether the Appellant is entitled to any amount of compensation. In the present case, admittedly, the Respondents unilaterally extended the period of the contract from time to time on

three occasions. Such extensions itself suggests that delay in starting the work was on account of the lapse on the part of the Respondents in completing the acquisition proceedings. The records also reveal that work could not commence as thereafter after examining the soil conditions, the Respondents decided to re-align the work. In such circumstances, the Agreement could not be performed on account of lapses on the part of the Respondents. The margin of profit in such cases of tender projects is between 10% to 20%. In the present case, it is an admitted fact that the work had not taken off at all on account of default on the part of the Respondents. The alleged claim of damages has not been established by the Appellant by any reliable and credible evidence on record and, as such, considering the peculiar facts and circumstances of the case, I find that a consolidated sum of 5% of the value of the tender work would be justified to be paid by the Respondents to the Appellant towards such compensation. This has been examined taking into consideration that there was no fault on the part of the Appellant in not starting the work as the site was not handed over to the Appellant as provided in the Agreement.

13. The Apex Court in the said Judgment in the case of **Dwaraka Das vs. State of M. P. & anr.** (supra) as observed at para 9 thus :

“9. Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in

the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured.”

To the same effect is the judgment in *Mohd.*

Salamatullah v. Govt. of A.P.—After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that “we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract”. It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs 20,000 on account of damages as expected profit out of the contract which was found to have been illegally rescinded.”

14. Considering that the termination of the contract was for the default committed by the Respondents, I find that a sum of Rs.45,000/- as damages towards loss of profit would be justified as payable to the Appellant by the Respondents which works out to 5% of the Contract price. This is not a case where work had started and thereafter abandoned by the Respondents. In the case at hand, the work could not be started for reasons not foreseen by the Respondents. In such circumstances, I find that the said amount would be reasonable and just in the facts of the case. The said amount is in addition to the amount awarded by the learned Trial Judge for the refund of the earnest money, etc.. The points for determination are answered accordingly.

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

ORDER

(I) The Appeal is partly allowed.

(II) The impugned Judgment and Decree passed by the learned Judge dated 28.04.2008 is modified and besides the amount awarded in the said Judgments, the Respondents are directed to pay a further sum of Rs.45,000/- to the Appellant together with interest thereon at the rate of 6% per annum from the date of filing of the suit till the actual payment.

(III) The Appeal stands disposed of accordingly with no order as to costs.

F .M. REIS, J.

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