

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.123 of 1998

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1. State of Bihar, through the Collector, Vaishali at Hajipur, P.S.- Hajipur,
District- Vaishali.
2. The Collector, Vaishali, Hajipur, P.S. & P.O.- Hajipur, District- Vaishali
3. The Chief Engineer, Irrigation, P.S. & District- Muzaffarpur
4. The Superintending Engineer, Tirhut Canal Circle, Gandak Project,
Muzaffarpur.
5. The Executive Engineer, Tirhut Canal Division, Gandak Project, Hajipur,
P.S.- Hajipur, District- Vaishali

Defendants- Appellants

Versus

M/s Indu Construction, Hajipur, P.O.- Hajipur, District- Vaishali, through its
Parnter, Dinanath Singh, son of late Ram Chandra Singh, R/o mohalla- Bagtaj
Khan @ Pokhra, Veeer Kuewar Singh Colony, P.S. & P.O.- Town Hajipur,
District- Vaishali. Respondent

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Appearance :

For the Appellants : Mr. Khurshid Alam, AAG
Mr. Asif Kalim, AC to AAG -12
For the Respondent : Mr. DR.MAYANAND JHA

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**CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN
SHARMA**

C.A.V. JUDGMENT

Date : 05-09-2017

The present appeal has been preferred against the judgment dated 20.12.1997 decree dated 08.01.1998 passed by Sri Uma Shankar Prasad Mishra, the then learned Sub-Judge Ist, Vaishali at Hajipur in Money Suit No. 24 of 1995 whereby the suit filed by the plaintiff-respondent was decreed for a sum of Rs. 25,91,876.25/- along with interest at the rate of 16 % per annum till realization of the amount and cost of Rs. 19704/-.

2. Money Suit No. 24 of 1995 has been filed by the plaintiff-respondent for decree of Rs. 22,81,294.56/- along with interest and cost described in schedule to the plaint pertaining to



4 works contract and the agreement entered into between the plaintiff-respondent through Dina Nath Singh and Government of Bihar through the Executive Engineer, Tirhut Canal Division Project, Hajipur under the Water Resources Department. The details of the agreement are as follows :-

“1. Agreement No. 61 F2 of 1984-85 dated 04.0-9.1984 for construction of Cross Drainage Work at Running Distance 6.00 of Nagarwa Distributory of the Ghaghra River. The estimated value of the work was Rs. 08,04,922.26/-.

2. Agreement No. 62 F2 of 1984-85 dated 04.09.1984 for construction of head Regulator-cum-Cross Regulator-cum-Single Line Road Bridge at R.D. 46.239 of Govindpur Sub-branch Canal for an estimated value of Rs. 3,92,381.76/-.

3. Agreement No. 10 F2 of 1982-83 dated 01.02.1983 for construction of C.D. Work at R.D. 11.60 of Nagarwa Distributory. The estimated value of the work was Rs. 1,44,255.40/-.

4. Agreement No. 204 of 1984-85 dated 15.03.1985 for construction of H. R. -cum-C.R.-cum- SLR Bridge at R.D. 6.05 of Jandaha Distributory for an estimated value of Rs. 03,19,961.03/-.”

3. The plaintiff had to do some extra works of diversion and dewatering in order to carry out the agreements no. 61 and 62 F2 of 84-85 under intimation of and on verbal nod and written communications of the controlling officers. The plaintiff



deposited a sum of Rs. 40,015/- and 20150/- by way of earnest money before the execution of the agreements no. 61 and 62 F2 of 84-85 respectively. The work orders for agreement no. 61 and 62 F2 of 84-85 were issued on 29.09.1984 during rainy season. Although the tenders were submitted in January, 1984 and decision was taken thereon on 25.05.1984. The plaintiff agreed to perform work of construction at a rate 15 % below the estimated rate and thus, the negotiated value of the agreements no. 61 and 62 F2 was Rs. 11,97,304/-. The plaintiff started the work in right earnest and carried out extra works of dewatering and diversion of river water, without which the contract work could not be carried out due to existence of rain water in the river bed, awaiting final work order for the same, on the assurance given by the concerned officials like the Junior Engineer, the Assistant Engineer and the Executive Engineer. The Junior Engineer visited the site and wrote to the superior officers, about the problem existed and recommended that necessary order be passed, vide his letter dated 10.01.1985. The Executive Engineer directed the plaintiff to carry out the contract work by doing diversion and other works vide his letter no. 579 dated 16.02.1985. However, due to laches, on the part of the present defendants-appellants, the work could not be



completed in time and the same was stopped by them as funds were not made available timely and the period of works elapsed and they stopped the construction work. The plaintiff raised first on Account Bill for a sum of Rs. 57,332.31/- which included the value of those extra works. The plaintiff firm started requesting the authorities to make payment for the work done by it and return of the earnest money vide different letters but they turned a deaf ear. The plaintiff sent a letter to the Superintending Engineer, Muzaffarpur, on 22.09.1988, who happens to be the Arbitrator, as per the agreement, for deciding the claim of the plaintiff but no information was given by him. Thereafter, the plaintiff gave legal notice to the Executive Engineer under Section 80 of the C.P.C. on 04.10.1993. The Executive Engineer sent reply to the legal notice on 03.12.1993 denying the claim wrongly stating that the contract had been rescinded and earnest money and security money have been forfeited both, neither any notice prior to said decision was given nor that decision was communicated to the plaintiff, hence, the same was not binding on him. It is expected that a contractor would earn a profit of Rs. 10 % of the agreement, if he carries the work, and thus, he can claim charge on that rate, if he is prevented to carry out the same due to fault and latches on



the part of the authorities. Thus, the plaintiff was entitled to claim damage at the rate of 10 % of the agreement amount i.e. Rs. 1,11,334.69/-. The plaintiff was entitled to get refund of the earnest money of Rs. 60,465/- and sum of Rs. 83,957.90/- for which he carried out the work but was not paid. The plaintiff was entitled to interest at the rate of 18 % per annum on this amount from the due date till date of filing of the suit which comes to Rs. 4,41,177.10/-. Thus, the total dues with respect to agreement no. 61 and 62 F2 of 84-85 came to Rs. 6,96,935.69/-. The plaintiff completed the work of Rs. 2,55,804.07/- as against the estimated amount of Rs. 1,44,225.40/- of agreement no. 10 F2 of 82-83 dated 01.02.1983 due to unnecessary over burden of extra work as well as price escalation due to rise in labour cost etc. As against the said amount the plaintiff was paid Rs. 1,05,804/- till second on Account Bill. Thus, a sum of Rs. 1,50,000./- remained due. The details are described in schedule C and D to the plaint of the suit. The plaintiff was entitled to receive the interest at the rate of 18 % per annum on that amount and also refund of earnest money of Rs. 6,000/- security money of Rs. 2175/- as per M.B. No. 876 dated 21.07.1984 and security amount of Rs. 3,115/- as per MB No. 1017 dated 28.03.1985. The plaintiff was entitled to refund of further amount of Rs.



1000/- as the keep back amount of SDO and Rs. 1000/- as the keep back amount of the Executive Engineer. Thus, the plaintiff was entitled to receive interest at the rate of 18 % on the total amount of Rs. 1,63,290.07/- from 01.05.1985 to 01.10.1993. The total of the dues, thus, under these agreements up to 01.10.1993 came to Rs. 4,47,414.51/-. On 02.07.1993 the plaintiff wrote a letter to the Superintendent Engineer, Muzaffarpur for Arbitration of the claim with a copy to the Executive Engineer, Hajipur but they failed to discharge their duty despite reminders. On 04.10.1993 the plaintiff sent a legal notice under Section 80 of the C.P.C. to the defendants but they did not pay the dues of the plaintiff. On 03.12.1993 the Executive Engineer sent a reply to the notice giving wrong statement that the work was not completed by the plaintiff whereas till then they had never raised such point, thus, giving rise to the filing of the suit in question. The agreement no. 204 F2 of 1984-85 dated 15.03.1985 was made after negotiation at the rate of 9.1/4 % higher than the estimated value of Rs. 3,19,961.03/- and the work order was issued by the Executive Engineer vide letter dated 834 dated 16.03.1985. The plaintiff started the work, as per the agreement, but the same was stopped by the Government due to non-availability of the funds. Vide



letter no. 1173 dated 05.10.1987 the Executive Engineer asked the plaintiff as to whether he was ready to execute the work at the old rate as the funds for the work was now available. The plaintiff replied in the affirmative vide his letter dated 07.10.1987. The period of completing the work was extended vide his letter no. 536 dated 22.04.1988. The plaintiff started the work with eagerness to complete the same within time along with his work force like labourers, masons. The foundation of the work was done. The plaintiff also carried out works of the construction to the best of his resources but due to non-supply of necessary items like cement, Hume pipe, iron rods by the government, the work could not be completed as the rainy season started. The materials collected by the plaintiff at his own cost were damaged and rendered useless which amounted to Rs. 1,03,855.12/-. The plaintiff was paid a sum of Rs. 1,23,108/- as first on Account Bill and the plaintiff started the work again but due to non-supply of cement by the defendants, the plaintiff again suffered damage to the extent of Rs. 96,250/-. Subsequently, the plaintiff was paid a sum of Rs. 1,44,542/- by way of second on Account Bill and Rs. 31,122/- as third on Account Bill but the final bill was not paid. The plaintiff claimed for payment of Rs. 8,69,633.80/- against this agreement



including the cost of construction of branch canal, refund of earnest money and security money, damages and loss suffered by him, out of which a sum of Rs. 2,99,722/- has been paid, thus, a sum of Rs. 5,69,911.80/- remained due despite various letters sent to the defendants. The plaintiff further claimed interest at the rate of 18 % on the due amount from 01.09.1989, thus, the total due amount claimed to Rs. 11,36,943.21/-. On 02.07.1993 the plaintiff wrote a letter to the Superintending Engineer for Arbitration of the claim but he remained silent. On 15.10.1993 the plaintiff sent a legal notice to the defendants-appellants under Section 80 of the C.P.C. On 03.12.1993 the Executive Engineer came out with a reply to the legal notice with a false and misleading stand that the work was not completed and loss has been caused to the government.

Agreement wise claim of the plaintiff is as follows:-

“Agreement no. 61 F2 and 62 F2 of 84-85 – Rs. 6,96,936.84/-, Agreement no. 10 F2 of 82-83 of Rs. 4,47,414.51/-, Agreement no. 204 F2 of 84-85 Rs. 11,36,943.21/- total Rs. 22,81,294.56/- having lis pendente lite interest.

4. Since all the agreements were executed by the defendant no. 4 the Executive Engineer at Hajipur, therefore, the cause of action arose within the pecuniary jurisdiction of



Hajipur Court. The plaintiff filed writ petition bearing C.W.J.C. No. 11719 of 1993 for directing the respondents (defendants) to make payment of his dues, however, the authorities disputed the claim and therefore, the same was withdrawn as the disputed questions of fact could not be decided under Article 226 of the Constitution of India and it was only thereafter, the plaintiff filed the suit for realization of his dues.

5. The defendants denied the claim of the plaintiffs by filing written statement stating that the suit as framed is not maintainable, the plaintiff has got no cause of action for the suit. The suit is barred by law of limitation and estoppel, the suit is bad for multifariousness as the plaintiff has filed one suit for four agreements. No valid notice under Section 80 C.P.C. has been served upon the defendants, the plaintiff has not disclosed the name of all partners of the firm M/S Indu Construction Hajipur, the conduct of the plaintiff is not that of a class I contractor. It is a fact that all aforesaid four agreements were executed at Hajipur but it is wrong to say that there is common cause of action against the defendants. Each agreement has got separate cause of action and one suit is not maintainable. The plaintiff has filed the suit against the terms and condition laid down in the aforesaid four agreements. It is a fact that the



plaintiff deposited Rs. 40,015 and Rs. 300/- a total amount of Rs. 40,315/- and Rs. 20,150/- as earnest money. It is wrong to say that the plaintiff has ever made application to the Executive Engineer regarding the difficulties for doing works. The plaintiff never asked the Executive Engineer to include all the aforesaid items in the agreement. It is wrong to say that the Executive Engineer instead of including the aforesaid items assured the plaintiff that difficulties would be looked into and asked the plaintiff to execute the agreement. The alleged petition of the plaintiff dated 03.09.1984 to the Executive Engineer is not in the office of the defendants. It is wrong to say that the Executive Engineer replied the application vide memo no. 81 dated 08.01.19085 and the plaintiff sent a reply to the aforesaid memo. It is wrong to say that the Junior Engineer visited the site and reported on 10.01.1985. It is wrong to say that it was the duty of the department to remove the alleged difficulties. The plaintiff is ignoring the terms of the contracts. The plaintiff has delayed at all stages i.e. from execution of agreement and doing work by letter no. 1443 dated 28.05.1985 of Superintending Engineer the work was rescinded and earnest money was forfeited as per F2 clause 2 and 3 of the agreement. The description given in the schedule A of the plaint is wrong. The



plaintiff has made wrong claim, the plaintiff is liable to pay compensation according to the agreement for non-completion of the work. It is wrong to say that the plaintiff has completed the entire work as mentioned in the agreement up to March, 1985. It is wrong to say that the value of the work done under agreement no. 61 F2 was Rs. 41,441.81 and agreement no. 62 F2 was Rs. 57,332.31 /-. The details given in schedule A of the plaint is imaginary and concocted. The actual work done by the plaintiff, with respect to the agreement no. 62 F2 and 62 F2, was only earth work which is apparent from M.B. No. 906 page 51-52 and M.B. No. 513/136 page 85. It is wrong to say that Superintending Engineer, Irrigation, Muzaffarpur vide his memo no. 1122 dated 20.05.1986 asked the plaintiff as to whether he was ready to complete on old rates. It is wrong to say that the plaintiff ever replied to the alleged letter. The department was always ready to get the work completed by the plaintiff but the plaintiff did not take any initiation in the matter. The department also suffered a loss due to non-completion of the work. The plaintiff misrepresented the facts before the authorities concerned and get some letter issued and the plaintiff cannot take undue advantage of his misdeeds. It is wrong to say that the plaintiff ever approached the Superintending Engineer,



Irrigation, Muzaffapur to act as an Arbitrator in terms of the contract. The plaintiff has manufactured some letters for the purpose of the suit. No notice was given to all the defendants for deciding the dispute through arbitration. It is wrong to say that the plaintiff made construction and completed the work with respect to agreement no. 61 F2 and 62 F2. The earth work for Rs. 42,519/- cubic feet was only done by the plaintiff vide M.B. No. 513/136 page no. 85-86 and the final Bill was Rs. 5,118/- only. Vide letter no. 1443 dated 20.05.1985 the work was rescinded and earnest money was forfeited as per the clause no. 2 and 3 of the agreement. The plaintiff was not willing to do the work. It is wrong to say that the amount of Rs. 2,44,922/- for the said work would have been paid to the plaintiff. It is fact that Rs. 1,05,804/- has been paid to the plaintiff. It is wrong to say that a sum of Rs. 1,52,408/- remains still due. It is wrong to say that the plaintiff asked the SDO for supply of cement. The plaintiff is in habit of filing false cases with ulterior motive. Thus, the suit is fit to be dismissed with cost.

6. On the basis of pleadings of the parties, the learned Sub-Judge framed the following issues on recast:-

- “I. Is the suit as framed not maintainable ?
- II. has the plaintiff got any cause of action or right to sue ?



III. Is the suit barred by law of limitation, estoppel, waiver and res judicata ?

IV. Is the suit bad for multifariousness ?

V. Is the notice under Section 80. C.P. C. legally served upon the defendants ?

VI. Is the Court fee paid sufficient ?

VII. Has the plaintiff been able to prove the case of departmental slackness, negligence and fault in timely execution of the agreements and supply of departmental materials to the plaintiff at site ?

VIII. Has the plaintiff fulfilled terms and conditions of the agreement ?

IX. Is the plaintiff entitled to money decree claimed by him together with interest ?

X. To what relief or reliefs, if any, is the plaintiff entitled to ?

7. The learned court below took up the issue no. VII and VIII together and decided the same holding that there was departmental slackness, negligence and fault in timely execution of the agreement and supply of the departmental materials to the plaintiff at site and the plaintiff fulfilled the terms and conditions of the agreement and accordingly, these issues were decided in favour of the plaintiff. Thereafter, issues no. I and IV were taken and those issues were also decided in favour of the plaintiff. Thereafter, issue no. III was taken and it was held that the suit is not barred by law of limitation, estoppel, waiver and



res judicata. Issue no. V was also decided in favour of the plaintiff holding that notice under Section 80 C.P.C. was legally served upon the defendants. Issue no. VI was not pressed. Issues no. II and IV were taken together and it was held that the plaintiff has got cause of action for right to sue, the suit is not bad for multifariousness and the plaintiff is entitled for the reliefs claimed in the plaint together with interest and accordingly, decided those issues in favour of the plaintiff.

8. The defendants being aggrieved and dissatisfied with the judgment and decree have preferred this appeal challenging the legality, correctness and propriety of the same on the ground that the learned court below wrongly decided all the issues in favour of the plaintiff. The suit is bad for multifariousness as for four agreements one suit has been brought. The suit is barred by law of limitation, estoppel, waiver and res judicata. With regard to agreement no. 61/F2 and 62/F2, the final bill was prepared on 25.06.1985 and from that period the suit ought to have been filed within three years. So far as the agreement no. 10/F2 is concerned, two Accounts Bill were prepared and payment was accepted vide Ext. A/4 dated 25.07.1984 and A/5 dated 28.03.1985, so the suit ought to have been filed within three years from that date. The plaintiff claims that the work was



completed by 30.04.1985, so from that date also the suit must have been filed within three years. With regard to agreement no. 204/F2 payment were made through three Accounts Bill, first Account Bill was made on 20.02.1988, the second Bill was made on 29.07.1988 and 3rd Account Bill was made on 15.03.1989, so from 15.03.1989 the suit must have been filed within three years. Article 137 of the Limitation Act is applicable in the present case and starting point of limitation will be the date when a dispute arose for reference to arbitration. In this case the plaintiff never made any petition for arbitration and even if it is taken that any petition for arbitration was sent then also from that date the suit ought to have been filed within three years so the suit is barred by law of limitation. The learned court below has wrongly held that the suit is not barred by law of limitation. Further the plaintiff has filed writ before the Hon'ble Court and subsequently after appearance of the defendants it was withdrawn, so in view of the writ petition the plaintiff is stopped to file any suit and the rule of res judicata is also applicable and on this score also the suit is fit to be dismissed. The learned court below wrongly held that notice under Section 80 C.P.C. was legally served upon the defendants. The notice ought to have been served upon all the defendants but it has not



been done so and as such the learned court below ought to have held that the notice under Section 80 C.P.C. was not legally served upon the defendants. The plaintiff has not been able to prove the case of the departmental slackness, negligence and fault in timely execution of the agreement and supply of departmental materials to the plaintiff at site, the plaintiff has also not been able to prove that he fulfilled the terms and conditions of the agreement. As a matter of fact the plaintiff has not fulfilled the terms and conditions of the agreement and violated the terms. The plaintiff has not completed the work allotted to him and as such the plaintiff is not entitled to a money decree claimed by him together with interest. The interest awarded is also very high, so the judgment and decree passed by the learned court below is fit to be set aside.

9. On the other hand, learned counsel for the respondent has argued that the learned court below has rightly decided all the issues after appreciating the facts and law and further considering the evidences available on the record. The suit is not bad for multifariousness as all the agreements were executed at Hajipur and cause of action also arose at Hajipur, so the suit is not bad for multifariousness. As per Order 2 Rule 3 of the Code of Civil Procedure, the plaintiff may unite in the same suit



several causes of action against the same defendants jointly. So the provision of law is clear besides that there are judgments of the Hon'ble Court as well as of different High Courts that if a plaintiff has more than one cause of action against the same defendants, he omits to raise them in the same suit, he will be precluded to raise such claim separately in subsequent proceedings. Reference may be made to the case of **S.N.P. Shipping Services Pvt. Ltd. Versus World Tanker Carrier Corporation** reported in **AIR 2000 Bombay page 34**. The suit is not barred by law of limitation, estoppel and res judicata. The period of limitation of three years starts to run when the contract is broken or where there are successive breaches and breaches are continuing when it ceases. In the present case, the breach of contract finally came to the knowledge only when the appellants refused to pay the dues of the plaintiff by way of reply to the legal notice under Section 80 of the C.P.C. on 03.12.1993. Prior to that the plaintiff was never informed that his claim has been denied by the defendants. Therefore, the cause of action arose only after the refusal to pay by the defendants. Reference may be made to the case of **Gannon Dunkerley and Company Ltd. Versus the Union of India** reported in **AIR 1970 Supreme Court page 1433** (paragraph 10) and further in the case of



Major Retd. Inder Singh Rekhi Vs. Delhi Development Authority reported in **1988 BBCJ page 54 (S.C.)** wherein the Bill has not been finally prepared, the claim made by the claimant is the accrual of the cause of action. The dispute arises where there is a claim and denial repudiation of the claim. Thus, the cause of action arose when the appellants denied the claim and limitation will run only from that date for three years. Thus, the suit in question was within the limitation period. It is true that the plaintiff had moved before the Hon'ble Court for payment of his dues by filing C.W.J.C. No. 11719 of 1993 but as soon as the respondents filed their counter affidavit raising the dispute, the said writ petition was withdrawn by the plaintiff, in order to file the present suit without adjudication, as disputed question of facts could not be decided in a writ petition under Article 226 of the Constitution of India. It is settled principle of law that principle of res judicata will be applicable only when the issues have been decided and it has attained finality. In the instant case the issue was not at all determined by the Hon'ble Court, hence, there was no question of bar in filing of the suit. Reference may be made to the judgment of the Hon'ble Supreme Court of India as reported in **2011 (12) SCC page 615** in the matter of **Fida Hussain and Ors. Versus Moradabad**



Development Authority further in the case of **Sarguja Transport Service Vs. State Transport Appellate Tribunal, M. P. Gwalior and Others reported in (1987) 1 SCC page 5** in which it has been held that where a petitioner withdraws a petition filed by him in the High Court under Articles 226/227 of the Constitution of India without permission to institute a fresh petition, remedy under Article 226/227 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the petition and it would not be open to him to file a fresh petition in the High Court in the same Article though other remedies like suit or writ petition before this court under Article 32 would remain open to him. The plaintiff did not violate the arbitration clause as stipulated in the agreement rather it was the defendants, more particularly the defendant no. 3, who had to arbitrate, violated the arbitration clause, the plaintiff had brought on the record the letters of request dated 12.08.1987 and 02.07.1993 for arbitration which has been marked as Exts. 4J and 4 P in the suit. However, the Superintending Engineer did not act upon that, thus, the plaintiff has not violated the arbitration clause and the grounds taken by the appellants in this regard is not at all tenable. The contract was never rescinded and an absurd ground has been taken. Story



of rescinding of contract is an after thought of the appellants to prepare a defence. Letter no. 1443 dated 28.05.1985, purportedly the order of rescinding the agreement numbers 61-62/F2 of 84-85, is a fabricated document and letter no. 1334 dated 07.06.1985, communicating the decision of cancellation too is fake one. Neither any notice was issued prior to the decision to cancel the contract nor the aforesaid decision was ever communicated to the plaintiff. No chit of paper has been filed in support of the proof that the said letter was ever served upon the plaintiff. Hence, the said decision was unilateral and in violation of the principle of natural justice and not binding upon the plaintiff. Therefore, the defendants-appellants cannot deny the damages and interest in the garb of their stand that since the contract was rescinded the plaintiff cannot claim any damage on that basis. Moreover, if the purported rescinding order after thought (not admitted) was only with respect to agreement no. 61 F2 and 62 F2 and not with respect to 10F2 of 1983-84, 204 F2 1984-85, thus, the appellants are precluded from taking such stand with respect to those contracts. The Executive Engineer or the Superintending Engineer who were posted in Gandak Project at the relevant period have not been examined by the defendants who could testify the existence of alleged letter of cancellation



of contract. It is the settled principle of law that only the author of a document can certify the genuineness of such document.

10. The defendants-appellants were acting with malafide intention right from the very beginning, they cannot relied upon a measurement taken behind the back of the contractor and denying the claim of the contractor on that basis, when the latter had submitted his first an account bill much earlier on the basis of actual measurement of the work done by him. It indicates that the defendants-appellants have tampered with the original measurement book as it remains in their custody. The appellants took the signature of the plaintiff by misrepresentation, with fraudulent intention and hence, the same is not binding upon the plaintiff as fraud vitiates everything. Learned trial court has scrutinized the evidence both oral as well as documentary adduced on behalf of both the parties and it was only thereafter, it has come to a categorical finding that the plaintiff has been able to prove his claim and decreed the suit in favour of the plaintiff. Further it has been argued that it is the consistent view of the Hon'ble Supreme Court of India both with respect to civil and criminal matters that the High Courts should not upset the findings of the trial court unless it is found to be palpably perverse and contrary to law and record or wholly without



jurisdiction. The reason is that the Trial Court has opportunity to consider the oral evidence and test its truthfulness but the appellate court does not have the opportunity to do so. The reference may be made to the judgment of Supreme Court reported in **AIR 1983 Supreme court** page 114 in the matter of **Madhusudan Das Vs. Naraini Bai & Ors.** (equivalent to **Supreme Court Reports 1983 page 851** paragraph 8). According to the learned counsel for the respondents there is no merit in the present appeal and the same is fit to dismissed with cost.

11. In this appeal the following points are for consideration:-

(i) Whether the suit is bad for multifariousness of causes of action in one suit ?

(ii) Whether the plaintiff ought to have moved court for arbitration, if the arbitrator refused to discharge his duties ?

(iii) Whether the suit is barred by law of limitation and res-judicata ?

(iv) Whether the contract was already rescinded and hence, the plaintiff was not entitled to any claim ?

FINDINGS:-

12. Point no. (i) :- On behalf of the defendants-appellants



it has been submitted that for four agreements only one suit was filed and as such the suit filed is not maintainable. In this connection the law is trite. As per order 2 rule 3 of the Code of Civil Procedure, the plaintiff may unite in the same suit several causes of action against the same defendants jointly. Judgments cited on behalf of the respondents reported in **AIR 2000 Bombay page 34** (Supra) is important wherein it has been held that if the plaintiff has more than one cause of action against the same defendants and he omits to raise them in the same suit he will be precluded to raise such claim separately in subsequent proceeding. Thus, the point regarding multifariousness of causes of action in one suit is not tenable and this point is decided in favour of the respondent and against the appellants.

13. Point No. (ii) :- On behalf of the defendants-appellants it has been submitted that the plaintiff-respondent has violated the arbitration clause which is in the agreement and without moving for arbitration filed the suit which is not maintainable. In this connection, I have considered the arguments of both the parties and it is clear that the plaintiff did not violate the arbitration clause, as stipulated in the agreement, which are Ext.3 series rather it was the defendants more particularly, the defendant no. 3 who had to arbitrate, violated the arbitration



clause. The plaintiff had brought on record the letters of request dated 12.08.1987 and 02.07.1993 for arbitration which have been marked as Ext. 4J to 4P in the suit, however, the Superintending Engineer did not act upon that. The plaintiff thereafter, sent the notice under Section 80 C.P.C. and after receiving the reply, wherein the claim of the plaintiff was refused, filed the suit. Thus, the plaintiff has not violated the arbitration clause and accordingly, this point is also decided in favour of the respondent and against the appellants.

14. Point No. (iii) :- According to the defendants-appellants, the suit is barred by law of limitation. The learned court below has discussed the issue in detail in its judgment under appeal and there is no need to repeat the same. In my view also this point is not tenable in the eye of law as discussed by the learned trial court. As per the decision of the Apex Court, in the ruling reported in **AIR 1970 Supreme Court page 1433** (Supra) paragraph 10, the period of limitation of three years starts to run when the contract is broken or where there are successive breaches and breaches are continuing, when it ceases. In the present case the breach of contract finally came to the knowledge only when the appellants refused to pay the dues of the plaintiff by way of reply to the legal notice under Section 80



C.P.C. on 03.12.1993, Ext. K/1, prior to that the plaintiff was never informed that his claim has been denied by the defendants, therefore, the cause of action arose only after the refusal to pay by the defendants-appellants. This view is also reiterated in the ruling reported in **1988 BBCJ page 54 Supreme Court** (Supra), wherein it has been held that where the Bill has not finally been prepared the claim made by the claimant is the accrual of cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. Thus, the cause of action in the instant appeal arose when the appellants denied the claim and limitation will run only from that date for three years. Thus, the suit in question was within the limitation period. In the result, this point is also decided in favour of the respondent and against the appellants. So far as the point of res-judicata is concerned, that too is not tenable in the eye of law. It is true that the plaintiff had moved before this court for payment of his dues by filing C.W.J.C. No. 11719 of 1993 but as soon as the respondents (appellants herein) filed their counter affidavit, raising dispute, the said writ petition was withdrawn by the plaintiff, in order to file the suit, without adjudication, as disputed question of facts could not be decided in a writ proceeding under Article 226 of the Constitution of India. It is settled principle of law that the



principle of res-judicata will be applicable only when the issues have been decided and it has attained finality. In the instant case, the issue was not at all determined by this Court and hence, there was no question of bar on filing the suit. In this connection, reference may be made to the ruling reported in **(2011) 12 SCC page 615** (Supra) and also **(1987) 1 SCC page 5** (Supra), wherein it has been held that where a writ petitioner withdraws a petition filed by him in the High Court under Article 226/227 without permission to institute a fresh petition remedy under Article 226/227 should be deemed to have been abandoned by the petitioner in respect of the causes of action relied on in the writ petition and it would not be open to him to file a fresh petition in the High Court under the same Article though other remedies like suit or writ petition before this Court under Article 32 would remain open to him. Thus, the suit filed by the plaintiff is not barred by res judicata. Accordingly, this point is decided in favour of the respondent and against the appellants.

15. Point No. iv:- According to the defendants-appellants, plaintiff was not entitled to any damage on the ground that the contract was rescinded. The learned Trial Judge has discussed in detail in this regard and has come to correct finding. There is



no need to repeat the same. It is clear that neither any notice was issued prior to the decision to cancel the contract nor the aforesaid decision was ever communicated to the plaintiff, no chit of paper has been filed by the defendants-appellants in support of the proof that letter no. 1334 dated 07.06.1985, Ext. C/17, was ever served upon the plaintiff and hence, the said decision was unilateral and in violation of principle of natural justice and thus, not binding upon the plaintiff. Therefore, the defendants-appellants cannot deny the damages and interest in the garb of their stand that since the contract was rescinded, the plaintiff cannot claim any damage on that basis. The rescinding order was only with respect to agreement no. 61/F2 and 61/F2 of 1984-85. Thus, the appellants are precluded from taking such stand with respect to those contracts. The defendants failed to prove their stand as they did not examine the Executive Engineer or the Superintending Engineer who were posted in Ganjdak Project at the relevant period who can testify the existence of alleged letter of cancellation of contract. It is settled principle of law that only the author of a document can certify the genuineness of such document. The evidence of DW 1 is categorical to the extent that he had no first hand knowledge of the execution of contract in question. He came to know about



the same only in 1993 when he received the legal notice. It has also been argued that the plaintiff signed M.B. No. 906 and 513/136, hence, he is stopped from challenging the measurement recorded therein. However, even DW 5 in his statement recorded in paragraph 7 of his deposition stated that it is not clear whether the measurement was taken in the presence of the plaintiff. On the other hand, it has been the specific case of the plaintiff that he denied the measurement book as he was asked to do the same on the assurance that when he signs the measurement book his further claim would be entertained. Moreover, it is apparent from perusal of the Measurement Book, Ext. A and A/2, that Junior Engineer prepared the Measurement Book on 25.06.1985 and Assistant Engineer signed the same on that very date and the plaintiff-respondent's signature was also taken thereon only on 24.04.1989 as rightly recorded in paragraph 81 of the judgment under appeal which shows that the appellants were acting with malafide intention right from the beginning. They cannot rely upon a Measurement Book behind the back of the contractor and denying the claim of the contractor on that basis when the latter had submitted his first on Account Bill much earlier on the basis of actual measurement of the work done by him. It indicates that the appellants have



tampered the original measurement book as it remains in their custody. The appellants took the signature of the plaintiff by misrepresentation with fraudulent intention and hence, the same is not binding upon them as fraud vitiates everything. The learned trial court has scrutinized the evidences both oral and documentary adduced on behalf of both sides and it was only thereafter, he has come to a categorical finding that the plaintiff has been able to prove his claim and decreed the suit in favour of the plaintiff. It has been consistent view of the Apex Court that the High Court should not up-set the findings of the trial court, unless it is only to be palpably perverse and contrary to law, illegal or wholly without jurisdiction. The reason is that the trial court has opportunity to consider the oral evidence and test its truthfulness but the appellate court does not have the opportunity to do so and in this connection reference may be made to the judgment of Apex Court reported in **AIR 1983 Supreme court page 114** (Supra) paragraph 8 of that judgment is as follows:-

“it would be right to refer the general principle that in an appeal against a trial court decree when the appellate court considers and issue turning on oral evidence, it must bear in mind that it does not enjoy the advantage which the trial court



had in having the witnesses before it and of observing the manner in which they gave their testimony when there is conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court.”

16. Thus, being in agreement with the findings of the learned trial court, it is held that the plaintiff was entitled to the reliefs claimed in the plaint. Accordingly, this point is also decided in favour of the respondents and against the appellants.

17. In the result, the judgment and decree passed by the learned trial judge, is hereby affirmed and finding no merit in this appeal, the same is hereby dismissed on contest but under the circumstances without cost.

(Jitendra Mohan Sharma, J)

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