

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 287 OF 2005**
WITH
CROSS OBJECTION NO. 9 OF 2006**FIRST APPEAL NO. 287 OF 2005**

Institute of Hotel Management,
Catering Technology & Applied
Nutrition, a Society registered under
the Societies Registration Act, 1860,
having office at Alto Porvorim, Bardez-
Goa.

....

Appellant

Versus

1. Shri Subhash Vasudev Xet Tilve,
major, married, resident of
Takwada, Usgao-Goa-403 407.
2. State of Goa, through Chief
Secretary, having office at
Secretariat, Panaji-Goa.
3. The Executive Engineer, Works
Division XIX, P.W.D., Bambolim-
Goa.

....

Respondents

CROSS OBJECTION NO. 9 OF 2006

1. Shri Subhash Vasudev Xet Tilve,
major, married, r/o Takwada,
Usgao, Goa.

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Cross Objectioner /
Org. Resp. No. 1 in
F.A. No. 287/2005

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Appellant

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Major, married, r/o Takwada,
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2. State of Goa, through its Chief
Secretary, Secretariat, Alto
Porvorim, Bardez Goa.
3. The Executive Engineer, Works
Division XIX, P.W.D., Bambolim-
Goa.

.... Respondents

Shri Devidas Pangam with Shri S.P. Munj, Advocates for the
Appellant-Institute of Hotel Management.

Shri Rajesh Shivolkar, Additional Government Advocate for the
Respondent Nos. 2 and 3.

CORAM:- C. V. BHADANG, J.

DATED:- 27th SEPTEMBER, 2017

ORAL JUDGMENT:

The challenge in this Appeal, is to the part of the
judgment and decree dated 26.08.2005, passed by the learned
Ad-hoc Additional District Judge at Panaji, in Civil Suit No.
130/2004 (old Special Civil Suit No. 67/2001/B), by which the
counter claim raised by the appellant has been dismissed.

2. For the sake of convenience, the parties are referred
to in their original capacity before the Trial Court.

3. The Appellant-Institute of Hotel Management, Catering Technology and Applied Nutrition is a Society (defendant no. 3), registered under the Societies Registration Act (Institute, for short). The said Institute was desirous of constructing a Boys Hostel for Catering College at Porvorim, Bardez, Goa. The construction of the said Hostel was entrusted to the Public Works Department (PWD) of the State of Goa (defendant no. 2). Somewhere in the month of April 1995, the PWD invited tenders, for the construction of the said Hostel at an estimated cost of Rs.44,95,840/-. Subhash Tilve (plaintiff) was the successful bidder, who was issued with the Work Order on 17.07.1995. The tender was accepted for an amount of Rs.50,39,805/-. The date of commencement of work was 31.07.1995 and it was to be completed within a period of 365 days i.e. upto 29.07.1996. However, the work was completed on 25.08.1998 i.e. almost after two years thereafter.

4. It appears that disputes and differences arose between the plaintiff-Subhash Tilve and the defendant no.2-PWD in respect of the completion of the said work, which led the plaintiff to file the aforesaid suit for recovery of Rs.29,97,545/- alongwith interest and for release of the Bank Guarantee etc.

5. According to the plaintiff, he has suffered loss on account of various factors as set out in para 41 of the plaint, which were attributable to the State/PWD. In the suit as originally filed, it was only the State of Goa, through the Chief Secretary and the Executive Engineer, Works Division XIX, PWD, who were arrayed as defendant nos. 1 and 2 respectively. The Appellant-Institute filed an application for impleadment as a party defendant, under Order I, Rule 10 of CPC. The learned Trial Court, by an order dated 14.11.2002, allowed the said application, whereupon the Appellant-Institute was arrayed as defendant no. 3 in the suit.

6. The original defendant nos. 1 and 2 filed their written statement and resisted the claim. The defendant no. 3 filed his written statement and also raised a counter claim seeking recovery of a total amount of Rs.5,16,000/- from the original plaintiff.

7. On the basis of the rival pleadings, the learned Trial Court framed the following issues:

1. Whether the plaintiff proves that he is entitled to recover an amount of Rs.29,97,545/- alongwith 21% interest from the defendants i.e. from 25.8.98 till final payment ?

2. Whether the plaintiff is entitled for release of Bank Guarantee of Rs.1,00,000/- forfeited by the defendant ?
3. Whether the defendant no. 3 proves that the plaintiff is liable to pay compensation of an amount of Rs.4,05,000/- with interest at the rate of 7% from 29.7.96 till final payment ?
4. Whether the defendant no. 3 proves that the plaintiff is liable to pay them an amount of Rs.3000/- per month from 31.7.95 till 25.8.98 amounting to Rs.1,91,000/- ?

8. The plaintiff and the defendant nos. 1 and 2 led evidence. The learned Trial Court found that the work was delayed by 25 months. It was also found that the work could not progress at the expected speed due to paucity of funds.

9. Insofar as the counter claim of defendant no. 3 is concerned, the learned Trial Court found that there was no evidence brought in support of the counter claim and that there was no privity of contract between the plaintiff and the defendant no. 3. The defendant no. 3 for the matter of that, the defendant no. 2 (PWD) had never complained about the delay and the consequent breach of any of the conditions of the contract. In the face of the findings as above, the suit of the plaintiff came to be partly decreed as under while dismissing the counter claim:-

“Suit of the plaintiff is partly decreed. Defendants are directed to make payment of Rs.5,04,000/- (Rupees five lakh four thousand only) to the plaintiff with 6% interest from the date of filing of the suit till actual payment. Counter claim of the defendant no. 3 is dismissed.”

10. Feeling aggrieved, the defendant nos. 1 and 2 filed First Appeal No. 7/2006. The appellant (defendant no. 3) filed First Appeal No. 286/2005 and First Appeal No. 287/2005. First Appeal No. 286/2005 is filed against the order decreeing the suit in the sum of Rs.5,04,000/-, while First Appeal No. 287/2005 is filed challenging the dismissal of the counter claim. The original plaintiff-Subhash Tilve filed Cross Objection No. 7/2006 in First Appeal No. 286/2005 and Cross Objection No. 9/2006 in First Appeal No. 287/2005.

11. It may be mentioned that all the three Appeals (First Appeal Nos. 286/2005, 287/2005 and 7/2006) alongwith the two Cross Objections (Cross Objection Nos. 7/2006 and 9/2006) were placed before the Lok Adalat on 08.10.2016, in which the following settlement was arrived at.

“After having discussed at length, these appeals are settled as follows:-

2. First Appeal No.286/2005 and First Appeal No. 7/2006 are settled as follows:

The State Government shall not pursue the First Appeal No. 7/2006. The amount of Rs.6,47,640/- deposited shall be paid to the original plaintiff/respondent no. 1 with accrued interest, if any. Consequently First Appeal No. 286/2005 and First Appeal No. 7/2006 shall stand disposed off as settled.

3. First Appeal No. 287/2005 filed by the Institute of Hotel Management against the dismissal of their Counter Claim shall be referred to the regular board to be decided on merits.”

12. It can thus be seen that the First Appeal No. 286/2005 alongwith Cross Objection No. 7/2006 and First Appeal No. 7/2006, are already settled as the State has paid an amount of Rs.6,47,640/- alongwith interest, if any, to the original plaintiff. We are thus left with First Appeal No. 287/2005 alongwith Cross Objection No. 9/2006. In other words, the only question is whether, the rejection of the counter claim is legal and proper.

13. As noticed earlier, the issue nos. 3 and 4 framed by the learned Trial Court were pertaining to the counter claim of the appellant (defendant no. 3). The Trial Court has dealt with these issues in para 6 of the judgment. Admittedly, the appellant did not lead any evidence in support of the counter claim. The learned Trial Court also found that there was no privity of contract between the appellant and the plaintiff and at no point

of time, any complaint was made about the delay in completion of the work.

14. I have heard Shri Pangam, the learned Counsel for the appellant and Shri Shivolkar, the learned Additional Government Advocate for the respondent nos. 2 and 3.

15. It is submitted by Shri Pangam, the learned Counsel for the appellant that once the Trial Court has found that there was a delay in completion of the work, the counter claim ought to have been decreed.

16. The learned Additional Government Advocate for the respondent nos. 2 and 3 has submitted that the matter has been finally settled between the plaintiff and the defendant nos. 1 and 2 and in the absence of any privity of contract between the appellant and the original plaintiff, the counter claim could not have been decreed.

17. On a careful consideration of the circumstances and the submissions made, I do not find that any case for interference is made out. The tender was floated by the State-PWD, in which the plaintiff was a successful bidder. Thus,

essentially, the contract was between the plaintiff and the original defendant nos. 1 and 2. Only because the construction of the Hostel was for the purpose of the appellant, it cannot be said that there is any privity of contract between the appellant and the original plaintiff.

18. The case of the appellant in the counter claim was that on account of the delay on the part of the original plaintiff to perform the contract and to execute the work in time, the appellant had to accommodate the students in another flat for a period of two years and one month and there were about fifty one such students accommodated in seven flats, out of which, four flats were of the Lower Income Group (LIG) and three were of Middle Income Group (MIG). According to the appellant, the three MIG flats would have fetched a rent of Rs.9,000/- per month, while the four LIG flats would have fetched a rent of Rs.7,200/- per month. Thus, the amount of compensation arrived at was Rs.4,05,000/-. It was also contended that in terms of clause 36 of the agreement dated 17.07.1995, the plaintiff was required to employ one Graduate Engineer during the execution of the work, who was required to be available at the site. However, the plaintiff did not comply with the same, which would make the plaintiff liable to pay Rs.3,000/- per month i.e. in

compliance with clause no.36 of the of the contract and under this head, an amount of Rs.1,11,000/- was claimed.

19. It is trite that in the absence of any evidence, merely making out of a case in the counter claim, would be of no consequence. The learned Trial Court after noticing that the appellant had failed to lead any evidence, has rightly dismissed the counter claim as the same is not substantiated. That apart, the Trial Court has also rightly come to the conclusion, that there is no privity of contract between the appellant and the original plaintiff. For this reason, no case for interference is made out.

20. Insofar as the Cross Objection No. 9/2006 is concerned, the original plaintiff is simply seeking dismissal of the First Appeal. Merely for such purpose i.e. for opposing the appeal, it is not necessary for the respondent no. 1 to file a cross objection. Be that as it may, the original plaintiff (Cross Objector) has raised certain contentions about the impleadment of the appellant in the suit, which according to the Cross Objector was illegal. Once, the original plaintiff has settled the material dispute with the State (defendant nos. 1 and 2) and further as the First Appeal No. 287/2005 is being dismissed, the

Cross Objection would become infructuous.

21. In the result, the following order is passed:

(a) First Appeal No. 287/2005 is dismissed.

(b) Cross Objection No. 9/2006 is disposed of as infructuous.

(c) In the circumstances, parties to bear their own costs.

(d) Decree to be drawn accordingly.

C.V. BHADANG, J.

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