

**IN THE HIGH COURT OF BOMBAY AT GOA**  
**FIRST APPEAL NO.178 of 2005 and 79 of 2007**

**FIRST APPEAL NO.178 of 2005**

Bharat Power T. Limited  
C-71A, First Floor,  
Kalka Jee, New Delhi-110019 .. Appellant

V/s

1. State of Goa  
Through its Chief Secretary  
Govt. of Goa
2. Electricity Department  
Through its Chief Engineer  
Govt. of Goa, Vidyut Bhawan,  
Panji, Goa.
3. The Executive Engineer  
Electrical Div. No XIII  
Electricity Department  
Through its Chief Engineer  
Govt. of Goa, Vidyut Bhawan,  
Panji, Goa. .. Respondents

Shri Vivek Rodrigues and Shri Vithal Naik, Advocates for the appellant.

Shri Pravin Faldessai, Additional Government Advocate with Ms. Purna Bhandari, Additional Government Advocate for the respondents.

**WITH**  
**FIRST APPEAL NO.79 of 2007**

1. State of Goa  
Through the Chief Secretary  
Government of Goa, Secretariat,  
Panaji-Goa
2. Electricity Department  
through its Chief Engineer

Government of Goa, Vidyut Bhawan,  
Panaji, Goa.

3. The Executive Engineer  
Electrical Div. No XIII  
Electricity Department  
Government of Goa,  
Kadmba Plateau,  
Chimbel-Goa.

.. Appellants  
(Original Defendants)

V/s

M/s. Bharat Power Tech Ltd.,  
P-5/12, Malviya Nagar,  
New Delhi 100017, through  
its Managing Director,  
Shri A. K. Tiwari

.. Respondent  
(Original Plaintiff)

Shri Pravin Faldessai, Additional Government Advocate with Ms.  
P. Kalangutkar, Additional Government Advocate for the  
appellants.

Shri Vivek Rodrigues and Shri Vithal Naik, Advocates for the  
respondent.

**CORAM :- C. V. BHADANG, J.**

**DATE : 19<sup>th</sup> June, 2018**

**ORAL JUDGMENT :**

Both these appeals arise out of the judgment and  
decree dated 10/02/2005, passed by the learned Additional District  
Judge at Panaji in Civil Suit No.114/2004 (Special Civil Suit  
No.146/1997/B (old)). As such, they are being disposed of by this  
common judgment.

2. Bharat Power Tech. Ltd, the appellant in First Appeal No.178/2005 is the original plaintiff while the appellants/ State in First Appeal No.79/2007 are the original defendants before the Trial Court. For the sake of convenience, the parties are referred to in their original capacity as plaintiff and defendants.

3. The plaintiff is a Public Limited Company engaged in the business of electrical contracts and allied work and is having its registered office at New Delhi. The third defendant Executive Engineer, Electrical Division, Government of Goa, had invited tenders for the supply and erection of work of 110 KV D/C steel towers for Marcela to Kadamba Transmission line. In pursuance of the said tender, the defendant was awarded a contract for supply and erection of the electrical towers and a work order was accordingly issued on 20/04/1993. A formal agreement containing the terms and conditions of the execution of the work was signed on 17/08/1993. Admittedly, the third defendant terminated the contract on 13/09/1994 on the ground that the plaintiff had failed to adhere to the terms of the contract and there were certain breaches of the terms of the agreement committed by the plaintiff. According to the plaintiff, the termination of the contract was unlawful and there were lapses on the part of the third defendant, as a result of which, the plaintiff had sustained loss. It was

contended that the contract could not be executed in its entirety on account of the non-cooperative attitude of the third defendant such as non-supply of 'bill of material' for the tower and other accessories, non-supply of profile of locations regarding foundation work within time and failing to get the site cleared and obtaining no objection from the owners of the land. It was also contended that the third defendant failed to get the site cleared by cutting of the trees and removal of huts from certain tower locations. It was also contended that the third defendant gave the bill of material which was not in accordance with the availability of the material in the market. It was also contended that the third defendant took considerable time for approving the drawings and there was also failure on the part of the third defendant to hand over the site for storing of the material sent by the plaintiff.

4. Indisputably, the plaintiff had sent two running bills (RA Bills), for Rs.1,33,738/- and Rs.2,07,937.50, which were unpaid. The plaintiff also sought compensation towards the second lot of material and for loss of profit and the loss suffered on account of the labour overheads and other expenses. The plaintiff in such circumstances, filed a suit for recovery of an amount of Rs.29,71,343/- against the defendants.

5. The defendants resisted the suit. It was contended that

since beginning, the plaintiff's attitude was to delay the work and the plaintiff never engaged sufficient man power and had no infrastructure to complete the work. It was contended that the plaintiff committed major breaches of the terms of the agreements and never made any serious attempts to speed up the work in spite of several written requests. It was contended that on account of inefficiency of the plaintiff, the defendants were forced to terminate the agreement. According to the defendants, the lapses committed by the plaintiff were in terms of clauses 1.27 and 3.16 of the agreement. All other adverse allegations made in the plaint were denied.

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

*“1. Whether the plaintiff prove that the defendants committed breaches in the contractual obligation and prevented or delayed the completion of work ?*

*2. Whether the plaintiff prove that the plaintiff is entitled for an amount of Rs.29,71,343/- from the defendants ?*

*3. Whether the defendant prove that the plaintiff failed to commence the work on 20/08/1993 as agreed by the plaintiff ?*

*4. Whether the defendants prove that the suit is barred by Law of Limitation ?*

*5. Whether the defendant prove that the suit is liable*

*to be rejected as no cause of action has arisen to the plaintiffs to file the present suit ?*

*6. What reliefs ? What Orders?"*

7. The parties led oral and documentary evidence. The plaintiff examined its Managing Director Mr. A. K. Tiwari (PW1) while on behalf of the respondent, Mr. Shivrao C., the Executive Engineer, Electrical Division, was examined as DW1.

8. The learned Trial Court has noted that the defendants did not press for the defence as regards the issue nos.4 and 5. The learned Trial Court answered issue nos.1 and 2 in the negative and issue no.3 in the affirmative. However, the learned Trial Court found that the plaintiff is entitled to the amount of running bill No.1 of Rs.67,297/- "if not received by him." In that view of the matter, the suit came to be partly decreed in the sum of Rs.67,297/-. Feeling aggrieved, the plaintiff as well as the defendants have come up in appeal.

9. I have heard Shri Rodrigues, the learned Counsel for the appellant/ plaintiff and Shri Faldessai, the learned Additional Government Advocate for the respondents/ defendants. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment of the Trial Court.

10. Shri Rodrigues, the learned Counsel for the appellant

has extensively taken me through the exchange of communication between the parties as also the oral evidence in the context of the terms of the contract, in order to submit that there was no lapse on the part of the plaintiff in executing the contract. He submitted that on the contrary, there were serious lapses on the part of the defendants in not adhering to the terms of the contract, as a result of which, the appellant was unable to work and to execute the contract within time. For instance, the learned Counsel for the appellant pointed out that admittedly, there were certain sites which were not cleared and there were hindrances in the execution of the work. It is also submitted that the bill of material contained certain items, which were not readily available in the market and which were obsolete. It is submitted that there was also delay in the approval of the drawings. It is submitted that the work also could not be carried out due to the intervening monsoon period. He submits that the Trial Court has failed to consider the oral and documentary evidence in the context of the terms of the contract and as a result of which, the material part of the suit claim, has been dismissed. Shri Rodrigues, the learned Counsel for the appellant pointed out that the contract was awarded to some other person after the termination of the contract with the plaintiff. The learned Counsel was at pains to point out that the subsequent contractor was also not able to complete the work for

a period of more than 3 years. It is submitted that there is enough evidence on record to show that the third defendant had already decided to terminate the contract. He pointed out that it has come on record that the period of contract was extended only in order to enable the third defendant to terminate the same. It is, thus, submitted that the termination of the contract was not bonafide and was with a view to favour some other contractor.

11. Shri Faldessai, the learned Additional Government Advocate has, on the contrary, supported the impugned judgment to the extent it has dismissed the claim of the appellant. He submits that the record is replete with evidence to show that it was the plaintiff, who was unable to adhere to the terms of the contract and there were breaches on his part. The learned Additional Government Advocate has taken me through the evidence to demonstrate this. He submits that the plaintiff had written to the defendants to deduct the amount of security deposits and earnest money deposited (EMD) from the running bill and the running bill was not paid as it was insufficient to cover the amount of security deposit and EMD taken together. It is submitted that the contract has rightly been terminated and the appeal filed by the plaintiff is without any merit. He, however, submitted that the Trial Court was in error in decreeing the suit to

the extent of RA Bill no.1 in as much as the amount was retained as against the EMD and was liable to be forfeited.

12. I have given my anxious consideration to the rival circumstances and submissions made and I find that the suit needs to be remanded back to the Trial Court, for deciding it afresh in accordance with law.

13. As noticed earlier, the learned Trial Court has found that the defendants had not pressed for the defence, which is part of the issue nos.4 and 5, namely the suit being barred by limitation and the suit not disclosing any cause of action. Nonetheless in concluding part of para 6, there is one line observation that the suit is not barred by law of limitation. In so far as issue no.3 is concerned, the learned Trial Court has found that the profiles were handed over to the plaintiff on 21/09/1993 and the work was started thereafter. If the Trial Court proceeded on the assumption of the plaintiff's contention that the profiles were handed over to the plaintiff on 21/09/1993, then there was no question of plaintiff failing to commence the work prior thereto on 20/08/1993. Nonetheless the Trial Court has held issue no.3 to be proved. In so far as the issue nos.1 and 2, which were material issues, are concerned, I have carefully gone through para 6 of the impugned judgment and I find that the Trial Court has not considered the

totality of the oral and documentary evidence produced on record. For instance, there is evidence available on record that there was difficulty in respect of some sites/ location of the towers and about non-removal of the trees and the hut. The Trial Court has found that there was no much of any dispute in so far as the security deposit/ EMD is concerned. The defendants had never made any issue of security deposit and only reference to the security deposit was made in the termination notice to the effect that the security deposit will stand forfeited to the Government. Thus, the issue was basically about the alleged breach of the terms of the agreement, on the other material aspects, regarding supply of bill of material, profiles of locations, approval of the design, making available the site for erection of the tower free from any encumbrances/ hindrances, obtaining of the site clearances from the owners of the lands and some ancillary aspects about the site for storing of the material not being made available. I also find that the Trial Court has failed to appreciate the oral and documentary evidence as a whole. For instance, the DW1 had admitted that time of one month was taken for verifying the second set of drawing given by the plaintiff. All these aspects ought to have been considered by the Trial Court as the fact finding Court.

14. Order XLI, Rule 23A of the Code of Civil Procedure (CPC) has enlarged the scope of the remand by the Appellate Court. Prior to introduction of Rule 23A of Order XLI of CPC in the year 1976, the Appellate Court could order remand under Order XLI, Rule 23 only where the suit was disposed of upon a preliminary point and the decree was reversed in appeal. However, under Rule 23A, such a remand can be ordered (i) when the Trial Court has disposed of the case otherwise than on preliminary point, (ii) the decree is reversed in appeal and retrial 'is considered necessary'. I am conscious of the fact that such a power of remand has to be exercised sparingly. However, in my considered view, the impugned judgment and decree cannot be sustained and it would be appropriate if the Trial Court decides the suit afresh, after hearing the parties and in accordance with law. The learned Counsel for the appellant as well as the learned Additional Government Advocate submit that the parties do not intend to lead any further oral or documentary evidence, in the event the suit is remanded to the Trial Court. Thus, the learned Trial Court can decide the suit afresh, after hearing arguments of the parties.

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

- (i) Both the appeals are partly allowed.

(ii) The impugned judgment and decree is hereby set aside.

(iii) Civil Suit No.114/2004 is restored to the file of the Principal District Judge at Panaji, for disposal according to law.

(iv) It would be open to the learned Principal District Judge to assign the suit to any other competent court, for disposal according to law.

(v) The learned Principal District Judge or the Court to which the suit is assigned, shall decide the suit, as expeditiously as possible and preferably, within a period of six months from receipt hereof.

(vi) Parties to appear before the learned Principal District Judge on 10/07/2018 at 2.30 p.m.

(vii) Parties to bear their own costs.

(viii) Decree be drawn accordingly.

**C. V. BHADANG, J.**

SMA