

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 26-7-2019

Delivered on 04-10-2019

FA No. 48 of 2014

- Mangaturam Prajapati S/o Late Onkarmal Prajapati Aged About 58 Years R/o Krishna Vihar, P.S. Baloda Bazar, Revenue & Civil Distt. Baloda Bazar-Bhatapara, Chhattisgarh

---- Appellant /defendant

Versus

- Ramesh Kumar Vishnoi S/o Late Kanchhedilal Vishnoi Aged About 66 Years R/o Near Gopal Mandir, Sadar Road, P.S. Baloda Bazar, Revenue & Civil Distt. Baloda Bazar-Bhatapara, Chhattisgarh

---- Respondent/plaintiff

For appellant : Mr. Prakash Tiwari and Mr. Palash
Tiwari, Advocates.

For respondent : Mr. Amiyakant Tiwari, Advocate.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. The appellant has preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 31-1-2014 passed by 2nd Additional District Judge, Baloda Bazar - Bhatapara (CG) in Civil Suit No. 9-B of 2013 wherein the said court decreed the suit filed by the respondent/plaintiff partially to the tune of Rs.1,42,800/- and allowed counter claim of the appellant/defendant to the tune of Rs.17,840/-.

2. Respondent/plaintiff instituted a suit for recovery of Rs.2,50,000/- before the trial court on 16-9-2012. The respondent/plaintiff is owner of a land measuring 1200 sq.ft., situated at Vaishnav Colony, Baloda Bazar. The appellant/defendant is a civil contractor and performing his profession at Balodabazar. On 9-2-2010 both parties entered into an agreement for raising construction over the above mentioned land. According to agreement it is settled between the parties that the defendant/appellant will charge Rs.550/- per sq.ft., for erection of ground floor and Rs.500/- per sq.ft., for erection of first and second floor respectively. The total cost of construction was Rs.18,60,000/- but the appellant/defendant took extra Rs.3,20,000/-. A notice was served to appellant and thereafter a suit was filed. In the said suit, appellant/defendant filed counter claim to the tune of Rs.17,840/- but the trial court decreed the suit as mentioned above. As per appellant, decree of the appellant is contrary to the fact and legal aspect of the matter.

3. Learned counsel for the appellant submits as under.

- i) The trial court awarded decree regarding excess amount paid to the appellant for construction of tower and boundary wall but valuation of the said construction was not done at the time of construction. The valuation which is filed is prepared after lapse of time and same is irrelevant for

deciding the issues between the parties.

- ii) As per admission of the respondent/plaintiff no complaint was made during construction, therefore, the valuation made by the appellant is not rebutted and finding of the trial court is not proper in this regard.
- iii) The cost of the boundary wall which is mentioned in the written statement is also not rebutted by the respondent and valuation done by the witness of the respondent after lapse of time is also not relevant for deciding the issue, therefore, finding of the trial court is liable to be set aside.

4. On the other hand, learned counsel for the respondent would submit that no bill is produced regarding inverter and electric wire, therefore, allowing counter claim on this ground by the trial court is not proper. He would further submit that when the appellant admitted acceptance of amount to the tune of Rs.25,30,000/-, respondent is not required to prove that excess amount was not received. Finding of the trial court regarding excess payment is based on legal evidence and same is not liable to be interfered with while invoking jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record of court below including the judgment and decree.

6. The first question for consideration of this court is whether excess amount is paid to the appellant for construction of tower and boundary wall.

7. From the admission of the appellant (para 10), he received Rs.25,30,000/- from the respondent/plaintiff. As per agreement and as per admission of the appellant (para 11) the cost of construction was Rs.18,60,000/-. He has further admitted that Rs.6,70,000/- was balance with him and as per version of the appellant, he has given the return account to respondent as per Ex.P/1. He has further admitted that as per Ex.P/1, it is account of Rs.5,50,000/- was given by him but he did not submit account for rest of Rs.1,20,000/-. From the statement of the appellant himself, it is clear that Rs.1,20,000/- was balance with him and he did not account for that amount. In view of the admission made by the appellant it is clear that Rs.1,20,000/- is balance with appellant and same is recoverable from him by the respondent. Accordingly, it is held that the appellant is under obligation to repay the balance amount of Rs.1,20,000/- to respondent.

8. The second question for consideration of this court is whether the appellant has received excess amount for construction of boundary wall. As per the appellant, cost of boundary wall is Rs.3,22,400/- for

area 806 sq.ft @ Rs.400/- per sq.ft. The trial court opined that as per version of the appellant he made RCC RAM in the gate and calculated amount of boundary wall for the said RAM. Though respondent deposed that boundary wall is not constructed in place of gate which is 10 feet in width, but it is not pleaded by the respondent in his plaint whether any RCC RAM is constructed in the gate and what is the cost of RCC RAM. The respondent was under obligation to plead about entire construction made by the appellant/defendant but it is not pleaded regarding RCC RAM and value of the same. Admittedly, construction of boundary wall was not within the original contract and it is extra work and for that respondent is under obligation to pay the amount to the appellant. The cost of this construction is recoverable from respondent and the respondent has not adduced any evidence as to what quantity and quality of material was used for construction of RCC RAM for transportation of material and labour charge for the same. In absence of evidence, it is not proved that any extra amount to the tune of Rs.33,800/- was received by the appellant in excess to work pleaded by him. Therefore, the trial court is not right in concluding that excess amount was received by the appellant. The trial court should have calculated the cost of RCC RAM but that is not done, therefore, finding of the trial court is not sustainable on this count.

9. The third question for consideration of this court is whether appellant is entitled for amount of inverter and electric wire. The

appellant has not claimed any amount before filing of the suit. No notice was served to respondent regarding bill of inverter and electric wire. No bill was produced in this regard. The trial court is not right in holding that the amount of Rs.17,840/- is balance against the respondent regarding inverter and electric wire. Finding on this count by the trial court is not sustainable. In view of this court, the decree is liable to be modified.

10. Accordingly, allowing the appeal partly the decree is passed against the appellant and in favour of respondent as under:

- i) The appellant shall pay Rs.1,20,000/- to the respondent.
- ii) Parties to bear their own costs.
- iii) Pleader's fee, if certified, be calculated as per schedule or as per certificate, whichever is less.
- iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju