

IN THE HIGH COURT OF ORISSA AT CUTTACK

(A) RFA No.266 of 2010

From the judgment and decrees passed by the learned Adhoc Addl. District Judge (Fast Track), Chhatrapur in CS No.01 of 2003 (M.S.No.70 of 1974) and CS No.02 of 2003 (MS No.21 of 1996).

Shri Krutibas Tripathy (Since Dead) :::: Appellants
by his LRs.

-:: VERSUS ::-

State of Odisha and others :::: Respondents.

For Appellants ::: M/s. Manoj Rath, G.K. Rath,
Advocates,
M/s. T.K. Mishra, B.B. Mohanty,
Advocates.

For Respondents ::: Mr. A.K. Parija, Adv. General,
Mr. G.N. Rout,
Additional Standing Counsel.

(B) RFA No.267 of 2010

Shri Krutibas Tripathy (Since Dead) :::: Appellants
by his LRs.

-:: VERSUS ::-

State of Odisha and others :::: Respondents.

For Appellants :::: M/s. Manoj Rath, G.K. Rath,
Advocates,
M/s. T.K. Mishra, B.B. Mohanty,
Advocates.

For Respondents ::: Mr. A.K. Parija, Adv. General,
Mr. G.N. Rout,
Additional Standing Counsel.

PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of Hearing ::13.05.2022 : Date of Judgment :: 20.06.2022

D. Dash, J. Since both these above noted Appeals as at (A) and (B) arise out of the common judgment and decrees passed in CS No.01 of 2003 (M.S.No.70 of 1974) and CS No.02 of 2003 (MS No.21 of 1996) by the learned Adhoc Addl. District Judge (Fast Track), Chhatrapur. Therefore, those had been heard together for their disposal by common judgment followed by the decrees.

2. Be it be stated here that Krutibas Tripathy, the original Appellant (the original Defendant in C.S. No.01 of 2003=M.S. No.70 of 1994 and the Plaintiff in C.S. No.02 of 2003 = M.S. No.21 of 1995) having expired during pendency of these appeals his legal representatives have been substituted in his place and are pursuing these appeals being the substituted as the original Defendants in challenging the judgment and decree passed in CS No.01 of 2003 (MS No.70 of 1994) for recovery of Rs.13,10,755.50 paise from them and as Plaintiffs of CS No.02 of 2003 (MS No.21 of 1995) challenging the dismissal of the Suit filed by said deceased Krutibas Tripathy for recovery and realisation of a sum of Rs.86,22,000/- together with 18% interest per annum Respondents-Defendants therein.

3. The original Defendant had filed these Appeals under Section-96 of the Code of Civil Procedure being aggrieved by the common judgments and decrees as above.

4. The parties hereinafter for the sake of convenience and to avoid confusion in bringing clarity have been referred to as per the position assigned in the CS No.01 of 2003 (MS No.70 of 1994) which has interchanged in C.S. No. 02 of 2003 (M.S. No.21 of 1995).

5. Facts necessary for the purpose are:-

The suits arise out of a contract executed on 27.07.1987 between the parties for construction of Groyne on the southern side of Sand Pump Trustee of Gopalpur Port at an agreement value of Rs.44,96,217/-. Thus, F.2 agreement was executed and came into force. In that F.2 agreement, there is an item rate contract and all the payments were to be made in the running bills as per the terms of the work executed to the satisfaction and on being duly measured and verified. The original Defendant obtained a Bank Guarantee bearing No.06 of 1987 dtd.27.07.1987 to the tune of Rs.06,75,000/-. Then, the original Defendant was paid the mobilization bill to the tune of Rs.06,74,433/- after production of Bank Guarantee. In this way, the original Defendant was paid 9th running bill to the tune of Rs.19,31,275/-. The original Defendant started the work on 7.12.1987 instead of 01.10.1987. As per the terms and conditions of the contract, the

original Defendant was to provide all tools and plants as well as equipments for which he was given the mobilization advance for timely completion of the work i.e. before March, 1988. It is the case of the Plaintiffs that despite availing mobilization advance, the original Defendant did not take proper step to complete the work within the period as stipulated in the agreement. Though the original Defendant was provided all the materials and all arrangements such as installation of weigh bridge, giving the lay out, keeping a space vacant for stacking materials and supply of electricity to query were made without any delay much prior to 07.12.1987, the original Defendant started work of late for which the Bank Guarantee was extended upto 28.02.1989. Accordingly, extension for completion of the work upto 28.02.1989 was sought by the original Defendant and the same was allowed. It is alleged that the original Defendant withdrew the Bank Guarantee without the knowledge of the Plaintiffs in violation of the terms and conditions of the contract and left the job. It is the further case of the Plaintiffs that when the requests of the original Defendant for extension of time with no claim certificate to complete the work was under consideration, the original Defendant withdrew the Bank Guarantee, for which, he is liable to make good the loose suffered by the Plaintiffs. The Plaintiffs rescinded the contract after long lapse of six years in accordance with the terms and

conditions of the contract and intimated the original Defendant that the security deposit as well as the earnest money deposit stood forfeited. In response to the letter issued to the original Defendant from the department, he neither resumed the work nor deposited the amount. The details of the amount due from the original Defendant-Contractor are (a) Mobilization Advance of Rs.05,36,055/-, (b) Interest on Advance @ 15% from 21.08.2008 to 31.08.1994 amounting to Rs.04,84,873/-, (c) Hire Charges of Department Machineries including materials to the extent of Rs.02,59,471/- and (d) Hire charges of Crane of M/s.IRE Limited of a sum of Rs.30,386/-. Thus in total a sum of Rs.13,10,785/- was levied against the original Defendant and demand for payment of the same was advanced.

6. On the other hand, the case of the original Defendant who is the Contractor is that the said work as expected could not be completed within time, for which, extension of time sought was on account of non availability of required stone products in time and high tide condition prevailing during rainy season. So, a modification was made and an additional agreement was executed on 01.07.1987. The original Defendant made an application seeking extension of time up to 14.6.1988. It was not paid any heed to. But then also substantial portion of the payments were withheld illegally by the Plaintiffs and they also

illegally withheld the machinery and equipments of the original Defendant for which the work could not proceed. It is thus stated that the Plaintiffs violated Clause 17 of the Tender as no notice was given to the original Defendant specifying the deficiencies and demanding the corrective measures to be undertaken and thus no opportunity was given to the original Defendant by the Plaintiffs to rectify the deficiency as alleged. Though representation was made from time to time, the same was not laid any heed to.

So, the original Defendant issued a notice U/s.80 CPC on 12.12.1988 advancing a claim of Rs.82,19,432/-. The original Defendant asserted that the claim of the Plaintiffs was unreasonable and on 01.09.1994 the Plaintiffs unilaterally and illegally rescinded the contract and forfeited the security deposit as well as the earnest money deposit.

7. The Trial Court on above rival case, framed ten (10) issues. Upon examination of evidence and their evaluation, taking up issue No.vi, vii and viii together, the Trial Court has held that the original Defendant is liable to pay the claim amount of his Employer-Plaintiff and this has led the Trial Court to pass the decree in favour of the Plaintiffs and dismissed the suit of the original Defendant. The claim of the Plaintiffs as against the original Defendant has been held as realizable whereas the original Defendant has been held to be not entitled to the sum from the Plaintiffs

as claimed.

8. It was submitted by the learned advocate appearing for the Appellants (Defendants) that the learned Trial Court ought not to have relied upon the decision of the Hon'ble Apex Court in the case of *K.C.Sakaria Vrs. Government of State of Kerala and another*, reported in Vol.101 (2006) CLT-758 in dismissing the suit filed by the original Defendant and decreeing the suit of the Plaintiffs. According to him, in the case at hand, as it appears from the available materials on record, there are allegations and counter allegations and passing of the buck to each other. He thus submitted that, the decision relied upon is of any aid to the case of the Plaintiffs as the facts of the given case are distinguishable from the factual settings of the cited case.

It was contended by him that the action of the Plaintiffs directed against the original Defendant is illegal, unilateral and the evidence clearly go to show that the Plaintiffs have acted in a calculated manner only to harass the original Defendant, for which, no payment was made to the original Defendant compelling him to proceed for withdraw of the Bank Guarantee and subsequently, the Plaintiffs have illegally rescinded the contract on 01.09.1994 without giving any opportunity to the original Defendant and violating the principles of natural justice and without affording any opportunity of being heard. It is further contended that such

high handed action of the Plaintiffs is completely against the terms of the contract and being in a superior position is designedly motivated.

9. Per contra, it was contended by the learned advocate appearing for the Respondents (Plaintiffs) that the original Defendant failed to act as per the terms and conditions of the contract vide Ext.A despite all cooperation being extended by the Plaintiffs. It was further contended that the original Defendant with ill intention to cause loss of the Department unilaterally has withdrawn the Bank Guarantee, though the application of the original Defendant for extension of time was under consideration. So, it was contended that the judgment and decrees passed by the Trial Court directing the original Defendant to pay the decretal amount is wholly justified and the same are required to be confirmed.

10. As regards the requests by the original Defendant for extension of time with no claim certificate to complete the balance work, it appears that no intimation had been given to the original Defendant by the Plaintiffs that his application for extension of the time to complete the work then under consideration. So, when the application of the original Defendant was not extended though not rejected, it is natural that the original Defendant remained in a fix being not sure of getting the permission for extension of time with no claim certificate to complete the rest work and in such back drop, the withdrawal of the Bank Guarantee

cannot be said to be unjustified and unreasonable and as an action by the original Defendant in violation of the terms and conditions of the contract.

11. The available evidence on record show that after rescission of the contract/agreement, the the original Defendant-Contractor, issued a notice U/s.80 CPC on 12.12.1988 putting forth a claim of Rs.82,19,432/- besides the additional loss caused to him. The Plaintiffs refused the claim of the original Defendant. It is however not forthcoming as to why and under what circumstances and grounds the claim of the original Defendant was refused. Plain and simple refusal will not suffice for the purpose of achieving the success in the case of the Plaintiffs making them entitled to a decree as prayed for and this Court is of the view that it was imperative on the part of the Plaintiffs to let all those known to the original Defendants and the rule of transparency in such matter so demands which cannot be lost sight of. It also appears that substantial amount having been withheld without any rhyme and reason by the Plaintiffs, the machineries equipments, etc. belonging to the original Defendant-Contractor have been withheld and the work could not proceed for which it is now said that Clause 47 of the F.2 agreement was violated. It does not surface from the available evidence on record that the Plaintiffs pointed out any such deficiencies and defects in the work

done by the original Defendant demanding corrective measures in those regard. Further, it does not also appear that any opportunity of being heard was given to the original Defendant at any such given point of time.

12. From the judgment of the Trial Court, it appears that the Trial Court has straightway held that as per F.2 admitted in evidence and marked as vide Ext.A, the original Defendant had to plan as to mobilization of manpower, materials and machineries and required space for efficient execution of the work in time when the evidence on record do not go to show that the original Defendant did not plan to have the above things. It further appears that the Trial Court has discussed that as per the agreement the original Defendant was also required to make water supply arrangement and in fracture including mobilization of crane and other accessories to operate the query by 01.09.1987 and also to mobilize required number of equipments, such as trucks, dumpers, cranes and other machineries and equipments and construct labour sheds at the groyne site before 1.9.1987. But then no evidence have surfaced on the record that the original Defendant did not do all the above works in proper time. No discussion has been made by the Trial Court that the original Defendant did not do the above works as per the terms and conditions of the F.2 agreement and as required by said obligation at what

point of time.

It is seen that the Trial Court has not discussed anything as to how the claim of the Plaintiffs which has been allowed directing the original Defendant to pay, has been substantiated and as to how the available evidence on record are establishing such claim. This Court having made a thorough scrutiny of evidence is not in a position to so hold in favour of establishment of the claim of the Plaintiffs.

13. The Trial Court has held that the original Defendant has admitted the claim of the Plaintiffs during his cross-examination at paragraph 15 of his deposition that his payments were withheld, for which he did not extend the Bank Guarantee beyond 31.03.1988 and withdrew the margin money from the Bank sometime in the month of October and November, 1988. It is not understood as to how thereby the claims of the Plaintiffs are admitted by the original Defendant and the above revelation in his cross examination would be sufficient enough to put the blame upon the original Defendant that he has violated the terms and conditions of the contract when the original Defendant has thereunder provided the jurisdiction and his point of view which is not getting refuted by the Plaintiffs through clear, cogent and acceptable evidence.

That the Plaintiffs have filed the Suit first thereafter the original Defendant has instituted the Suit and it is within a gap of five months.

But then the Trial Court has held the claim of the original Defendant as barred by the law of limitation. While no so holding in relation to the claim of the Plaintiffs. The Trial Court has held that the original Defendant cannot claim rendition of accounts and for realization of certain claim at the same time and this amounts to blowing hot and cold at the same movement. Such a view is untenable. But no stretch of imagination it can be said that the original Defendant was blowing hot and cold at the same time inasmuch as the original Defendant has to seek for rendition of accounts from the Plaintiffs and after rendition of accounts, he is only entitled to realize the amount due on the Plaintiffs if any. Sec.34 of Specific Relief Act and Order-2 Rule-2 CPC lay down that the whole claim of a party as plaintiff is to be made in a single Suit and the claim in piecemeal by filing different, separate and successive Suits is not permissible.

14. That the Trial Court has observed that the original Defendant made some claims and did not do any further work had virtually abandoned the work on 12.12.1988. However, no discussion appears to have been made by the Trial Court that the claims of the original Defendant are not as per terms and conditions of F-2 agreements, for which, such claims are unjustified and unreasonable.

15. It reveals that the Trial Court has held that there is no evidence on

record that the parties have taken shelter of Clause 54 of the Agreement vide Ext.A and resorted to it. So, the original Defendant's suit when is liable to be dismissed for not resorting to Clause 54 of the Agreement vide Ext.A, there can never be any different treatment as to the suit of the Plaintiffs and here when the Plaintiffs have also not resorted to the same Clause. This view taken by the Trial Court in saving the suit of the Plaintiffs and throwing the suit filed by the original Defendant is untenable. This Court, therefore, is of the view that the Plaintiffs are equally at fault in the matter.

The evidence on record being read as a whole, it appears that the original Defendant when is said to have not acted as per the terms and conditions of the agreement, the Plaintiff had not provided him the opportunity to rectify his defects/ deficiencies/ shortfall as the case may be. Except some correspondences, nothing more emerges in evidence to show that both parties have acted fairly and reasonably in the process of execution of the work under the Contract.

16. As it is seen here both the original Defendant and Plaintiffs have not acted strictly as per the terms and conditions of the agreement F.2 vide Ext.A. Thus, it is apparent that both the parties are at fault in not acting within the four corners of the agreement F.2 and in adherence to the terms and conditions set forth therein. The finding recorded by the

Trial Court are seen to have been not found upon available evidence. In the upshot of the aforesaid, the judgment and decree passed by the Trial Court in C.S. No.01 of 2003 (M.S. No.70 of 1994) allowing the claim of the Plaintiffs cannot be sustained and those passed in C.S. No.02 of 2003 (M.S. No.21 of 1995) are have to receive the scale of confirmation.

17. For the aforesaid discussion and reasons, the judgment and decree passed by the Trial Court in C.S. No.01 of 2003=M.S. No.70 of 1994 allowing the claim of the Plaintiff are hereby set aside and those passed in (C.S. No.02 of 2003= M.S. No. 21 of 1995) are hereby confirmed. Consequently the RFA bearing No.266 of 2010 challenging the judgment and decree passed in CS No.01 of 2003 (MS No.70 of 1994) is allowed and RFA No.267 of 2010 challenging the judgment and decree passed in CS No.02 of 2003 (MS No.21 of 1995) by the Adhoc Addl. District and Sessions Judge, Chhatrapur is dismissed. No order as to costs.

18. The Appeals are accordingly dismissed.

***D. Dash,
(Judge).***