

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 1994) and CS No.02 of 2003 (MS No.21 of 1995).

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

-:: VERSUS ::-

State of Odisha and others :::: Respondents

(B) RFA No.267 of 2010

Shri Krutibas Tripathy (Since Dead)
by his LR's :::: Appellants

-:: 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 in both RFAs)

For Respondents :::: Mr. G.N. Rout,
Addl Standing Counsel
(in both RFAs)

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 under section 96 of the Code of Civil Procedure (for short, called as 'the Code') 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 1994) and CS No.02 of 2003 (MS No.21 of 1995) by the learned Adhoc Addl. District Judge (Fast Track), Chhatrapur, those had been heard together for their disposal by this common judgment followed

by the decrees.

2. Be it be stated here that Krutibas Tripathy, the original Appellant (the 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 substituted as the 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) and they too are assailing 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 being aggrieved by the common judgment 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 to them in the CS No.01 of 2003 (MS No.70 of 1994) which stands 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, a protective structure of permanent nature extending from shore into the water to prevent a beach from washing away on the southern side of Sand Pump Trestle 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 with 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 loss 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 was sought 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 paid 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 two suits since arose out of one contract, upon whose terms and conditions, both sides rely on for their respective claim; those have been heard by the Trial Court analogously and disposed of by common judgment followed by the decrees. The suit (C.S. No.1 of 2003=M.S. No.70 of 1994) filed by the Plaintiffs has been decreed in full and the suit (C.S. No.2 of 2003=M.S. No.21 of 1995) filed by the original Defendant has been dismissed. It be stated here that the Plaintiffs have not filed the written statement in the suit filed by the Defendant against them.

8. 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. In the trial, the Plaintiffs have tendered the evidence of the

then Assistant Engineer, Gopalpur Port Project whereas the Defendant has examined himself as the lone witness from his side.

9. It was submitted by the learned counsel 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 no 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 withdrawal 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 in violation of the principles of natural justice and without affording any opportunity of hearing. It was further contended that such high handed action of the Plaintiffs is completely against the terms of the contract and they being in a superior position is designedly motivated. He submitted that when the Trial Court on the basis of evidence has not held that the Plaintiffs had no fault in the matter and as such has made no contribution in posing hindrance to the work, the

answer on the issue as to the saddling of the liability upon the original Defendant in their favour is unsustainable.

10. Per contra, it was submitted by the learned counsel 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 a dishonest 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. He confirmed that in the facts and circumstances, as those emerge from the evidence on record; the dismissal of the suit filed by the original Defendant which was as a measure of counterblast to pose threat to the claim of the Plaintiffs is wholly justified; more particularly in view of the utter failure on the part of the original Defendant to establish his defence taken in the suit filed by the Plaintiffs and the facts narrated in the suit filed by the original Defendant justifying the claim levied therein.

11. The points for determination as required under Order 41 Rule 31 of the Code and as authoritatively pronounced in case of Somakka (Dead) by LRs –V- K.P. Basavaraj (Dead) by LRs; in Civil Appeal No.117 of 2009 disposed of on 13.06.2022; 2022 Live Law (SC) 550 thus stand formulated as under:-

“(i) Whether the Plaintiffs have established their claim as against the original Defendant within the four corners of the F-2 agreement by leading clear, cogent and acceptable evidence?;

and

(ii) Whether the original Defendant's claim against the Plaintiffs can sustain on the basis of evidence on record in consonance with the terms and conditions of the contract?"

12. Coming to judge the sustainability of the findings recorded by the Trial Court on those issues in side by side addressing the rival submission and finding out the answers to the points for determination as stated above; as regards the requests by the original Defendant for extension of time with no claim certificate to complete the balance work, it is seen 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 favoured with extension though not rejected, it is quite normal for the original Defendant remaining in a fix being not sure of getting the permission for extension of time with no claim certificate to complete the rest work. In the back drop of the above, the non-extension of the Bank Guarantee and withdrawal of the margin money 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 with a dishonest intention to cause loss to the Plaintiffs. That act itself thus in my view cannot be termed to be the one in breach of terms of conditions under the agreement.

13. The available evidence on record show that after rescission of the contract/agreement, 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 under what circumstances and grounds the claim of the original Defendant was

refused. When the averments specific taken by the original Defendant have not been controverted in any manner by filing the written statement, plain and simple refusal in evidence through the D.W.1 will not suffice the purpose of achieving the success for the Plaintiffs in its suit as entitled to the 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 which the rule of transparency in such matter so demands and thus cannot be lost sight of. It also appears that substantial amount having been withheld by the Plaintiffs without any rhyme and reason, the machineries equipments, etc. belonging to the original Defendant-Contractor had also been withheld and the work could not proceed for which Clause 47 of the F.2 agreement is said to have been violated. It does not surface in the available evidence on record that the Plaintiffs pointed out any such deficiencies and defects in the work done by the original Defendant demanding any such corrective measures in those regard to be immediately undertaken. Further, it does not also appear that any opportunity of hearing was given to the original Defendant at any such given point of time.

14. From the judgment of the Trial Court, it appears that the Court has straightway held that as per F.2 admitted in evidence and marked as 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 properly in due 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 standing to support such claim. It is admitted that besides the usual terms and conditions, as contained in F-2 agreement and additional argument was entered into on 01.07.1987 fixing additional terms and conditions and respective duties, liabilities and obligations forming part of the agreement which were typed out in five sheets and have been the part of the agreement. The evidence on record show that the parties too had a lot of difference with regard to the mode and conduct of carrying out the project. This Court having made a thorough scrutiny of evidence is not in a position to so hold in favour of the finding as to establishment of the claim of the Plaintiffs as has been recorded in a slipshod manner by the Trial Court.

15. 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 being withheld, 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 being admitted by the original Defendant and the above revelation in his cross examination would be enough to take the blame wholly upon the original Defendant that he has violated the terms and conditions of the contract when the original Defendant has thereunder provided the justification and his point of view which is not getting refuted by the Plaintiffs through clear, cogent and acceptable evidence and shown to be otherwise than to having no foundation in the pleading.

That the Plaintiffs have filed the Suit first and thereafter the original Defendant has instituted the Suit. 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 not holding so 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 which in my view is correct but then amounts to blowing hot and cold at the same breath when one goes to sustain the claim of the Plaintiffs.

Sec.34 of Specific Relief Act and Order-2 Rule-2 of the Code lays 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 are not permissible which appears to have not been adhered to by the original Plaintiffs.

16. That the Trial Court has observed that the original Defendant made some claims and having not done any further work had virtually abandoned the work on 12.12.1988. However, no detail discussion appears to have been made by the Trial Court that either 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.

17. 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 with which I have no difference; there can never be any different treatment as to the suit of the Plaintiffs to say that the same does not fall foul of that very clause. Here when the Plaintiffs have also not resorted to the same Clause, the suit at their instance too ought to be viewed through the same prism in producing the same end result. This view taken by the Trial Court in throwing the suit filed by the original Defendant when is correct, the suit of the Plaintiffs ought not to have been saved is thus untenable. This Court, therefore, is of the view that the Plaintiffs are equally at fault in the matter.

The evidence on record being read in entirety, it appears that the original Defendant when is said to have not acted as per the terms and conditions of the agreement, the Plaintiffs 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.

18. In the given case and as obtained in evidence 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 seen that both the parties are responsible at their level for non-completion of the project and as such 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 in upholding the claim of the Plaintiffs as against the original Defendant is thus found to be having no base. Given equal treatment in so far as the claim advanced by the original Defendant against the Plaintiffs is concerned; this Court accepts the finding on that score as has been recorded by the Trial Court.

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) have to receive the seal of confirmation.

19. In the wake of above, 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 Plaintiffs are hereby set aside and those passed in (C.S. No.02 of 2003= M.S. No. 21 of 1995) dismissing the claim of the original Defendant are hereby confirmed.

20. Resultantly, 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 the RFA No.267 of 2010 challenging the judgment and decree passed in CS No.02 of 2003 (MS No.21 of 1995) is dismissed.

There shall be no order as to cost in both the Appeals.

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