

Sr. No.218

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-6568-2016 (O&M)

Date of decision: 28.04.2023

Sanjay Kiloi – Dopana Co-operative Labour and Construction Society Ltd.

...Appellant

Vs.

The Financial Commissioner and Principal Secretary Irrigation Department,
Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Ravinder Malik, Advocate
for the appellant.

Mr. S.S. Mann, Addl. A.G., Haryana.

ARUN MONGA, J. (ORAL)

For convenience, parties herein are addressed as per the recitals
before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts
below, plaintiff is in second appeal before this Court assailing Ld. Trial
Court judgment and decree dated 17.12.2014, as upheld by Ld. First
Appellate Court vide its judgment and decree dated 16.05.2016, dismissing
its suit for recovery of Rs.7,07,200/- along with interest.

3. Briefly stated, facts as noticed by Ld. Courts below, are that
plaintiff society authorized Ramphal Singh, Special Power of Attorney of
Sanjay, President of Society to file the present suit.

3.1. Plaintiff was awarded a contract to lay down pipe line to drain out the flood water from RD-0 to RD-2650. The said task was named “Constructing Baland Pipe Line Link Drain with RD-0 to RD-2650 out falling into JLN Feeder at RD 185160-R. The total work assigned to plaintiff was awarded at the cost of Rs.31,97,760/-. Thereafter, defendants reduced the distance from RD-2650 to RD-2250 vide order dated 11.01.2010. Vide letter dated 20.05.2010, defendants again increased the length from RD-2250 to RD-2650. Plaintiff completed the assigned work up to RD-0 to RD-2250 on 29.06.2010. For the remaining work, a sump well was to be constructed only after de-watering the vicinity. Plaintiff requested permission for de-watering to construct the sump well on RD-185610-R JLN feeder, but the defendants did not grant any permission. The material placed on the site by plaintiff in expectation of permission was taken away by the villagers stealthily as the same continued to be lying there for quite long time. Thus, the plaintiff suffered monetary loss of Rs.99,272/- due to negligence of defendants.

3.2. Defendants prepared total bill of Rs.25,54,989/- for work done by plaintiff. But only payment of Rs.19,45,041/- was cleared and balance payment of Rs.6,09,948/- remained outstanding. An amount of Rs.97,252/- deducted as security was also outstanding against defendants. Earnest money of Rs.35,000/- was also not returned by defendants. Thus, total amount of Rs.8,06,472/- was outstanding against defendants. Plaintiff time and again raised demand from defendants for recovery of above said

amount. Beleaguered plaintiff-society, as it then was, also served a legal notice upon defendants but to no effect, hence the suit for recovery.

4. Upon notice, defendants filed joint written statement taking preliminary objections *inter alia* regarding *locus standi*, causal connection, maintainability, jurisdiction, concealment of material facts etc.

4.1. On merits, the defense was that length of drain was proposed to be reduced and slope of pipe line was provided as 0.25 per 1000 ft. instead of 0.15 per 1000 ft. but later on the length was restored as per the agreement. Revised L-section was approved vide S.E., YWS Circle, Rohtak letter dated 20.05.2010 in which some modifications in design were made as per demand of the farmers and site requirement. Plaintiff society neither completed the work in full length assigned to it nor executed the work according to PWD specification and design, as per condition No.11 of bid contract. SE, Vigilance Circle, Rohtak in his inspection notice dated 15.01.2011 had pointed out serious deficiencies in the execution of the work and clear directions were given for dismantling the already laid pipe line in a length of about 300 ft. But the agency did not rectify the defects.

4.2. It was further asserted that plaintiff society did not complete the work as per design level of pipe line and, as per the agreement, the work was required to be completed by the agency by 30.06.2011 i.e., the extended time period, but the same was not be completed by agency. It was further alleged that the executing agency was responsible for the protection of material placed at site and the department had no concern in this regard.

5. Based on the rival pleadings, following issues were framed:

1. Whether the plaintiff is entitled to effect the recovery of an amount of Rs.8,06,472/- along with interest @ 8% per annum w.e.f. 29.06.2010 from the defendants, if so to what effect? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiff has no cause of action to file the present suit? OPD
4. Relief.

6. On appraisal of evidence vis-à-vis pleadings, issue No.1 was decided in favour of defendants and issues No.2 & 3 were decided in favour of plaintiff and consequently, the suit of plaintiff was dismissed vide judgment and decree dated 17.12.2014.

7. Aggrieved, plaintiff-appellant preferred first appeal, which was dismissed by Ld. First Appellate Court vide impugned judgment and decree dated 16.05.2016, resulting in instant Regular Second Appeal before this Court.

8. Learned counsel for appellant would argue that Ld. Trial Court non-suited the appellant mainly on technical ground of execution of Special Power of Attorney by President of Society and evidence tendered by holder of an SPA, though no such objection was raised on behalf of respondents.

9. He would further argue that Ld. Courts below have failed to appreciate that appellant has executed the work assigned to it within prescribed time and competent authority has also given a certificate that work had been executed by appellant as per PWD specification within time and completion certificate had also been issued to appellant on 30.06.2010

by respondents and therefore, appellant cannot be compelled to execute work beyond contract agreement by way of revising the schedule of work.

10. Having perused the judgment of Ld. Courts below, what thus transpires is that plaintiff/appellant has been non-suited primarily on two counts, which are as under:-

- i) *For non-execution of work for a distance of 400 ft. qua RD-2250 to RD-2650;*
- ii) *The suit was held to be non-maintainable because the resolution as well as power of attorney authorizing the representative of the society was of a date subsequent to the date of completion of work.*

11. In my opinion, the learned Courts below erred on both counts while non-suiting the plaintiff.

11.1. The defendants' stand in the written statement summarized in the judgment of the learned trial Court shows that they did not refute the plaintiff's pleading to the effect inter alia that they (the defendants) had changed the quantum of work to be executed by the plaintiff by reducing the distance from RD 2650 (reduced distance from the canal) to RD 2250 vide order dated 11.01.2010 and then vide letter dated 20.05.2010 increased the length from RD-2250 to RD-2650; on 29.06.2010 the plaintiff had completed the assigned work from RD-0 to RD-2250; the defendants had prepared a bill of Rs.25,54,989/- for the work done by the plaintiff; the payment of Rs. 19,45,041/- only was made to the plaintiff and balance of Rs. 6,09,948/- remained unpaid and the earnest money of Rs. 35,000/- had not been returned by them. These factual averments in the plaint thus stood impliedly admitted by the defendants. Settled law is that the facts admitted

need not be proved. That apart, in his cross examination the defendants' own sole witness namely DW1 Pawanjeet SDEO, Beri clearly admitted that the contractor had completed the work (from RD-0 to RD-2250) up to 29.06.2010. For ready reference, his cross-examination as available in the grounds of this appeal is also reproduced hereunder:

“It is correct that at first time, contractor has completed the work as per the terms and condition of contract but later on after the enquiry note of S.C vigilance he has held the work up to the length of 300 feet as below specification and ordered for re-executing the work. It is correct that contractor has completed the entire work up to 29.06.2010. Whatever work was correct its payment was made. I do not know that in which R.D deficiency in 300 feet length of work was found by S.C vigilance. It is wrong that we have increased the depth of 300 feet work subsequently. I do not know as to whether depth of 300 feet was increased or not subsequently. It is correct that if depth of any work is increased then department has to pay extra amount. It is correct that contractor payment for 221 pipes is already made and payment for 50-60 pipes is remaining outstanding. Again said that payment of pipe was outstanding. I can not tell clearly that how many pipes were there. It is correct that I can tell this after perusing the record. It is correct that payment of Rs 7 lakh of plaintiff was remaining outstanding. Again said that how much payment is outstanding I can tell after perusing the record. It is correct that flood water is accumulated at the place of execution of work. It is correct that contractor has requested the department for draining out the water which was not accepted by department. It is correct that water is being drained out through these pipelines only. Now we are draining water with the help of machine and pump. It is correct that contractor has completed the work on 29.06.2010. It is wrong that we have not given any notice to contractor for deficiency in work. It is wrong that contractor has executed the work as per the terms and condition. It is wrong that department is liable to pay Rs 7 lakh to contractor. It is wrong that I am deposing falsely being Government employee.”

11.2 It was thus not necessary for the plaintiff to appear personally as a witness for proving that he had completed the assigned work from RD-0 to RD-2250; the defendants had prepared a bill of Rs.25,54,989/- for the work done by him; the payment of Rs. 19,45,041/- only was made to the plaintiff and balance of Rs. 6,09,948/- remained unpaid and the earnest money of Rs. 35,000/- had not been returned by them, since the relevant plea in the plaint stood impliedly admitted by the defendants. Furthermore, as stated above, the defendants' own sole witness namely DW1 had admitted that the contractor had completed the work (from RD-0 to RD-2250) up to 29.06.2010. Thus, the execution of the work (from RD-0 to RD-2250) up to 29.06.2010 by the plaintiff stood proved, if at all any proof was required.

11.3 Given the facts and circumstances of the case, in my opinion, the non-examination of the plaintiff was not fatal to his claim for the balance unpaid amount of Rs. 6,09,948/-(Rs.25,54,989-19,45,041=6,09,948) for the works actually executed and for refund of his earnest money of Rs. 35,000/-.

12. Plaintiff's own case is that the defendants had prepared a bill of Rs.25,54,989/- for the work done by the plaintiff; the payment of Rs. 19,45,041/- only was made to him and balance of Rs.6,09,948/- remained unpaid. These arithmetical calculations negate the plaintiff's claim that a sum of Rs. 97,252/- had also been deducted as security. Learned counsel for appellant could not reconcile these contradictions. I am, therefore, not inclined to allow this part of the claim in present appeal.

13. As regards award of interest at the rate of 7% on the unpaid amount, same is fair and reasonable.
14. Resultantly, the appeal is partly allowed, finding of the learned courts below on issue No. 1 is modified and it is held that the plaintiff is entitled to the recovery of Rs.6,44,948/- comprising of Rs.6,09,948/- being the unpaid balance for the works executed and Rs.35000/- as refund of his earnest money with interest at the rate of 7% per annum from the date of filing the suit till payment.
15. Pending application/s, if any, shall also stand disposed of.
16. No order as to costs.

(ARUN MONGA)
JUDGE

April 28, 2023
ashish

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No