

CASE NO.:
Appeal (civil) 7333 of 2004

PETITIONER:
State of Kerala & Anr

RESPONDENT:
M.A. Mathai

DATE OF JUDGMENT: 09/04/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Kerala High Court dismissing the appeal filed by the appellant-State and its functionary questioning legality of the judgment and decree in O.S. No.859 of 1988 on the file of the Sub Court, Trichur. The suit was filed for recovery of money in connection with the award of work undertaken by the respondent-plaintiff who is the contractor.

The High Court was of the view that the court below had fixed award of damage of Rs.9,53,669/- and found that the plaintiff was entitled to damage under other head and, therefore, restricted the decretal amount to Rs.10,00,000/- The appeal was accordingly dismissed.

In support of the appeal learned counsel for the appellant submitted that the letters on which reliance had been placed show that the contractor was not doing the work within stipulated period and had been asked for to apply for extension. The basic stand of the plaintiff\026respondent was that the extensions had been sought for and supplemental agreements were executed not on the free will and free consent of the plaintiff but it was due to circumstances which prevailed at that time which necessitated the plaintiff to agree to the commands of the defendants. To put it differently as noted above the plaintiff had contented that it was due to coercion that these supplemental agreements were executed. The trial court concluded that on the threat of forfeiture, re-allocation and re-arrangement at the cost of the plaintiff the execution of supplemental agreement was done. It is pointed out that there was no clause for any escalation. It was wrongly assumed by the trial court that the supplemental agreements and declarations made by the plaintiff were not binding on him as it was not obtained by free consent and free will and in the normal course of events.

In response, learned counsel for the respondent submitted that the amounts awarded were not for damages and it was only in respect of extra work done that the amounts has been awarded. It was submitted that the department itself had recommended for payment for the extra work done and as per rates under the contracts the amounts have been awarded. Though the Government did not agree to the proposal, that itself shows about the genuineness of the

respondent's claim. In respect of another contract the extra amounts have been paid.

The trial court and the High Court appear to have been totally confused about the nature of the suit. The plaint itself indicated that it was a "suit for recovery of money for damages". In fact the High Court itself observed at para 8 that the primary issue related to assessment of damages. It also found that the plaintiff was entitled to damages under various heads.

Additionally, the trial court concluded that the supplemental agreements (Ex. B-2 to Ex. B-6) and Declarations (B-10 to B-14) were not at all binding on the plaintiff. If that was really so, there could not have been any extension. The finding that these documents were not obtained by free will and free consent and in the normal course of events, to say the least, is an inferential conclusion not supported by any evidence.

As noted above, the trial court proceeded on the basis as to whether plaintiff was entitled to damages and if so what is the amount and quantum is to be fixed. It was noted that being a suit for damages, the plaintiff was claiming so many items of damages in terms of money involving many calculations. This is contrary to respondent's plea before us. Their stand is that the amount was not for damages but for extra work done. As noted above it was only a suit for damages. In *General Manager, Northern Railway and another v. Sarvesh Chopra* [2002 (4) SCC 45] it was inter alia observed as follows:

"In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states

"a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-

performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (1) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

In the instant case both the trial court and the High Court have without any basis come to hold that the supplemental agreement was due to coercion etc. For coming to such conclusion, material had to be placed, evidence had to be led. Mere assertion by the plaintiff without any material to support the said stand should not have been accepted by the trial court and the High Court.

Looked at from any angle the impugned judgment of the High Court is without any basis and is set aside. The appeal is allowed but in the circumstances without any order as to costs.