REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3245 OF 2003

R.L. Kalathia & Co. ....
Appellant(s)

Versus

State of Gujarat ....
Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) This appeal is directed against the judgment and final order dated 07.10.2002 passed by the Division Bench of the High Court of Gujarat whereby the High Court set aside the judgment and decree dated 14.12.1982 passed by the Civil Judge, (S.D.), Jamnagar directing the State Government to pay a sum of Rs.2,27,758/- with costs and interest and dismissed the Civil Suit as well as cross objections filed by the appellant-Firm for recovery of the aggregate amount of Rs. 3,66,538.05

on account of different counts as specified in the claim of the said suit.

2) Brief facts:

a) The appellant-Firm, a partnership firm registered under The Indian Partnership Act, is carrying on the business of construction of roads, buildings, dams etc. mostly in Saurashtra and also in other parts of the State of Gujarat. In response to the invitation of tender by the State Government for construction of Fulzer Dam II in Jamnagar District, the appellant-Firm quoted and offered to construct the same for the quotation, specifications and design of the Dam vide covering letter dated 05.06.1970. In the said letter, the appellant-Firm also offered that they would give rebate of 3/4% provided the final bill be paid within three months from the date of completion of the work. The offer of the appellant being the lowest amongst other parties, it was accepted by the State Government with the clause that the construction work was to be completed within a period of 24 months from the works order dated 07.09.1970 which was subsequently

clarified that the period of 24 months was to be commenced from the date of commencement of work i.e., 29.11.1970.

b) During execution of the said work, the Executive Engineer, who was in-charge of the project, made certain additions, alterations and variations in respect of certain items of work and directed the appellant to carry out additional and alteration work as specified in writing from time to time. The final decision as to the alteration in respect of certain items of work and particularly, in respect of the depth of foundation which is known as cut off trenches (COT) took long time with the result that the Firm was required to attend the larger quantity of work and thus entitled for extra payment for the additional work. As per the works contract, the Firm was not paid the running bill within the specified time and, therefore, suffered loss.

c) On 16.07.1976, the Firm lodged a consolidated statement of their claims for the additional or altered works etc. to the Executive Engineer. As there was no response, the Firm served a statutory notice dated 04.01.1977 under Section 80 of the Code of Civil Procedure (hereinafter referred to as 'the

Code'). Again, on 24.03.1977, after getting no reply, the Firm filed Civil Suit No. 30 of 1977 on the file of the Civil Judge (S.D.), Jamnagar praying for a decree of the aggregate amount of Rs.3,66,538.05 with running interest at the rate of 9% p.a. from the date of final bill till the date of Suit and at the rate which may be awarded by the Court from the date of Suit till payment. Vide order dated 14.12.1982, the Civil Judge allowed the suit and passed a decree for a sum of Rs.2,27,758/- with proportionate costs together with interest @ 6% p.a. from the date of suit till realization.

d) Being aggrieved by the said judgment and decree, the State Government filed First Appeal No. 2038 of 1983 before the High Court of Gujarat at Ahmedabad. The Division Bench of the High Court, vide its order dated 07.10.2002, allowed the appeal of the State Government and dismissed the suit of the appellant-Firm and also directed that the decretal amount deposited by the State Government and as permitted to be withdrawn by the Firm should be refunded within a period of four months from the date of the judgment. Being aggrieved

by the said judgment, the appellant-Firm has filed this appeal by way of special leave petition before this Court.

3) Heard Mr. Altaf Ahmed, learned senior counsel for the appellant and Ms. Madhavi Divan, learned counsel for the respondent-State.

4) Though the trial Court after accepting the claim of the plaintiff granted a decree to the extent of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of suit till realization, in the appeal filed by the State after finding that the plaintiff was estopped from claiming damages against the Department as the final bill was accepted, the High Court allowed the appeal of the State and dismissed the suit of the plaintiff. The High Court non-suited the plaintiff mainly on the ground of Clauses 8 and 10 of the agreement and of the fact that the final bill was accepted by the plaintiff under protest. In view of the same, it is relevant to refer Clauses 8 and 10 of the agreement which are as follows:

"Clause 8.—No payment shall be made for any work estimated to cost less than Rs 1,000/- till after the whole of the said work shall have been completed and a certificate of completion given. But in the case of work estimated to cost more than Rs 1,000/- the contractor shall, on submitting a monthly bill therefore, be entitled to receive payment proportionate to the part of the work then approved and passed by the engineer in charge whose certificate of such approval and passing of the sum so payable shall be final and conclusive against the contractor. All such intermediate payments, shall be regarded as payments by way of advance against the final payments only and not as payments for work actually done and completed and shall not preclude the engineer in charge from requiring bad, unsound, imperfect or unskillful work to be removed and taken away and reconstructed or re-erected, nor shall any such payment be considered as an admission of the due performance of the contract or any part thereof in any respect of the occurring of any claim nor shall it conclude, determine, or effect any way of the powers of the engineer in charge as to the final settlement and adjustments of the accounts of otherwise, or in any other way vary or affect the contract. The final bills shall be submitted by the contractor within one month of the date fixed for the completion of the work, otherwise the engineer in charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties.

Clause 10. A bill shall be submitted by the contractor each month on or before the date fixed by the engineer in charge for all work executed in the previous months and the engineer in charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claim, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the engineer in charge may depute a subordinate to measure up the said work in the presence of the contractor or his duly authorized agent whose counter signature to the measurement list shall be sufficient warrant, and the engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects."

It is the stand of the State and accepted by the High Court that the plaintiff-Firm has not fully complied with Clauses 8 and 10 of the agreement. It is also their stand that mere endorsement to the effect that the plaintiff has been accepting the amount as per final bill "under protest" without disclosing real grievance on merits is not sufficient and it amounts to accepting the final bill without any valid objection and grievance on merits by the plaintiff. The High Court has also accepted the claim of the State that by the conduct of the plaintiff in accepting the final bill and the Department has made full payment to the plaintiff, sending statutory notice and filing suit for recovery of the differential amount was barred by the principle of estoppel. On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the plaintiff.

5) It is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials.

6) Before going into the factual matrix on this aspect, it is useful to refer the decisions of this Court relied on by Mr. Altaf Ahmed. In the case of ***Chairman and MD, NTPC Ltd.*** **vs.** ***Reshmi Constructions, Builders & Contractors,*** (2004) 2 SSC 663, which relates to termination of a contract, one of the questions that arose for consideration was "Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuance a 'No Due Certificate' by the contractor, can

any party to the contract raise any dispute for reference to arbitration? While answering the said issue this Court held:-

> **"27.** Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.
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> **28.** Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

7) In ***Ambica Construction*** vs. ***Union of India,*** (2006) 13 SCC 475 which also deals with issuance of "No-claim Certificate" by the contractor. The following conclusions are relevant which read as under:-

> **"16.** Since we are called upon to consider the efficacy of Clause 43(2) of the General Conditions of Contract with reference to the subject-matter of the present appeals, the same is set out hereinbelow:
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> "43. (2) *Signing of 'no-claim' certificate*.—The contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a 'no-claim' certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally

measured up. The contractor shall be debarred from disputing the correctness of the items covered by 'no-claim certificate' or demanding a reference to arbitration in respect thereof."

17. A glance at the said clause will immediately indicate that a no-claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a no-claim certificate had been issued by the appellant. On the other hand, even the first arbitrator, who had been appointed, had come to a finding that no-claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no-claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in *Reshmi Constructions* it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate.

19. We are convinced from the materials on record that in the instant case the appellant also has a genuine claim which was considered in great detail by the arbitrator who was none other than the counsel of the respondent Railways."

8) In ***National Insurance Company Limited*** vs. ***Boghara Polyfab Private Ltd.,*** (2009) 1 SCC 267, the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant:-

> **"26.** When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

9) From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'No Due Certificate'.

10) In the light of the above principles, we are convinced from the materials on record that in the instant case, the appellant/plaintiff also had a genuine claim which was considered in great detail by the trial Court and supported by oral and documentary evidence. Though the High Court has not adverted to any of the factual details/claim of the plaintiff except reversing the judgment and decree of the trial Court on the principle of estoppel, we have carefully perused and considered the detailed discussion and ultimate conclusion of the trial Judge. Though we initially intend to remit the matter to the High Court for consideration in respect of merits of the claim and the judgment and decree of the trial Court,

inasmuch as the contract was executed on 05.06.1970 and work had been completed in August, 1973, final bill was raised on 31.03.1974 and additional claim was raised on 16.07.1976, to curtail the period of litigation, we scrutinized all the issues framed by the trial Court, its discussion and ultimate conclusion based on the pleadings and supported by the materials. The trial Court framed the following issues:-

" The following issues were framed at Ex. 16:-

1. Whether Plaintiff proves that he executed extra work of change and entitled to claim Rs. 3,600/-?
2. Whether Plaintiff proves that he did extra work of C.O.T. filing and hence entitled to claim Rs. 1,800/-?
3. Whether Plaintiff is entitled to claim Rs. 15,625/- in connection with excavated stuff?
4. Whether Plaintiff is entitled to claim Rs. 7,585/- for guide bunds?
5. Whether Plaintiff is entitled to claim Rs 5,640/- for pitching work?
6. Whether Petitioner is entitled to claim Rs. 13,244/- for providing sand filter in river.?
7. Whether Plaintiff is entitled to claim Rs. 1,375/- for waster weir back filling?
8. Whether Plaintiff is entitled to claim Rs. 30,600/- for extra item of masonry?
9. Whether Plaintiff is entitled to claim Rs. 14,339.84 for breach of condition and irregular payment?
10. Whether Plaintiff is entitled to claim Rs 12,386.64 ps. for providing heavy gate?
11. Whether Plaintiff is entitled to claim Rs. 1,37,478.17 ps for rising of prices?
12. Whether Plaintiff is entitled to claim Rs. 30,000/- for establishment charges?
13. Whether Plaintiff is entitled to claim Rs. 93,049.76 towards interest?
14. Whether notice under Section 80 of the CPC is defective?

15. Whether Plaintiff is estopped from filing suit in view of fact that he has signed and accepted bills prepared by Defendant?
16. Whether suit is barred by time?
17. Whether Court has jurisdiction to decide the present suit?
18. What order and decree?"

11) We have already considered and answered the issue relating to No. 15 in the earlier paragraphs and held in favour of the plaintiff. In respect of other issues relating to execution of extra work, excavation, construction of guide bunds, pitching work, providing sand filter in river, waste weir back filling, extra masonary, providing heavy gate, additional amount due to raising of prices, additional amount towards establishment charges, interest etc., the trial Court based on the materials placed accepted certain items in toto and rejected certain claims and ultimately granted a decree for a sum of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of the suit till realization. On going through the materials placed, relevant issues framed, ultimate discussion and conclusion arrived at by the trial Court, we fully agree with the same and the plaintiff is entitled to the said amount as granted by the trial Court.

12) In the result, the impugned judgment of the High Court in First Appeal No. 2038 of 1983 dated 07.10.2002 is set aside and the judgment and decree of the trial Court in Civil Suit No. 30 of 1977 dated 14.12.1982 is restored. The civil appeal is allowed with no order as to costs.

.....J.
(P. SATHASIVAM)

.....J.
(DR. B.S. CHAUHAN)

NEW DELHI;
JANUARY 14, 2011