State Of Gujarat vs M/S. Kothari & Associates on 16 October, 2015

Equivalent citations: AIRONLINE 2015 SC 206

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Bench: Shiva Kirti Singh, Vikramajit Sen

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1770 OF 2005

STATE OF GUJARAT … APPELLANT

VERSUS

M/S KOTHARI AND ASSOCIATES … RESPONDENT

J U D G M E N T

VIKRAMAJIT SEN, J.

1 This Appeal lays siege to the decision of the Division Bench of the High Court of Gujarat at Ahmedabad which dismissed the appeal of the Appellant before us while allowing the cross-objection filed by the Plaintiff/Respondent by holding it to be entitled to claim interest for an extended period. For the reasons which will follow, we have set aside these concurrent findings against the Appellant State, principally on the ground that the claim of the Respondent stood barred by the principles of prescription as contained in the Limitation Act, 1963. 2 The Appellant State invited tenders for providing lining to the main canal line. The Respondent, a registered partnership, submitted a tender that was accepted by the Appellant State. Thereafter a regular agreement was entered into according to which the Respondent would have from 15th November to 14th June as its working period. Under the Work-Order dated 24.9.1976, the Respondent was required to complete the work within 18 months, i.e. on or before 23.3.1978. The case of the Respondent, which we have no cause to disbelieve, is that there were repeated and consecutive delays in handing over the site due to which the Respondent could not complete the work within the stipulated time. The first season was to extend from 15.11.1976 to 14.7.1977, but the canal was only made available on 15.1.1977 and even then the cement was not issued to the Respondent by the Appellant State till 31.1.1977. The second season was to extend from 15.11.1977 to 23.3.1978, but the canal was handed over on 15.3.1978. At the Respondent's request, the contract period was extended to 14.6.1978, but the Appellant State specifically stated that no compensation would be payable for the extension. Pursuant to a written request by the Respondent, a third season from 15.11.1978 to 14.6.1979 was granted, but yet again the site was handed over as late as on 15.3.1979. The Respondent sought further time to complete the project, and was consequently granted a fourth season which was to extend from 15.11.1979 to 29.6.1980. The site was once again made available with delay only on 15.3.1980. The work was finally completed on 20.6.1980. It is noteworthy that in

each request for an extension, the Respondent sought compensation for monetary loss due to the extended time limit, but while allowing each extension the Appellant State denied the claim for compensation each time. The Respondent's case was that as per the contract period, 342 days should have been made available to it to conduct the stipulated work, but as a result of the delay in handing over the site and the materials, the Respondent had to seek extensions, and nevertheless managed to complete the project in 288 working days, thus indicating that there was no laxity on its part. The Respondent signed the Final Bill under protest on 1.1.1982; and the Security Deposit was refunded on 27.1.1982. Thereupon, the Respondent addressed a statutory notice under Section 80 of the C.P.C. dated 7.8.1983 to the Appellant State, claiming damages as a result of the additional costs incurred due to the abovementioned delays. The Respondent eventually filed a suit on 25.1.1985 seeking damages under thirteen different heads, including price escalation in labour due to the prolongation of the work, price escalation in fuel lubricants etc., overstay of capital and machinery, and overheads such as staff, kitchen, office etc. 3 The Trial Court found that the delay was caused by the Appellant State; that work was completed by the Respondent well within the number of days contractually allocated to complete it. Noting that under Section 73 of the Indian Contract Act compensation is payable for any loss or damage for breach of a contract, the Trial Court granted compensation under twelve of the thirteen heads of claims itemised by the Respondent. In terms of its Judgment dated 4.5.1991 the Trial Court observed that the factual matrix pertaining to these amounts claimed have remained uncontroverted, and accordingly decreed the suit. The Respondent was granted Rs.13,61,571/- with interest at 12 per cent per annum with effect from 7.8.1983 viz. the date of the statutory notice. The Appellant State appealed against the decree and the Respondent filed a counter-claim seeking interest from the date of written demand of the suit claim instead of from the date of statutory notice. The High Court, vide its judgment dated 30.7.2003, dismissed the appeal filed by the Appellant State and allowed the Respondent's cross objection, granting interest thereon from 5.3.1982. 4 The Appellant State has contended that the High Court ignored its myriad objections/submissions in connection with the various different heads; that the bills paid from time to time by the Respondent including the Final Bill were accepted without any remonstration or reservation being raised, thereby inexorably leading to the conclusion that the suit was clearly an afterthought; and that the suit was barred by limitation as the claims were raised after a lapse of more than three years from the arising of the causes of action. It is only the last contention to which we shall advert our attention.

5 It would be pertinent to note that the issue of limitation was not pleaded as a ground before the Trial Court or the High Court. It was pressed for the first time in the course of oral arguments before the High Court. Nonetheless, it has been discussed in the impugned Order. The High Court, noting the contention raised by the Respondent that the point of limitation was a mixed question of fact and law and could therefore not be adjudicated at this point, held that even if it could be adjudicated, the suit would not be barred by principles of prescription as it was based on a series of successive breaches committed by the Appellant State, and in such circumstances the date of the last breach was relevant. The High Court was of the opinion that limitation need not mandatorily be computed on the basis of each cause of action. It held the date of return of the Security Deposit as the last date of payment for the work done, and concluded that the suit had been filed within three years from this date. The suit was therefore found to be within the prescribed period of limitation. 6 Section 3 of the Limitation Act explicitly states that "every suit instituted, appeal preferred, and

application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence." It is thus incumbent upon the Court to satisfy itself that the suit is not barred by limitation, regardless of whether such a plea has been raised by the parties. In Union of India vs. British India Corporation Ltd (2003) 9 SCC 505, it has been opined that "the question of limitation is a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute on facts." It is thus irrelevant that the Appellant State had not raised the issue of limitation before the Trial Court. A duty was cast on the Court to consider this aspect of law, even on its own initiative, and since it failed to do so, the Appellant State was competent to raise this legal question in appeal or indeed even in any successive appeal. Close to a century ago, in Lachhmi Sewak Sahu vs. Ram Rup Sahu AIR 1944 Privy Council 24, it has been held that the point of limitation is available to be urged even in the Court of last resort. Furthermore, we are not confronted with a situation where the plea of limitation is a mixed question of fact and law, or where additional evidence needs to be adduced. The submissions of Learned Counsel for the Respondent to the effect that the Appellant is foreclosed and precluded from urging the plea of the bar of limitation are meretricious and are rejected. We shall now proceed to consider whether the suit was in fact barred by limitation. 7 The period of li mitation would be computed under either Article 55 or Article 113, both of which are laid out below of the facility of reference:

> |Description of Suit |Period of |Time from which period | | |Limitation |begins to run | |Art 55. For |Three years |When the contract is | |compensation for the | |broken or (where there | |breach of any | |are successive | |contract, express or | |breaches) when the | |implied, not herein | |breach in respect of | |specially provided | |which the suit is | |for. | |instituted occurs or | | | |(where the breach is | | | |continuing) when it | | | |ceases. | |Art. 113. Any suit |Three years |When the right to sue | |for which no period | |accrues. | |of limitation is | | | |provided elsewhere in| | | |this Schedule | | |

8 It would be pertinent, at this point, to recall the decision of this Court in Gannon Dunkerley and Co. Ltd. vs. Union of India (1969) 3 SCC 607, though that matter dealt with the provisions of the Indian Limitation Act, 1908. The Appellants/Plaintiff therein filed a suit seeking an enhanced rate of compensation in light of the deviation in the nature of the work being rendered more complex, the increase in costs due to undue prolongation of the period of work, the increase in the quantity of work, and the grant of contracts to other competing parties at substantially higher rates. This Court held that the "suit filed by the appellant Company is not a suit for compensation for breach of contract express or implied:

> it is a suit for enhanced rates because of change of circumstances, and in respect of work not covered by the contract." The claim for enhanced rates was found to arise outside the contract and for this reason was not in the genre of an action for compensation for breach of contract. It was therefore held that the claim was not covered under Article 115 of the 1908 Act (which is in pari materia to Article 55 of the Limitation Act), and would have to fall within the ambit of Article 120 of the 1908 Act (which is akin to Article 113 of the Limitation Act). The facts at hand are dissimilar to

> those in Gannon Dunkerley in that the damages sought by the present Respondent are for work covered by the contract, and the change in circumstances was directly caused by breaches ascribable to the Appellant State in not handing-over the site on time. Facially, the suit claims are damages incurred due to the extension of the contract period and the resultant damages are incurred by the Respondent. The suit would therefore fall within the ambit of Article 55. Article 113, which is a residuary provision, cannot be resorted to.

9 It also appears to us that the contract was clearly not broken as the Respondents chose to keep it alive despite its repeated breaches by the Appellant State. The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as each delay in handing over the canal/site by the Appellant State constituted to a breach that was distinct and complete in itself and gave rise to a separate cause of action for which the Respondent could have rescinded the contract or possibly claimed compensation due to prolongation of time and resultant escalation of costs. Of course the Respondent is enabled to combine all these causes of action in one plaint, as postulated in the C.P.C provided each claim is itself justiciable. Even the Respondent has argued before the High Court that the suit was based on successive breaches committed by the Appellant State. In our opinion, the suit was required to be filed within three years of the happening of each breach, which would constitute a distinct cause of action. Article 55 specifically states that in respect of successive breaches, the period begins to run when the breach in respect of which the suit is instituted, occurs. In this vein, Rohtas Industries Ltd vs. Maharaja of Kasimbazar China Clay Mines ILR (1951) 1 Cal 420 is apposite as it has held that when a party agrees to deliver certain goods every month for a duration spanning certain years, the cause of action for breach for failure to deliver in a particular month arises at the end of that month and not at the end of the period of the contract. The situation before us is similar in that the cause of action had arisen on each occasion when the Appellant State failed to hand over the site at the contractually stipulated time. Specifically, the limitation periods arose on 15.11.1976, 15.11.1977, 15.11.1978 and 15.11.1979, i.e. on the first day of each season, when the Respondent State committed a breach by failing to hand over the site. Thus the period of limitation did not commence at the termination of the contract period or the date of final payment. The High Court's conclusion that the last date of breach and last date of payment were relevant, not each cause of action, was thus patently erroneous. For each breach, a corresponding amount of damages for additional costs could have been sought. The suit, however, was filed on 25.1.1985, well after the limitation period of three years for even the final breach, as the various causes of action became time barred on 15.11.1979, 15.11.1980, 15.11.1981 and 15.11.1982 respectively.

10 There is another perspective on the method or manner in which limitation is to be computed. We have already narrated that the Respondent, on every occasion when the extension was sought by it, had requested to be compensated for delay. The Appellant State had granted the extensions but had repudiated and rejected the Respondent's claims for damages. The effect of these events would be that the cause of action for making the claim for damages indubitably arose on each of those occasions. It is certainly arguable that the Appellant State may have also been aggrieved by the delay, although the facts of the case appear to be unfavourable to this prediction, since delay can reasonably be laid at the door of the Appellant. The Respondent, however, could prima facie be

presumed to have accepted a renewal or extension in the period of performance but with the rider that the claim for damages had been abandoned by it. If this assumption was not to be made against the Respondent, it would reasonably be expected that the Respondent should have filed a suit for damages on each of these occasions. In a sense, a fresh contract would be deemed to have been entered into between the parties on the grant of each of the extensions. It is therefore not legally possible for the Respondent to contend that there was a continuous breach which could have been litigated upon when the contract was finally concluded. In other words, contemporaneous with the extensions granted, it was essential for the Respondent to have initiated legal action. Since this was not done, there would be a reasonable presumption that the claim for damages had been abandoned and given a go-by by the Respondent. 11 In a works contract, more often than not, delays occur, and that is why it is assumed that time is not of the essence. Where extensions are asked for and granted, there must be a clear and discernable stand on behalf of either of the parties that the extension is granted and/or accepted without prejudice to the claim of damages. It has become commonplace that neither party lodges a claim for damages, but waits for the end of the contract to raise these disputes, taking advantage of the nebulous and equivocal nature of the transactions between them. This, however, is not the position that obtains before us since the Appellant State had categorically posited that the claim for damages for the alleged delay on its part would not be entertained.

12 The Respondent has sought to place reliance on Section 19 of the Limitation Act. It would be apposite to reproduce this Section:

> 19. Effect of payment on account of debt or of interest on legacy.—Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

This Section would not come to the aid of the Respondent, as the suit before us is not for payment on account of a debt or of interest on legacy, but is a suit for damages for additional costs incurred as a result of the extension of the contract period. This Court in Union of India vs. Raman Iron Foundry 1974 (2) SCC 231, after placing reliance on Jones v. Thompson [1858] 27 L.J.Q.B. 234, has opined that a claim for damages does not give rise to a debt until the liability is adjudicated and damages have been assessed by a decree or any order of a Court or any other adjudicatory authority or forum. Furthermore, in J.C. Budharaja vs Chairman, Orissa Mining Corporation Ltd. and Anr (2008) 2 SCC 444, it has been held that the effect of Section 19 would be to allow a fresh period of limitation with regard to the 'existing debt' in respect of which acknowledgment and payment has been made. It would not extend the period of limitation for any fresh claim, or any amount not accepted by the other party. In the factual scenario before us, the payment of the Final Bill and Security Deposit could not be construed to accept or acknowledge the damages raised by the Respondent and therefore Section 19 would not per se extend the period of limitation. Furthermore, there could be no extension under Section 18 on account of the acknowledgement in writing, as at each point that the Respondent raised a claim for damages, it was specifically refuted by the Appellant State, and the amounts that were accepted by the Appellant State were limited to the liabilities within the contract, not fresh liabilities for damages.

13 The Respondent has also argued that since notice under Section 80 of the C.P.C. was served to the Appellant State claiming damages on 7.8.1983, a period of two months from the date of the notice would have to be excluded when calculating the period of limitation, as per Section 15(2) of the Limitation Act. It has relied on M/s Disha Constructions vs. State of Goa (2012) 1 SCC 690 to this end. However, since the limitation period for the last breach alleged by the Respondent itself ended on 15.11.1982 and the notice under Section 80 C.P.C. is dated 7.8.1983, this provision is irrelevant. The notice perforce should have been issued before the suit became time barred, and only if so done would the period have been extended for a further two months.

14 It is thus clear that the Respondent failed to file the suit for damages within the period prescribed in the Limitation Act. The suit is required to be dismissed on this ground alone. The impugned Order is, therefore, set aside, and the Appeal is allowed, but with no order as to costs.

.....J. (VIKRAMAJIT SEN) .....J. (SHIVA KIRTI SINGH) New Delhi, October 16, 2015.