# Hind Construction Contractors By Its ... vs State Of Maharashtra on 30 January, 1979

## Equivalent citations: AIR1979SC720, (1979)2SCC70, [1979]2SCR1147, AIR 1979 SUPREME COURT 720, (1979) 2 SCR 1147 (SC), 1979 2 SCR 1147, 1979 (2) SCC 70

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## Bench: Y.V. Chandrachud, V.D. Tulzapurkar, A.P. Sen

JUDGMENT

V.D. Tulzapurkar, J.

1. These appeals by certificate of fitness granted by the High Court of Judicature at Bombay are directed against that Court's common judgment and decree dated September 9/10, 1968, passed in two cross appeals being First Appeal Nos. 245 of 1962 and 844 of 1961.

2. A contract for the construction of an aqueduct across the Alandi River at Mile No. 2 of the Nasik Left Bank Canal of the total value of Rs. 1,07,000/- was granted to the appellant-plaintiff (originally a partnership but later a proprietary firm of contractors) by the respondent-defendant (the State of Maharashtra) after the former's tender was accepted on June 17, 1955. On July 2, 1955 the Executive Engineer issued the work order to the appellant-plaintiff directing him to commence the work by July 5, 1955 intimating in clear terms that the stipulated date for starting the work would be reckoned from July 5, 1955. The formal regular Contract in prescribed Form B-2/1 of 1955-56 (Ex. 34) containing the terms and conditions as well as the Schedules, specifications etc. was executed by the parties on July 12, 1955. A security deposit of Rs. 4,936/- was kept by the appellant-plaintiff with the respondent-defendant. The period for completion of work was fixed as 12 months from the date stipulated for commencement of the work, that is to say, it was expected to be completed on or before July 4, 1956. It appears that on the ground that the appellant-plaintiff had not completed the work as expected within the stipulated time the Executive Engineer by his letter dated August 27, 1956 (Ex. 78) rescinded the said contract with effect from August 16, 1956. After serving a notice under Section 80 of the Civil Procedure Code the appellant-plaintiff filed a suit (being Special Civil Suit No. 23 of 1959) on August 28, 1959 in the Court of the Joint Civil Judge, Senior Division, Nasik making a claim for Rs. 65,000/- in the aggregate against the respondent-defendant alleging wrongful and illegal recision of the contract on the part of the respondent-defendant The appellant-plaintiff's case was that the initial fixation of July 5, 1955 as the date for commencement of the work was nominal, that the area where the work was to be done had usually heavy rainfall rendering it impossible to carry out any work from July to November and that, therefore, it was the

practice of the Public Works Department to deduct the period of monsoon in case of such type of works and that the appellant-plaintiff had been orally informed that this period would be deducted or not taken into account for calculating the period of 12 months under the contract and that oft this assurance he had commenced the work towards the end of December 1955. His case further was that in any event time was not of the essence of the contract, that on account of several difficulties, such as excessive rains, lack of proper road and means of approach to the site, rejection of materials on improper grounds by Government Officers, etc., over which he had no control, the completion of the work was delayed and that the extension of the time which was permissible under the contract had been wrongfully refused by the officers of the respondent-defendant. According to him none of these factors had been taken into account by the Government while refusing the extension and the contract was wrongfully rescinded and, therefore, the respondent-defendant was liable in damages. The total claim of Rs. 65,000/- comprised six items-(1) Rs. 4,936/- being the amount of security deposit wrongfully forfeited by the respondent-defendant, (2) Rs. 10,254/- being the amount due to him for the actual work done by him under Bill No. 1253 dated September 20, 1956 and which had not been paid for, (3) Rs. 7,375/- being the value of the material collected by him on the site for work but which had been rendered useless on account of wrongful recision, the 4th and 5th items sounded in damages, while the last item was interest from date of recision to the date of the suit.

3. The State of Maharashtra resisted the claim contending that time was of the essence of the contract, that the date fixed for commencement was real and not nominal and the 12 months period was fixed after all aspects of the matter had been taken into account, it was further contended that the appellant-plaintiff knew the situation of the site and the so-called difficulties, that there was no excuse for him for not doing the work during the months of July to November, that the appellant-plaintiff failed to carry out the proportionate work during the periods fixed in the contract and that since the appellant-plaintiff had rendered himself incompetent to complete the work in proper time it had to rescind the contract and the recision was proper and for adequate reasons; it was further contended that the State was entitled to forfeit the security deposit which it did on the date when the contract was rescinded. The several items claimed by the appellant-plaintiff were denied by the State. It was denied that the material of the value of Rs. 7,375/- remained on the sits or that it was responsible for its non-removal from the site. Regarding items 4 and 5 the State denied its liability to pay the same as it was the appellant-plaintiff who had committed the breach of the contract. As regards the amount due under Bill No. 1253 dated September 20, 1956 for the actual work done, it was contended that the State had to deduct the amount of penalty leviable under the contract and for the actual cement supplied to the appellant-plaintiff and after making deductions in that behalf only a sum of Rs. 700/- would be due to the appellant-plaintiff.

4. On a consideration of the documentary evidence including the terms and conditions of the contract (Ex. 34) and the oral evidence led by the parties, the learned trial Judge held that the date July 5, 1955 fixed as the date for commencement of the work was not nominal but that time was not of the essence of the contract between the parties, that the respondent-defendant (State Government) had wrongfully, rescinded the contract, that the appellant-plaintiff was entitled to damages but that he had not established the two items claimed as damages and he was entitled to a nominal sum of Rs. 120/- as damages. He further held that since the recision of the contract was wrongful the State was not entitled to forfeit the security deposit nor levy any penalty. He

accordingly decreed the appellant-plaintiff's claim in respect of refund of security deposits and as regards the amount of Bill No. 1253 dated September 20, 1956 for actual work done he held that a sum of Rs. 5,845/- only would be due to him after giving credit for Rs. 4,409/- due from the appellant-plaintiff to the State. He accordingly decreed the appellant-plaintiff's suit to the extent of Rs. 10,901/- with interest thereon at 6% per annum from the date of recision till date of suit and allowed proportionate costs to him.

5. Two appeals were preferred against the aforesaid decree of the trial court, one by the appellant-plaintiff in respect of the claims that had been disallowed (First Appeal No. 245 of 1962) and the other by the State in respect of the claims allowed against it (First Appeal No. 844 of 1961). Curiously enough the High Court did not decide the main issue that arose between the parties, namely, whether time was of the essence of the contract, as it took the view that a decision on that question was really unnecessary for disposal of the appeals. It proceeded to decide the appeals on the assumption that time was not of the essence of the contract by considering the question whether the recision of the contract by the State could be regarded as mala fide or so unreasonable that it must in the place of the judgment of the officers concerned substitute its own judgment and hold that the recision was wrongful. The High Court observed that even the appellant-plaintiff had not alleged any mala fide on the part of any of the officers of the State but had pressed into service five or six factors the non-consideration whereof by the respondent-defendant rendered the recision of the contract arbitrary, unreasonable and, therefore, unjustified. After discussing each one of those five or six factors the High Court held that some of them had not been proved by the appellant-plaintiff while others did not head to the inference that the recision of the contract was arbitrary, unreasonable or unjustified. It found that by about July 21, 1956 (vide Ex. Engineer's letter Ex. 74) the appellant-plaintiff had done only 1/3rd of the contract work and that in the circumstances the appellant-plaintiff could not have completed the work even within the next three months and, therefore, the respondent's officers had rightly rescinded the contract and, therefore, it was the appellant-plaintiff and not the respondent-defendant who had committed a breach of the contract. However, the High Court took the view that for such breach on the part of the appellant-plaintiff, the respondent-defendant, on a reading of the Clauses 2 and 3 of the Conditions of Contract, was not entitled both to levy compensation and also to forfeit the security deposit. Accordingly, the High Court upheld the forfeiture of the security deposit made by the respondent-defendant and while modifying the trial court's decree it confirmed it only to the extent of Rs. 5,845/-, being the amount due to the appellant-plaintiff for the work actually done by him under Bill No. 1253 and which had not been paid. In the result, the appellant-plaintiff's appeal was dismissed and that of the State was partly allowed with appropriate order of proportionate costs.

6. In support of the present appeal counsel for the appellant-plaintiff raised two or three contentions. In the first place he contended that the High Court was in error in not deciding the main issue whether the time was of the essence of the contract or not ? He urged that the said issue could not be avoided in the manner done by the High Court, for, if time was not of the essence of the contract then just before the expiry of the 12 months' period or immediately after its expiry it was up to the respondent-defendant to grant some reasonable time to the appellant-plaintiff for completing the work undertaken and make the same the essence of the contract and only if the work was not completed by the appellant-plaintiff within that time the contract could have been rescinded on the

ground that the appellant-plaintiff had committed a breach of a contract. According to him such course of action on the part of the respondent-defendant was obligatory, when the initial period of 12 months was not of the essence, especially when the request of the appellant-plaintiff for extension of time was pending before the concerned officers of the Government since before the expiry of the initial period. He contended that instead of adopting the aforesaid course the respondent-defendant had without making time of the essence of the contract rescinded the same with effect from August 16, 1956 by a letter dated August 27, 1956 (Ex. 7:8), which recision must be regarded as wrongful and illegal. Secondly counsel contended that the High Court further erred in considering the question whether the recision of the contract by the State was either mala fide or wholly unreasonable and, therefore, unjustified. He pointed out it was not the appellant-plaintiff's case that the recision was mala fide and, according to him, the question was not whether the recision of the contract on the part of the respondent-defendant was unreasonable, and, therefore, unjustified but whether the respondent-defendant was entitled in law to rescind the contract in the manner done when time was not of the essence of the contract. He further urged that the High Court had clearly erred in assuming that the appellant-plaintiff could not have completed the work even within the next three mouths A and, therefore, the contract was rightly rescinded by the respondent-defendant. He, however, fairly stated that even if this Court held in his favour that the recision was wrongful and, therefore, the respondent-defendant had committed a breach he would merely press for the restoration of the decree passed by the trial Court and not press any other item forming the subject-matter of the original claim in the suit. On the other hand, counsel for the respondent-defendant sought to support the judgment and decree of the High Court on both the grounds first that time was of the essence of the contract having regard to the express provision contained in Clause (2) of the "Conditions of Contract" and, therefore, on appellant-plaintiff's failure to complete the same within the stipulated time the recision of the contract was legal and justified and secondly, that even if time was not of the essence of the contract, having regard the circumstances the High Court rightly came to the conclusion that the recision of the contract by the respondent-defendant could not be regarded as unreasonable or unjustified and that, therefore, the appellant-plaintiff being in breach £ the security deposit had been rightly forfeited.

7. The first question that arises for our consideration, therefore, is whether time was of the essence of the contract that was executed between the. parties on July 12, 1955 (Ex. 34). It cannot be disputed that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. The contract in the instant case is for the construction of an aqueduct across the Alandi River at Mile No. 2 of the Nasik Left Bank Canal and unquestionably 12 months' period commencing from the date of the commencement of the work had been specified within which the construction had to be completed by the appellant-plaintiff. Indisputably, in the work order dated July 2, 1955 the Executive Engineer had directed the appellant-plaintiff to commence the work by July 5, 1955 intimating in clear terms that the stipulated date for starting the work would be reckoned from July 5, 1955. Both the trial court as well as the High Court have found that mentioning of July 5, 1955 as the date for starting the work was not nominal but was real date intended to be acted upon by the parties. It is, therefore, clear that 12 months' period mentioned for the completion of the work was to expire on July 4, 1956. The question is whether this period of 12 months so specified in the contract was of the essence of the contract or not ? On the one hand, counsel for the appellant-plaintiff contended that the contract

being analogous to a building contract the period of 12 months would not ordinarily be of the essence of the contract as the subject-matter there of was not such as to make completion to time essential, that an agreement to complete it within reasonable time would be implied and that reasonable time for completion would be allowed. On the other hand counsel for the respondent-defendant contended that time had been expressly made of the essence of the contract and in that behalf reliance was placed upon Clause (2) of the "Conditions of Contract" where not only time was stated to be of the essence of the contract on the part of the contractor but even for completion of proportionate works specific periods had been specified and, therefore, the appellant-plaintiff's failure to complete the work within the stipulated period entitled the respondent-defendant to rescind it. In the latest 4th edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, Para 1179, which runs thus:

> 1179. Where time is of the essence of the contract. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.
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> Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.
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> (Emphasis supplied)

8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union [1849] 3 Exch 283 at 308, Webb v. Hughes [1870] L.R. 10 Eq 281 and Charles Rickards Ltd. v. Oppenheim [1950] 1 KB 616. It is in light of the aforesaid position in law that we will have to

consider the several clauses of the contract Ex. 34 in the case. The material clauses in this behalf are Clauses 2 and 6 of the "Conditions of Contract" which run as follows:

> Clause 2:The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished, after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound, in all cases in which the time allowed for any work exceeds one month, to complete.
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> 1/4 of the work in 1/4 of the time 1/2 of the work in 1/2 of the time 3/4 of the work in 3/4 of the time.
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> Clause 6: If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiry of period stipulated in the tender or before expiry of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier and the Executive Engineer, may if in his opinion there are reasonable grounds for granting an extension, grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final.
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> Two aspects emerge very clearly from the aforesaid two clauses, In the first place under Clause 6 power was conferred upon the Executive Engineer to grant extension of time for completion of the work on reasonable grounds on an application being made by the contractor (appellant-plaintiff) in that behalf; in other words, in certain contingencies parties had contemplated that extension of time would be available to the contractor. Such a provision would clearly be inconsistent with parties intending to treat the stipulated period of 12 months in Clause 2 as fundamental. Similarly, in Clause 2 itself provision was made for levying and recovering penalty/compensation from the appellant-plaintiff at specified rates during the period the work shall remain unfinished after the expiry of the fixed date. Such provision also excludes the inference that time (12 months period) was intended to be of the essence of the contract. Further with regard to the provision that is to be found in Clause 2 whereunder a time schedule for proportionate work had been set out (namely, 1/4 of the work in 1/4 of the time, 1/2 of the work in 1/2 of the time and 3/4 of the work in 3/4 of the time ), the evidence of the Superintending Engineer Pandit (D.W. 1) is very

eloquent. In para 13 of his deposition this is what he has stated:

> In the agreement (Ex. 34) the rate of work is based on the valuation 1/4th time mentioned means 1/4th in 12 months. The suit contract is for Rs. 1,07,000/-. 1/4th work means the work of about Rs. 27,000/-. It is not possible to do the work of Rs. 27,000/- in 1/4th time as the days were rainy. This was not reasonable.

The witness in para 12 of his deposition has also given the following admission:

> It is not specifically mentioned in the agreement (Ex. 34), that the suit work was urgent and that it was to be completed within 12 months. In this agreement (Ex. 34) there are the clauses of imposing a penalty and extension of time.

9. Having regard to the aforesaid material on record, particularly the clauses in the agreement pertaining to imposition of penalty and extension of time it seems to us clear that time (12 months period) was never intended by the parties to be of the essence of the contract. Further from the correspondence on the record, particularly, the letter (Ex. 78) by which the contract was rescinded it does appear that the stipulation of 12 months' period was waived, the contractor having been allowed to do some more work after the expiry of the period, albeit at his risk, by making the recision effective from August 16, 1956.

10. Once either of the aforesaid conclusions is reached it would be difficult to accept the High Court's finding that the recision of the contract on the part of the respondent-defendant was proper and justified on the basis that the same was neither shown to be mala fide nor unreasonable. It must be observed that it was never the case of the appellant-plaintiff that the recision of the contract on the part of the respondent-defendant was mala fide. Counsel for the appellant-plaintiff further pointed out and, in our view, rightly that the five or six factors, namely, (1) the contract having been given at the threshold of monsoon, the period of monsoon (4 months) ought not to have been reckoned, (2) absence of proper road and approach to the work site during the rainy season and a couple of months thereafter, (3) unreasonable rejection by the Government Officers of material brought on the site, which material was later on allowed to be used, (4) difficulty in procuring labour due to malarious climate at the site, (5) delay in issuing quarry permit and (6) extra time taken for doing extra work that was entrusted ought to have been taken into account-were put forward by the appellant-plaintiff merely for the purpose of showing that the refusal to extend the time by the Superintending Engineer although recommended by the S.D.O. and Executive Engineer was unreasonable and not for showing that the recision of the contract was unreasonable or unjustified. In our view, the question would not be whether the recision of the contract was unreasonable and, therefore, unjustified but whether the recision of the contract in the circumstances of the case was wrongful and illegal. If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of waiver, ceased to be applicable then the only course open to the respondent-defendant was to fix some time making it the essence and if within the time so fixed the appellant-plaintiff had failed to complete the work the respondent-defendant could have rescinded the contract. The High Court has taken the view that the contract was rightly rescinded by the respondent-defendant because by about July 21, 1956 (vide letter Ex. 74) the appellant-plaintiff

had done work of the value of Rs. 35,000/- as against the tender value of Rs. 1,07,000/-, that is to say, only 1/3rd of the total work had been completed and, therefore, even though time was not of the essence of the contract, the appellant-plaintiff, in the circumstances, could not have completed the work even within the next three months. In our view, this approach adopted by the respondent-defendant and upheld by the High Court is not correct. Long before the expiry of the period of 12 months the appellant-plaintiff had by his letter dated June 6, 1956 (Ex. 68) requested for extension of period of completion up to the end of December, 1956; this request was repeated by another letter dated June 23, 1956 (Ex. 69). May be the reasons or grounds on which the request was made may not have appealed to the Superintending Engineer but some reasonable time making it the essence ought to have been granted. In this behalf it may be stated that the S.D.O. by his letter (Ex. 69) had recommended extension upto December 1956 as sought while by his letter dated June 23, 1956 (Ex. 70) addressed to the Superintending Engineer, the Executive Engineer had recommended that extension of time up to October 30, 1956 may be granted to the appellant-plaintiff with clear intimation that if he failed to complete the work by then, the maximum penalty allowable under Clause 2, namely, 10% of the cost of the work will be inflicted on him, but the recommendation did not receive approval of the Superintending Engineer. It appears that the appellant-plaintiff had an interview with the Superintending Engineer on August 24, 1956 when a written representation (Ex. 99) was handed over and the whole position was sought to be explained to the Superintending Engineer but within three days of the interview by the letter dated August 27, 1956 (Ex. 78) the contract was rescinded and the full security deposit was forfeited to Government. It will thus appear clear that though time was not of the essence of the contract, the respondent-defendant did not fix any further period making time the essence directing the appellant-plaintiff to complete the work within such period; instead it rescinded the contract straightaway by letter dated August 27, 1956. Such recision on the part of the respondent-defendant was clearly illegal and wrongful and thereby the respondent-defendant committed a breach of contract, with the result that there could be no forfeiture of the security deposit. In our view, therefore, the trial court was right in coming to the conclusion that the appellant-plaintiff was entitled to a refund of their full security deposit of Rs. 4,936/- as also to Rs. 5845/- being the balance of their Bill No. 1253 dated September 20, 1956 for work actually done by them and not paid for and nominal damages of Rs. 120/-. The appellant-plaintiff was also entitled to interest on the aforesaid sums and costs of suit as directed by the trial court.

11. In the result we allow the appeal, set aside the common judgment and decree in F.A. No. 844 of 1961 passed by the High Court and restore that of the trial court. The appellant-plaintiff will get costs of this appeal as also costs of F.A. No. 844 of 1961. The High Court's decree dismissing F.A. No. 245 of 1962 is confirmed.