Gannon Dunkerley & Co. Ltd vs Union Of India on 28 October, 1969

Equivalent citations: 1970 AIR 1433, 1970 SCR (3) 47, AIR 1970 SUPREME COURT 1433, 1970 ALL. L. J. 746, 1970 BLJR 832, 1970 2 SCJ 281

Author: J.C. Shah

Bench: J.C. Shah, K.S. Hegde

PETITIONER:
GANNON DUNKERLEY & CO. LTD.

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT:
28/10/1969

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
HEGDE, K.S.

CITATION:
1970 AIR 1433 1970 SCR (3) 47
1969 SCC (3) 667
CITATOR INFO :
R 1992 SC 111 (4)

ACT:
Limitation Act, 1908-Suit for payment at an additional rate over contract rate in view of altered circumstances and complex nature of work--Claim is not one for price of work done nor for compensation or breach of contract--Therefore Art. 56 and Art. 115 of First Schedule not applicable--Suit governed by Art. 120--Commencement of period of imitation under Article.

HEADNOTE:
The appellant-company filed a suit against the Union of India demanding payment at an enhanced rate over the basic rate stipulated in a construction contract with the Union of

India. The claim related to revision of rates due to the complex nature and increase in the quantity of work and in respect of work not covered by the, contract. The additional work was done at the request of the Engineer-in-charge who under the terms of the contract was competent to give instructions for work not covered by the terms of the contract and fix the rate at which remuneration was to be paid in respect of such work. The Union of India contended that the claim was barred, by the law of limitation. The trial court decreed the suit for the amount certified by the Superintending Engineer. On appeal the High Court held that the claim was governed either by Art. 56 or by Art. 115 of the First Schedule, to the Limitation Act, 1908, and a suit, more than three years of the date on which the work was done and in any event of the, date on which the claim was rejected, was barred. Allowing the appeal to this Court and restoring the decree for the trial court,

HELD : (i) Article 56 of the First Schedule to the Indian Limitation Act, 1908, prescribes a period of three years for a suit for the price of the work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, and the, period of limitation commences to run from the date when the work is done. A suit is governed by Art. 56 if it arises out of a contract to pay the price of work done at the request of the defendant., The claim in the present case is for payment at an additional rate over the stipulated 'rate in view of change in circumstances and not for the, price of work done by the appellant, even though the additional work was done :at the request of the Engineer-incharge. [51 F]

(ii) Article 115- of the First Schedule to the Limitation Act is a residuary article dealing with the claim for compensation for the breach of any contract, express orimplied, not in writing registered and, not specially provided for in the first schedule. The period of limitation in such cases is three years and it commences to ran when the contract is broken, or where there are successive breaches when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases. 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 rate because of change of circumstances, and in respect of work not covered by the contract. The additional work directed by the Engineer-in-charge when carried out May be deemed to be done under the

48

terms of the contract; but the claim for enhanced rates does not aris out of the contract : it is in any case not a claim for compensation for beach of contract. [51 H]

(iii)The claim is, therefore, not covered by any specific article under the First Schedule and must fall within the terms of Art. 120. Under this Article the period of six

years commences to run when the right to sue accrues. There is no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe the right by the defendant against whom the suit is instituted. [52 C]
Bolo v. Kokao and Others, L.R. 87 I.A. 325, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 258, and 2585 of 1966.

Appeals from the judgment and decrees dated January 19 1965 of the Patna High Court in First Appeals Nos. 190 and 21 of 1960.

H.R. Gokhale, G. L Sanghi, J. B. Dadachanji and Ravinde, Narain, for the appellant (in both the appeals). Jagdish Swarup, Solicitor-General, V. A. Seyid Muhammad, B. D. Sharma and S. P. Nayar, for the respondent (in both the appeals).

The Judgment of the Court was delivered by Shah, J. The Government of India invited tenders for "rein forced concrete work relating to the foundation and super structure of the Fertilizer Factory building at Sindri" in the State of Bihar. The tender submitted by the appellant Company was accepted on November 22, 1947 and a formal contract in that behalf was executed on November 26, 1948. By cl. 12 of the contract, insofar as it is relevant, it was provided :

> "The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to, or substitutions for, the original specifications, drawings, designs and instructions and the contractor shall be bound to- carry out the work in accordance with any instructions which may be given to him and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out: by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in that tender for the main work And if the altered, additional or substituted work includes any class of work, for which no rate is specified in this contract then such class of work shall be carried out at the rates entered in the current schedule of rates of the Hazaribagh P.W.D. district which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender, and if the altered, additional or substituted work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of his receipt of the order to carry out the work inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-incharge does not agree to this rate he shall, by notice in writing, be at liberty to cancel his order to carry out such class of work provided that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined

> then .... he shall only be entitled to be paid in respect of the work carried out or expenditure incurred according to such rates as shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the Circle shall be final."

Clause 25 of the agreement provided, insofar as it is relevant "Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the qualify of workman- ship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to a Superintending Engineer to be nominated by the Chief Engineer for arbitration in the manner provided by law relating to arbitration The Sindri Factory Buildings were to be constructed under the, , advice and guidance of M/s. Chemic Construcetion, Corporation of New York. That Firm made delay in supplying the drawings and specifications which involved work of a complicated nature not included in the original contract. Time for completion of the work was on that account extended till February 26, 1950.

On September 20, 1950 the appellant Company made a demand for payment at an enhanced rate of 421 % over the basic rates stipulated under the original contract. This claim was made on -five grounds :

> 1 . That there was a "substantial deviation"
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> in the nature of work of which the detailed work drawings were supplied to the appellant Company after the date of the contract. The work involved was of a complex nature requiring highly skilled labour, and that additional labour and materials not covered by the contract rates were required;

2. That there was "great increase in the price of materials and labour on account of undue prolongation of the period of work;"

3. That there was increase in the cost of transportation on account of rise in the price of petrol and increase in railway freight;

4. That the Government of India entered into other contracts incidental to the construction of the Sindri Factory at substantially higher rates which directly affected the cost of labour and materials of the appellant Company who had to compete with the other contractors;

5. That additional work ordered to be done involved in many instances quantity of -work several times the work set out in the contract.

By his letter dated September 13, 1950, the Additional Chief Engineer rejected the claim. In September 1954 the disputes relating to the claim for rise in cost of material and labour due to delay in supplying detailed work drawings, the claim arising from rise in price of petrol and for increase in the cost of material and labour due to other contractors working on the site, were referred to arbitration, but not the claims for revision of rates due to complex nature of the work and increase in the quantity of work, The arbitrator rejected the claims of the Company in respect -of the matters which were referred.

Thereafter the appellant Company filed a suit on August 9, 1956, against the Union of India, for a decree for Rs. 3,62,674/9/6 being the amount claimed at the rate of 421% above the contract rate, in the alternative, a decree for Rs. 2,44,000/- being the amount claimed at the rate of 28.1% above the contract rate as recommended by the Executive Engineer, and in the -further 'alternative, a decree for Rs. 1,36,222/-at the rate of 18 17% above the contract rate as certified by the Superintending Engineer. The Union of India contended, inter alia, that the claim was barred by the law of limitation.

The Trial Court held that the claim was not barred by the law of limitation and decreed the claim for Rs. 1,36,222/- as certified by the Superintending Engineer. Aginst the decree passed by the Trial Court the appellant Company as well as the Union of India appealed to the High Court. Before the High Court, in support of the appeal only the plea of limitation was pressed on behalf of the Union of India. In the view of the High Court the claim was governed either by Art. 56 or by Art. 115 of the First Schedule to the Limitation Act, 1908, and the suit not having been filed within three years of the date on which the work was done and in any event of the date on, which the claim was rejected was barred. The appellant Company has appealed to this Court with certificate.

The appellant Company had undertaken under the terms of the contract to do specific construction work at "basic rates". The Engineer-in-charge was by the terms of cl. 12 of the agreement competent to give instructions for work not covered by the terms of the contract, and it was provided that remuneration shall be paid at the rate fixed by the Engineer-in-charge for such additional work, and in case of dispute the decision of the Superintending Engineer shall be final. It is common ground that the claim made by the appellant Company was not covered by the arbitration agreement, and on that account it was not referred to the arbitrator. The claim in suit related to the revision of rates due to the complex nature of the work and due to increase in the quantity of work and also grant of contracts to other competing parties at substantially higher rates and other related matters.

Article 56 of the First Schedule to the Indian Limitation Act. 1908, prescribes a period of three years for a suit for the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, and the period of limitation commences to run from the date when the work is done. A suit is governed by Art. 56 if it arises out of a contract to pay the price of work done at the request of the defendant. The claim in ,the present case is for payment at an additional rate over the stipulated rate in view of change in circumstances, and not for price of work done by the appellant Company. It is true that additional work was done at the request of the Engineer-in-charge, but the claim in suit was not for the price of work done but. for enhanced rates in view of altered circumstances.

Article 115 of the First Schedule to the Limitation Act is a residuary article dealing with the claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, in the First Schedule. The period of limitation in such cases is three years and it commences to run when the contract is broken, or where there are successive breaches when the breach in respect of which the suit is instituted occurs, or where the breach is continuing when it ceases. 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 rate because of change of circumstances, and in respect of work not covered by the contract. The additional work directed by the Engineer-in-charge when carried out may be deemed to be done under the terms of the contract : but the claim for enhanced rates does not arise out of the contract : it is in any case not a claim for compensation for breach of contract. The claim is therefore not covered by any specific article under the First Schedule, and must fall within the terms of Art. 120. The Solicitor-General appearing on behalf of the Union of India contended that even if the claim falls within the terms of Art. 120 of the Limitation Act, it was barred, for, the appellant Company had in the suit made a claim for work done more than six years before the institution of the suit. Counsel submitted that under Art. 120 the period of limitation commences to run from the date on which the defendant obtains the benefit of the work done by the plaintiff. But under Art. 120 of the Limitation Act the period of six years for suits for which no period of limitation is provided elsewhere in the Schedule commences to run when the right to sue accrues. In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted : Bolo v. Kokan and, Others(1).

The appeals are allowed and the decree passed by the Trial Court is restored with costs in the High Court and in this Court. One hearing fee. The appellant will be entitled to intereston the amount decreed at the rate of 6% per annum from the date of the suit till payment.

R.K.P.S. Appeals allowed.

(1) L.R. 57 I.A. 325 at p. 331,