

Kerala High Court

P.V.Joseph vs Abdulla on 20 October, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

RSA.No. 1064 of 2009()

1. P.V.JOSEPH

... Petitioner

Vs

1. ABDULLA

... Respondent

For Petitioner :SRI.MANJU ANTONEY

For Respondent : No Appearance

The Hon'ble MR. Justice THOMAS P.JOSEPH

Dated :20/10/2009

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THOMAS P JOSEPH, J

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R.S.A.No.1064 of 2009  
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Dated this 20th day of October 2009

JUDGMENT

Appellant, having successively failed in the two courts in his attempt to get damages recovered from the respondent has come up in second appeal raising as substantial questions of law, whether courts below are justified in presuming that payments to the appellant has been made by the respondent from time to time since payment is denied and whether the courts below are justified in non suiting the appellant inspite of report of advocate commissioner.

2. Appellant is a contractor by occupation and it is not disputed, he had undertaken to perform concrete work of the house of respondent as per an agreement dated 15-03-2001. As per the agreement work was to be finished within a period of three months. Labour charge was fixed at Rs.10/- per square foot. According to the appellant, he agreed to carry out the work within three

months on the representation of respondent that the latter would supply materials but respondent failed to supply material on time. The first phase of work could be finished only by 07-04-2001. Again there was delay in work of second phase due to delay on the part of respondent in supplying materials. Centering work could be finished only on 09-06-2001. Appellant was ready and willing to carry out the remaining part of the work as well and wanted respondent to supply materials but, respondent did not do so. Hence appellant was not able to carry out the work. Alleging that respondent committed breach and that appellant suffered damages to the tune of Rs.90642.95/- on the different heads stated in the plaint he instituted the suit. Respondent denied the allegations and contended that breach was on the part of appellant. He claimed that appellant received Rs.20,823/- from him and that the materials used for centering work was of low quality and was damaged in rain. Respondent claimed that he suffered loss of Rs.51,823/- due to the delay in completing the work. Learned Munsiff found that breach was on the part of appellant and dismissed the suit. Appellate court has confirmed the finding. Learned counsel for appellant contends that courts below are not justified in non suiting the appellant inspite of evidence let in by him. It is also contended by learned counsel that if at all there was any mistake on the part of the Advocate Commissioner in preparing the report appellant should not have been punished for that.

3. A second appeal on a finding of fact entered by the first appellate court is permissible only when the finding is based on no evidence or, when the finding is perverse. The trial court as well as first appellate court found on evidence that breach was on the part of appellant. Appellant gave evidence as PW1 and examined PWs.2 to 4 in support of his case. PW4 is an engineer who issued Ext.A2 certificate supporting the appellant and showing the loss allegedly caused to the appellant. But it came out in evidence that he had not even gone to the work place. Trial court observed that PW4 issued Ext.A2 on the information given by the appellant which cannot be taken into account. So far as Exts.C1 and C2, reports prepared by CW1, advocate commissioner is concerned courts below found on evidence that the reports cannot be accepted. Trial court also observed that the commissioner inspected the property and prepared the report without notice to the respondent. On the other side, there is evidence of DWs.1 to 3 who stated that the breach was on the part of appellant. First appellate court observed that claim of appellant who is a contractor by occupation that he continued to carry out the second phase of the work and even went for the third phase of the work without receiving any amount from the respondent is quite difficult to believe. Trial court also found that low quality wooden planks were used for centering work and that there was much space between the wooden planks used for centering work with which no proper concrete work could be done. Courts below referred to the oral and documentary evidence and came to the conclusion that breach was on the part of appellant and non suited him. That finding is based on an appreciation of the evidence on record. No question of perverse finding is involved calling for interference in the second appeal. On going through the judgment under challenge and hearing learned counsel I do not find any substantial question of law involved in the second appeal requiring its admission and notice to the respondents.

Accordingly the second appeal fails. It is dismissed in limine.

THOMAS P JOSEPH, JUDGE Sbna/