Supreme Court of India
A.T. Brij Paul Singh And Ors. vs State Of Gujarat on 25 July, 1984
Equivalent citations: AIR 1984 SC 1703, 1984 (2) SCALE 56, (1984) 4 SCC 59, 1984 (16) UJ 915 SC
Author: D Desai
Bench: A Sen, D Desai, V B Eradi
JUDGMENT D.A. Desai, J.

1. This appeal was heard alongwith C.A. No. 1998 of 1972 between the same parties and raising certain identical questions. In the course of hearing of both the appeals inevitably it was pointed out that with regard to identical questions the two Benches of the same High Court, though one learned Judge was common to both the Benches, arrived at irreconcilable conclusions which has to some extent resulted in denial of justice to the appellant. It would be our attempt to reconcile the approach of the court in both the matters keeping, in view the limitation on account of the two suits having not been consolidated and evidence recorded separately in each matter.

2. On an invitation to tender sought by the erstwhile State of Saurashtra for providing cement concrete surface to Rajkot Jamnagar road for miles 18 to 40 measuring from the Rajkot end, the appellant submitted his tender quoting 7 1/2% lower than the estimated cost of the warks in the amount of Rs. 16,59,900/- only. The tender of the appellant was accepted on July 6, 1954 as per the letter of the Executive Engineer, Road Development Division, Rajkot. As agreed to between the parties, the appellant furnished security deposit in the amount of Rs. 24, 885/- and the Contract documents were executed between the parties. The only term of the contract which at present needs nothing is that the work was to be executed within a period of 14 months from the date fixed by the written order to commence the work. Indisputably, the appellant commenced the work, and completed sub-grading of the road in a distance of 5 miles and 5 furlongs and furnished cement concrete surface in the length of 2 miles. Certain disputes arose between the parties as a result of which the respondent rescinded the contract imputing that as the lime was of the essence of the contract and as the appellant failed to execute the work within the stipulated time he was guilty of committing breach of contract. The final bill in respect of the work done by the appellant was prepared but the payment thereunder was accepted by the appellant under protest. The appellant thereafter filed a suit claiming Rs. 7 lakhs by way of damages, goodwill, prestige and loss of expected profit, Rs. 3 lakhs by way of damages on account of loss sustained while executing the work and Rs. 1 lakh as damages for the extra work done by the appellant. The total claim was of Rs. 11 lakhs. The State of Bombay as the defendant resisted the suit on diverse grounds inter alia contending that the rescission of the contract consequent upon the breach of contract committed by the appellant was just, legal and valid. It was contended that as the time was of the essence of the contract and the commencement order was served on the appellant on July 26, 1954 and as the appellant failed to complete the work within the stipulated period of 14 months from the date of the commencement order the defendant was justified in rescinding the contract. All the claims as to damages and damages for extra work and damages by way of loss of profit were denied and the plaintiff was put to strict proof thereof.

3. The learned trial Judge framed as many as nine issues. Issue No. 4 was: 'whether the plaintiff proves that the work contract has been illegally rescinded by the defendant.' The learned Judge held

that the rescission of the contract by the defendant in the circumstances found proved by him was not illegal. With regard to the claim for damages the learned Judge held that even though Swarn singh, the witness on behalf of the plaintiff has given minutest details and measurement of the work executed by the contractor orally, no documentary evidence is produced to substantiate the claim and therefore, the plaintiff has failed to prove the damages as claimed in the plaint. Accordingly, plaintiff's suit was dismissed. As the suit was filed in forma pauperis, a direction was given that the court fee be recovered from the plaintiff.

4. The plaintiff preferred Civil Appeal No. 599/64 after paying the court fees as directed by the court. In the petition of appeal, the plaintiff reduced his claim from Rs. 11 lakhs in the plaint to Rs. 6,50,00/- comprising of Rs. 4,30,314/- on account of loss of profit, Rs. 1,19,686/- by way of compensation for loss sustained while executing the work and Rs. 1 lakh as compensation for extra items executed by the plaintiff while performing the contract.

5. The High Court substantially dismissed the appeal but allowed the appeal for a few items and decreed the plaintiff's suit to the extent of Rs. 12,055. 90 p. However the High Court did not agree with the trial court on the question of justification or propriety of rescission of the contract by the defendant and reversed the finding. Consistent with the finding the High Court proceeded to examine the principal contention whether the appellant-contractor was entitled to recover damages for loss of expected profits and rejected the claim for want of proof. Hence this appeal by certificate under Article 133(1)(a) of the Constitution.

6. It may be recalled that plaintiff was also given a works contract for providing cement concrete surface in another portion of the same road for which a separate and independent contract was entered into. That contract was also rescinded by the defendant and the plaintiff had filed suit for recovering the damages. In that suit the trial court gave a decree to the plaintiff in the amount of Rs. 1,20, 053. 20 p. Against the decree, the defendant preferred appeal to the High Court of Gujarat, being Civil Appeal No. 384 of 1962. This appeal was heard by a Division Bench of the Gujarat High Court. By its judgment and order dated 3/9 July, 197G, the High Court held that the defendant was guilty of breach of contract and the plaintiff was entitled to damages for loss of expected profit reasonably calculated at 15% of the balance of the value of the works contract. The decree was, however, modified by deleting certain items awarded by the trial court on the ground that they were barred by limitation. Against the decree so modified by the High Court, the original plaintiff preferred Civil Appeal No. 1998/72 which was heard alongwith this appeal.

7. A Division Bench of the High Court examined the voluminous evidence bearing on the question whether the rescission of the contract by the respondent was justified and recorded a categorical finding which reads as under:

In that view of the matter, therefore, we are of the opinion, that the respondent-State was not justified in rescinding the contract 1 under Clause (3) of the contract document.

This finding clearly establishes that the respondent was guilty of breach of contract. Mr. T.U. Mehta, learned Counsel who appeared for the respondent attempted to persuade us to upset this finding by

reading the evidence. We declined to undertake this exercise after reading with him the exhaustive judgment pronounced by the High Court discussing every item of evidence bearing on the subject. The conclusion reached by the High Court is persuasively correct and consistent with the weight of evidence and nothing could be pointed out to us to take a different view of the matter. Undoubtedly, the learned trial Judge in a very scrappy judgment held to the contrary. The High Court while hearing the first appeal having had the advantage of looking extensively at the evidence preferred to differ with the learned trial Judge and in our opinion rightly. We are therefore, in agreement with the High Court that the respondent-State was guilty of breach of contract. A similar finding was recorded in cognate appeal which we have upheld.

8. Once is it held that the respondent was guilty of breach of works contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. One of the heads of damages under which claim is made is 'loss of expected profit in the work'. The claim under this head as canvassed before the High Court was in the amount of Rs. 4,30,314/-

9. It was not disputed before us that where in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. Leaving aside the judgment of the trial court which rejected the claim for want of proof, the High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff-contractor was entitled to damages under the head 'loss of profit.' In this connection, the High Court referred to Hudson's Building and Engineering Contract (1970), tenth edition and observed that 'in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office overheads and : profit is between 3 to 7% of the total price of cost' which is added to the tender. In other words, the High Court was of the view that the claim under this head was admissible. The High Court, however, addressed itself to the question whether adequate proof is tendered to sustain the claim. In this connection, it was observed that the loss of profit when it is sought to be recovered on the percentage basis has to be proved by proper evidence. Having settled the legal position in this manner, the High Court proceeded to reject the claim observing that the bare statement of the partner of the contractor's firm that they are entitled to damages in the nature of loss of profit @ 20% of the estimated cost is no evidence for the purpose of establishing the claim. The High Court further observed that the appellant has not proved by any primary documents the basis of its pricing for the purpose of quotation in reply to the tender and more so when it has quoted at 7 % less than the original estimated cost and in this view of the matter the claim for loss of profit is unsustainable.

10. Mr. Aneja, learned Counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals arising from two identical contracts inter prates being heard on two different occasions by two different Benches even though one learned Judge was common to both the Benches. Mr. Aneja pointed out that in the appeal from which the

cognate Civil Appeal No. 1998/72 arises, the same High Court in terms held that the claim by way of damages for loss of profit on the remaining work at 15% of the price of the work as awarded by the trial court was not unreasonable. The High Court had observed in the cognate appeal that 'the basis adopted by the learned civil Judge in computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable'. In fact, the High Court had noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not furnish adequate evidence to sustain the claim. In this connection the High Court referred to another judgment of the same High Court in First Appeal No. 89 of 1965 but did not refer to its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of 1962 rendered on 3/6 July, 1970 between the same parties. When this was pointed out to Mr. Mehta, his only response was that the court cannot look into the record of the cognate appeal. We find the response too technical and does not merit acceptance. We are not disposed to accept the contention of Mr. Mehta for two reasons: (1) that in an identical contract with regard to another portion of the same Rajkot-Jamnagar road and for the same type of work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same road which would permit an inference that the work was entirely identical. And the second reason to reject the contention is that ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the claim under this head.

11. Now if it is well-established that the respondent was guilty of breach of contract in as much as the recission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit, Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of the remaining parts of the work contract, the damages for loss of profit can be mesured.

12. Mr Aneja then attempted to take us through the maze of evident and requested us that the claim under this head in the amount of Rs. 4,30,314/- is reasonable, fair and just. The value of the works contract was Rs. 16,59,900/- and the appellant had offered the rate at 7 % less of the estimate made by the State. The appellant had executed some part of the contract. How much work he had completed and what was the balance of the work contract was attempted to be spelt out by a reference to Ext. 77/1 (Line Plan of Road) read with Ext. 77/2 and 77/3 showing the widening of the side strips near Kankawati Bridge as well as Longitudinal Sections of the Roads. In our opinion,

while estimating the loss of profit that can be claimed for the breach of contract by the other side, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. A broad evaluation would be sufficient. We in this connection, invited both Mr. Aneja, learned Counsel for the appellant and Mr. T.U. Mehta, learned Counsel for the respondent to give broad features of the work as well as the portion of the work executed by the appellant. Having heard them, we are satisfied that the appellant should be awarded Rs. 2 lakhs under the head 'loss of estimated profit' for breach of contract by the respondent.

13. Mr. Aneja next contended that the High Court was in error in substantially rejecting the claim in the amount of Rs. 1,19,686/- by way of compensation for loss sustained while executing the work and the claim of Rs. 1 lakh for extra items executed by the contractor while performing the contract. The High Court has examined the claim under both the heads. The items claimed under various subheads under each major head have been separately examined by the High Court bringing to bear upon each sub head the detailed evaluation of the evidenc. In the process the High Court had allowed an amount of Rs. 12,055.90 p. under various sub-heads under major heads 2 and 3. While reaching this conclusion, the High Court minutely examined the evidence and substantially rejected the claim. Haing read the judgment, we are not disposed to take a different view of the matter. Therefore, the claim under these two heads except to the extent allowed by the High Court have been rightly rejected and we agree with the reasoning and conclusion of the High Court in this behalf.

14. Accordingly, this appeal is partly allowed and over and 50 above the amount awarded by the High Court, respondent-State shall have Rs. 2 lakhs as and by way of damages for loss of profit for breach of contract committed by the respondent with interest at 6% from the date of the suit and proportionate costs. The court fee shall be recovered proportionately from the appellant and the respondent. We order accordingly.