A

STATE OF MAHARASHTRA & ANR.

v.

DIGAMBAR BALWANT KULKARNI

February 13, 1979

B

[P. N. BHAGWATI AND A. D. KOSHAL, JJ.]

Contract—Stipulated time as essence of contract—Meaning of —Right to rescind the contract—When accrues.

Clause (2) of a works contract entered into by the plaintiff (respondent) with the defendant (appellant) stipulated that time was of the essence of the contract, that time (of one year) allowed for carrying out the work shall be strictly observed by the contractor, and that the contractor *shall pay compensation* at a certain percentage *for every day when the work remained unfinished* after the proper dates. One of the three courses open to the defendant under cl. (3) was to *rescind the contract in case the contractor rendered himself liable to pay compensation* or abandoned the work owing to serious illness or death of the contractor or any other cause and in that event security deposit of the contractor was to stand forfeited. It was also provided in that clause that in the event of any of the above courses being adopted by the defendant the contractor shall have no claim to compensation for any loss sustained by him.

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The work remained unfinished beyond the stipulated time. The defendant rejected the contractor's request for extension of time and eventually rescinded the contract under cl. (3) and forfeited the security deposit.

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In the plaintiff's suit for refund of security deposit and payment of certain other sums, the trial court, holding that the forfeiture of security deposit was legal, granted a decree for its refund.

On appeal the High Court held that the right to rescind a contract being a right to put an end to it, it could not exist after the date for its performance had expired and that in this case the right of rescission having been exercised after the expiry of the date of contract, the impugned action of the defendant in rescinding the contract was unjustified.

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Allowing the appeal,

HELD : 1. The rescission of the contract was well-founded and the forfeiture of the security deposit was justified. [193 F]

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2. Although cl. (2) specifically mentioned that time was of the essence of the contract, all that was meant was that in case the work was not completed within the originally specified time, the plaintiff would be liable to pay such compensation for delay in execution as was fixed within the limits of that clause. This is clear not only from clause (2) but also from clause (3). These two clauses must be read together. So read, the contract was to continue to be in force till the completion of the work or its abandonment. Time was of the essence only in the sense that if the plaintiff completed it within the original period of one year, he would not be liable to pay any compensation but in case he overstepped that limit he would have to compensate for every day of delay and that the right

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to rescission would accrue only when compensation due exceeded the amount of the security deposit or the plaintiff abandoned the work. Till the time it was rescined, the contract was in force. [193 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2010 of 1969.

(From the Judgment and Decree dt. 11-7-68 of the Bombay High Court in Appeal No. 534 of 1960).

Girish Chandra and *M. N. Shroff* for the appellant.

A. G. Ratnaparkhi for the respondent.

The Judgment of the Court was delivered by

KOSHAL, J. The facts giving rise to this appeal by the two defendants (who are the State of Maharashtra and one of its Executive Engineers) on certificate granted by the High Court of Bombay against its judgment dated 11th July 1968 may be briefly stated. In the year 1955, defendant No. 1 decided to construct an aqueduct over Kulthi Nala situated in Malegaon Sub-Division of Nasik district. The Executive Engineer, Nasik Irrigation Division, invited tenders for the work which was entrusted to the plaintiff in acceptance of his tender on conditions reduced to writing in the form of exhibit 66. The estimated cost of the work was Rs. 1,55,854.00 and it was to be completed within 12 months from the date of the written order to commence it which happened to be the 16th of May 1955. The plaintiff paid a sum of Rs. 1558/- as earnest money and another of Rs. 3896/- as security deposit to defendant No. 1. Clauses (2) and (3) of the contract in accordance with which the work was to be executed provided as follows :—

> "(2) : The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor xx xx The work shall throughout the stipulated period of the contract be proceeded 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 xx xx xx may decide xx 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

A in 1/4 of time 1/10 of the work,
in 1/2 of time 4/10 of the work,
in 3/4 of time 8/10 of the work

xx xx xx xx xx xx"

B "(3) : In any case in which under any clause or clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit xx xx xx xx or in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause, the Executive C Engineer xx xx xx shall have power to adopt any of the following courses :—

(a) to rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence) and in that case the security deposit of the contractor shall stand forfeited and D be absolutely at the disposal of the Government.

(b) xx xx xx xx xx

(c) xx xx xx xx xx

In the event of any of the above courses being adopted by E the Executive Engineer, the contractor shall have no claim to compensation for any loss sustained by him."

Clauses (4) and (5) of the contract related to action to be taken when the progress of any particular portion of the work was found unsatisfactory. Provision was made in the contract for interim payments of running bills submitted by the plaintiff and for final payment F to him against a certificate of completion of the work. Clause (6) of the contract provided for extension of time during which the work was to be completed, in pursuance of applications to be made by the plaintiff. A provision was made in clause (14) of the contract for extension of time as a consequence of additions to or alteration in the work.

G The plaintiff started executing the work and by December 1955, running payments amounting to Rs. 13,967/- in all had been made to him against bills submitted by him. In the month of March 1956, Shri Y. A. Shinde, defendant No. 2, came to occupy the post of Executive Engineer in Nasik Irrigation Division and called upon the H plaintiff to speed up the execution of the work as the progress thereof was not satisfactory. However, the work continued to be executed at a snail's pace and on May 9, 1956, the plaintiff made an application

(exhibit 54) for extension of the time fixed for completion of the work by a period of six months. That application was rejected by defendant No. 2 who informed the plaintiff accordingly through a letter dated June 15, 1956 (exhibit 55) which stated *inter alia* that the reasons put forth by the plaintiff for extension of the time-limit were not convincing, that the application had not been received within the time prescribed in that behalf by clause (6) of the contract and that the proportion of the work executed did not conform to the condition contained in clause (2) of the contract, the value of the work executed till then being only Rs. 25,000/-. The letter further informed the plaintiff that he had become liable to pay compensation under clause (2) of the contract and called upon him to show cause why action should not be taken against him under clause (3) thereof. Ultimately, by letter dated October 30, 1956 (exhibit 48) the plaintiff was informed that it had been decided to burden him with compensation at the rate of Rs. 5/- per day for the entire period commencing on the 16th of May 1956 and ending with the completion of the work and that if the plaintiff failed to show satisfactory progress within a month of the date of the letter, defendant No. 2 would be compelled to increase the rate of compensation and take suitable penal action against the plaintiff. The work not having made much progress and the plaintiff having stopped its execution, he was informed by a letter dated January 17, 1957 (exhibit 49) that the contract stood rescinded under clause (3) thereof. The defendants also forfeited the security deposit which had by then swelled, presumably on account of the addition of interest, to Rs. 4679/- (although this amount has been erroneously described by the High Court as consisting of the earnest money of Rs. 1558/- and the security deposit of Rs. 3896/-).

In his suit, the plaintiff claimed a refund of the said amount of Rs. 4679/-, another sum of Rs. 2500/- on account of the balance due to him for part execution of the work and still another sum of Rs. 4000/- by way of damages.

The trial court found that the plaintiff had failed to prove that any sum was due to him for execution of the work or by way of damages, but further held that the forfeiture of the security deposit was illegal. It therefore granted a decree to the plaintiff for the sum of Rs. 4679/- only with interest at 3 per cent per annum from the date of the suit till realisation and also proportionate costs of the suit.

Aggrieved by the decree passed by the trial court, the defendants went up in appeal to the High Court and the plaintiff filed his cross objections to the decree appealed from which was maintained by the

A High Court in its entirety. The High Court agreed with the findings of the trial court and on the question of rescission of the contract observed as follows :—

> "In our view in law the contract could not be rescinded subsequent to the expiry of the due date for the performance thereof. The right to rescind a contract is the right to put it to an end and such right cannot exist after due date for the performance expires. The right to rescind the contract is the right to accept anticipatory breach thereof by the promissor, i.e., prior to the expiry of the date of the performance of the contract. This right arises in favour of the promisee under section 39 of the Contract Act. A contract cannot be abandoned by either side either by a promissor or a promisee after the expiry of the due date for performance thereof. For the above reasons in our view the abandonment of the work of the contract as mentioned in sub-clause (a) of the clause relate to (anticipatory) breach of the contract by the contractor before the due date for the performance thereof. In this case the Executive Engineer purported to rescind the contract which had become dead some time in August 1956. He purported to do so on the ground that the contractor had abandoned the contract some time in October 1956. The Executive Engineer in our view, had no power under clause (3) to rescind the contract having regard to the facts and circumstances which we have already pointed out above. The forfeiture of the security deposit on the footing that the contract was validly rescinded must be held to be unjustified and untenable."

It was on the basis of this conclusion that the trial court's decree for Rs. 4679/- passed in favour of the plaintiff was affirmed. On the 9th of June 1969 however, the High Court certified the case to be a fit one for appeal by the defendants to the Supreme Court under sub-clause (c) of clause (1) of article 133 of the Constitution of India. At that stage defendant No. 1 agreed to pay the costs of the respondent in the proceedings before the Supreme Court.

2. Learned counsel for the appellants has challenged the correctness of the observations made by the High Court and reproduced above. Those observations, according to him, run counter to the tenor of clauses (2) and (3) of the contract governing the execution of the work and we are of the opinion that his criticism thereof is justified. Although in clause (2) of the contract it was specifically mentioned that time was of the essence of the agreement between the parties, all

that was meant was that in case the work was not completed within the time originally specified in that behalf, the plaintiff would be liable to pay such compensation for delay in execution as was fixed by the Superintending Engineer within the limits laid down in the clause. This becomes clear not only from the provision appearing in clause (2) and stating that "the contractor shall pay as compensation an amount equal to 1 per cent or such smaller amount as the Superintending Engineer may decide for every day that the work remains uncommenced, or unfinished after the proper dates" but also from the contents of clause (3) of the contract, which would become operative only if the plaintiff renders himself liable to pay compensation [in accordance with clause (2)] or abandons the work either on account of serious illness or death or for any other cause and it is then that the contract would become liable to rescission. Clauses (2) and (3) have to be read together and interpreted with reference to each other and their provisions, read as one single whole, clearly mean that the contract was to continue to be in force till the completion of the work or its abandonment. The time was of the essence of the contract only in the sense that if the plaintiff completed it within the original period of one year, he would not be liable to pay any compensation but that in case he overstepped the said time-limit he would have to compensate the defendants for every day of the delay in completing the work and that the right to rescission would accrue to the defendant No. 2 only when the compensation due exceeded the amount of the security deposit or the plaintiff abandoned the work. Till the time the contract was rescinded therefore, it was fully in force and the rescission was consequently well-founded, being squarely covered by clause (3) of the contract, sub-clause (a) of which conferred on the Executive Engineer the right to forfeit the security deposit Far from being illegal, the forfeiture was fully justified and the High Court's finding to the contrary is liable to be reversed.

3. In the result the appeal succeeds and is accepted, the decree of the High Court is set aside and the suit of the plaintiff is dismissed in its entirety. In accordance with the undertaking given by defendant No. 1 on the 9th June 1969 to the High Court when it certified the case to be a fit one for appeal to this Court, the plaintiff shall be entitled to the costs incurred by him in this Court. In respect of costs in the two courts below, we make no order.

P.B.R. *Appeal allowed.*