VENKATESH CONSTRUCTION COMPNAY A

v.

KARNATAKA VIDYUTH KARKHANE LIMITED (KAVIKA)

(Civil Appeal Nos.461-462 OF 2016)

JANUARY 20, 2016 B

**[T.S. THAKUR, CJI., A.K. SIKRI AND R. BANUMATHI, JJ.]**

*Contract – Execution of Work Contract – Suit by contractor making a claim for Rs. 30 lakhs for the work already completed, for extra work, stocking of materials etc. – Trial Court decreed the suit and directed the defendant to pay Rs. 3,23,000/- to the plaintiff with 12% per annum interest – Cross appeals – High Court set aside the decree – On appeal, held: Findings of trial court need not be interfered with by the appellate court unless they are erroneous or reached ignoring the evidence on record – In the present case findings of trial court and the amount awarded was based on evidence and material on record – The High Court, without considering oral or documentary evidence erroneously interfered with the factual findings of trial court – In view of the facts of the case, rate of interest is reduced to 6% per annum.* C D

**Allowing the appeal, the Court** E

**HELD: 1. The Appellate Court may not interfere with the finding of the trial court unless the finding recorded by the trial court is erroneous or the trial court ignored the evidence on record. The amount awarded by the trial court under various heads was based on evidence and material on record. The High Court reversed the decree passed by the trial court without discussing oral and documentary evidence and several grounds raised before the trial court. The High Court veered away from the main issue and went on to elaborate on the law of arbitration and the mode of setting aside the arbitral award under Section 34 of the Arbitration Act, which was not warranted. The High Court erred in interfering with the factual findings recorded by the trial court. [Paras 15 and 16] [519-B-D]** F G

**2. The defendant has not adduced any evidence to discredit the testimony of PWs 1 and 3 that extra work was** H

A required to be done on account of seepage of water and soil caving in and widening and deepening the trench. In so far as the direction of the respondent to stop the work is concerned, on appreciation of evidence, trial court rightly held that the respondent asked the appellant to stop the running work for B want of revised design. So far as the claim of the appellant that it suffered loss due to loss of stock of material, PWs 1 and 3 have stated that they have stocked the material of worth about rupees six lakhs at the work site. Even though the appellant has claimed rupees six lakhs on account of loss of the material stocked, as the appellant had not produced any bill relating to C purchase of material nor produced authentic trip sheet, the trial court rightly awarded rupees one lakh only on account of loss of building material. [Paras 11, 12, 13 and 15][517-B-C, H; 518-F-H; 519-A]

3. The High Court took note of clause 11 of the D contract which states that the contractor is not authorized to do any extra work or make any alteration without the previous consent in writing of the respondent. The respondent has not raised the plea relying upon clause 11 of the contract. Further, by perusal of Ex.P2 dated 20.12.1991, a letter addressed by the appellant to the respondent informing the respondent about the E extra work which needs to be done and the fact that PW-4 was engaged by the respondent to prepare the new design for the work, it is evident that the respondent was aware of the fact of the change in the nature of work and that there is alteration in the work done by the appellant. When the evidence and material F clearly depict the change of nature of work involved and when the extra work to be done was also admitted by DW-1, parties cannot be expected to go for a revised agreement/contract, and specially when the work was to be completed within a specified time-frame. The High Court was not right in placing reliance upon clause 11 of the contract to reverse the findings of fact G recorded by the trial court. [Para 14] [518-A-F]

4. In the facts and circumstances of the case and having regard to the fact that the matter is pending for over two decades and in the interest of justice, it is appropriate that the interest of 12% per annum awarded by the trial court is reduced to 6% H per annum. [Para 17] [519-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 461-462 of 2016 A

From the Judgment and Order dated 15.06.2010 of the High Court of Karnataka at Bangalore in RFA Nos. 1051 and 1076 of 2003 (MON)

Partha Sil, Tavish B. Prasad for the Appellant. B

P. Vishwanatha Shetty, E. C. Vidhya Sagar, Jennifer John, B. K. Gautam, Subhash Chandra Sagar, for the Respondent.

The Judgment of the Court was delivered by

**R. BANUMATHI, J.** 1. Leave granted. C

2. These appeals assail the judgment dated 15.06.2010 in R.F.A. Nos.1051 of 2003 and 1076 of 2003, by which the High Court of Karnataka vide the common impugned judgment reversed the judgment of the trial court and allowed the appeal of respondent-defendant. While doing so, the High Court dismissed the cross-appeal preferred by the appellant-plaintiff. D

3. Briefly stated case of the appellant-plaintiff is that appellant-company is engaged in construction of dams and other civil works and registered as a civil contractor for the Government of Karnataka amongst others. The respondent-defendant invited tender on 17.08.1991 *"for constructing a compound wall along the boundary line of Kavika and also for constructing underground sump, shed to store useful laminations and also core assembly shop for these works"*. The appellant responded to the said tender and appellant's tender was accepted by the respondent. On 12.02.1992, a contract was executed between the appellant and the respondent incorporating the terms and conditions and the cost of work was estimated at Rs.10,86,200/-. The appellant had quoted the rates on the premise that the earth work for the foundation was to the depth of 1.5 metres and average width of 4.25 metres. However, after the work commenced, even while digging earth to one foot depth, it was noticed that soil was caving in and there was seepage of water from Vrushabhavathi river. The appellant was instructed by the respondent's engineers to dig earth up to four metres depth until hard soil bed is reached. Accordingly, in order to make a trench of four metres depth, appellant had to excavate earth commencing from width of six metres at the ground level and the entire nature of work changed and

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A appellant had to incur additional expenses on account of the changed plan. The changed measurements were verified by the engineers nominated by the respondent and a payment of Rs.4,50,000/- was made in two running bills. The respondent then asked the appellant to stop the work till the new designs are given by the respondent which was not forthcoming. Vide several letters appellant sought permission B for continuation of the work, but, there was no response from the respondent. Finally, after issuing legal notice dated 15.03.1993, for which no reply was given by the respondent. The appellant filed a civil suit being Original Suit No.11037 of 1993 in the court of Additional City Civil Judge, Bangalore, making a claim of rupees thirty lakhs under various C heads, interalia, on the work already completed, towards the extra earth work, stocking of materials and also liquidated damages and others.

4. Admitting the execution of the contract dated 12.02.1992, the respondent filed a written statement contending that the construction of the compound wall was in accordance with the estimate and the D question of the respondent's directing the appellant to stop the ongoing work for want of fresh design did not arise. Respondent averred that the appellant unilaterally stopped the work and there is no question of defendant making further payment. It was averred that no extra work was done by the appellant and the respondent was not liable to pay any amount either towards the damages or towards the alleged E loss sustained by the appellant.

5. On the above pleadings, trial court framed seven issues. To substantiate the claim, appellant-plaintiff examined four witnesses and produced thirty three documents. On behalf of respondent-defendant, DW-1-Jagadeesh Kumar-Deputy Manager was examined F and five documents were produced. Upon consideration of evidence adduced by the parties, the first three issues were answered in favour of the appellant-plaintiff viz.: (i) appellant's claim as to extra work; (ii) respondent's direction to stop the running work for want of revised design and (iii) due to stoppage of work side embankment began to G fall in the trench due to the seepage of water and involving double work for the appellant-plaintiff to remove the fallen loose earth. Taking note of the fact that the respondent had paid only a sum of Rs.4,36,575/- to the appellant out of the assessed value of Rs.5,82,100/-, trial court calculated the balance of Rs.1,45,525/- as the balance amount payable in respect of completed portion of the work. On the value of building

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material stock, trial court awarded Rs.1,00,000/- as against the appellant's claim of Rs.6,00,000/-. Trial court decreed the suit in respect of extra earth work, embankment work and other heads and directed the defendant to pay in all a sum of Rs.3,23,000/- to the appellant with proportionate cost and interest on the said amount at 12% per annum from the date of the suit till the date of realization.

6. Being aggrieved, respondent as well as the appellant preferred appeals before the High Court and both the appeals were heard together and disposed of by the impugned judgment. Referring to the contract, the High Court held that the written contract governs the terms between the parties and any variation thereof ought to be in terms of the provisions of clause 11 of the contract and the appellant having not gone through the procedure envisaged under clause 11, the appellant cannot putforth a claim for a higher payment on the premise that it has executed some extra work over and above the stipulated quantity of the work. The High Court reversed the judgment of the trial court observing that the trial court acted more like an arbitrator in examining the suit claim and that the trial court erred in passing the decree in favour of the appellant-plaintiff for a sum of Rs.3,23,000/- with interest and proportionate cost.

7. Learned counsel for the appellant Mr. Partha Sil has contended that the High Court failed to appreciate that the change in work which materially changed the nature of intended work mentioned in the tender document which was admitted by DW-1-Jagadeesh Kumar during trial. It was further submitted that the High Court erred in ignoring the evidence adduced by the appellant which clearly establish that the respondent directed the appellant to stop the work resulting in double work due to soil caving in trenches causing severe financial loss and hardship to the appellant. It was submitted that upon appreciation of evidence when the trial court recorded findings of fact, the High Court was not right in reversing the same.

8. Per contra, learned Senior Counsel for the respondent Mr. P. Vishwanatha Shetty submitted that appellant was appointed to complete the given work as per the terms of the contract and it was the duty of the appellant to collect the relevant information before making an offer and the appellant was not justified in making an exaggerated claim of rupees thirty lakhs which is thrice the estimated cost of the work. It was submitted that the appellant failed to prove

A that he had purchased material and they were brought to the site and there is no acceptable evidence to show that the appellant had stored large quantities of material in the site. It was submitted that the plea of the appellant that he was orally asked to stop the work and to await revised design is totally baseless and the High Court rightly reversed the judgment of the trial court.

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9. We have carefully considered the rival contention and perused the impugned judgment and also the judgment of the trial court and other material on record.

10. PW-1-Venkatesh, who is the proprietor of the appellant-company stated that the alignment of compound wall to be constructed is in line with the existing flow of water from the river and that excavation for the compound wall was done in the river itself and when the work commenced, water started collecting in the trenches and the plaintiff had to dewater the same simultaneously. PW-1 further stated that the appellant requested the respondent to consider the matter and accord sanction for extra items namely, making temporary drain, dewatering work and that the appellant had to do extra work for removal of loose earth and this caused double work for the appellant. PW-3-Hanumegowda, working as a supervisor under the appellant corroborated the version of PW-1 and stated that while doing the foundation work, seepage water from river flooded in and collected in trenches and the appellant had to do extra work in dewatering and removal of loose earth. PW-3 further stated that as per the estimate, depth of the earth excavation for the foundation work was only four feet and while digging the trenches it was found that the soil was loose and that the engineers of the respondent told the appellant to dig the earth to a further depth till hard soil bed is reached and on this score also, the appellant had to do extra work. The version of PWs 1 and 3 is fortified by letter dated 06.05.1992 (Ex. P4) sent by the appellant to the respondent stating that there was seepage of water in the trench and that embankment had fallen in the trench and that the appellant has to do extra work in dewatering and removing the loose soil. Inspite of repeated letters (Exs. P4 and P5), there was no response from the respondent.

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11. DW-1-Jagadeesh Kumar working as Deputy Manager with the respondent had stated that the parties were not aware of the soil strength at the time of entrustment of the work to the appellant.

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However during cross-examination, DW-1 admitted that before commencement of work, both parties were unaware of nature of different strata of soil. He also stated that in case soil testing had been done before, the records would have been available with the respondent. But no such record was produced by the respondent. Be it noted that the defendant has not adduced any evidence to discredit the testimony of PWs 1 and 3 that extra work was required to be done on account of seepage of water and soil caving in and widening and deepening the trench. On appreciation of evidence of PWs 1 and 3 and other documentary evidence, the trial court recorded the findings of fact that the appellant had to do extra work incurring additional expenditure.

12. In so far as the direction of the respondent to stop the work, PW-1 stated that during the first week of April, 1992 officials of the respondent had asked the appellant to stop the work for getting the design from the architect on account of seepage of water. PW-2-Raghavendra Rao working as Civil Engineer in the appellant company, has also corroborated the version of PW-1 and stated that the respondent asked the appellant to stop the work and that the work could be resumed later. Though DW-1 stated that the defendant did not issue any letter to the plaintiff complaining against the stopping of work, he also stated that the plaintiff was orally told about the same. By perusal of various letters, it is seen that inspite of number of letters by the appellant seeking permission to continue the work, there was no response from the respondent. Absence of any response on the part of the respondent, only indicates that the respondent was aware of the change of nature of work.

13. PW4-Naresh Kumar-architect had stated about his visit to the work site at the request of the respondent for preparing the design after the masonry wall for the length of hundred metres was over and that he gave the revised design and PW-4 estimated the cost of the work as per the revised design at rupees twenty lakhs. PW-4 was engaged to prepare the design suitable to the soil strength only because of the change in the nature of the work. Otherwise the need for engaging PW-4 for preparing new design would not have arisen if the earlier design would have been suitable. On appreciation of evidence, trial court rightly answered issue No.2 in favour of the appellant that the respondent asked the appellant to stop the running work for want of revised design.

A 14. The High Court took note of clause 11 of the contract dated 12.02.1992 which states that the contractor is not authorized to do any extra work or make any alteration without the previous consent in writing of the respondent. High Court set aside the findings recorded by the trial court holding that the parties are governed by the terms of the written contract and any variation with the terms of the agreement B was required to be done strictly adhering to clause 11 of the contract. While saying so, the High Court brushed aside the admission by DW-1 that extra work was done by the appellant and the High Court was not right in ignoring the same to hold that the admission of DW-1 cannot have the effect on the contractual obligation of the parties. It is to be C pointed out that the respondent has not raised the plea relying upon clause 11 of the contract. Further, by perusal of Ex.P2 dated 20.12.1991, a letter addressed by the appellant to the respondent informing the respondent about the extra work which needs to be done and the fact that PW-4 was engaged by the respondent to prepare the new design for the work, it is evident that the respondent was aware of the fact of D the change in the nature of work and that there is alteration in the work done by the appellant. When the evidence and material clearly depict the change of nature of work involved and when the extra work to be done was also admitted by DW-1, parties cannot be expected to go for a revised agreement/contract. Moreover, having regard to the E fact that the work was to be completed within a specified time-frame, the parties cannot be expected to go for a second round of negotiation and reframe the terms and conditions of the work. While so, the High Court was not right in placing reliance upon clause 11 of the contract to reverse the findings of fact recorded by the trial court.

F 15. So far as the claim of the appellant that it suffered loss due to loss of stock of material, PWs 1 and 3 have stated that they have stocked the material of worth about rupees six lakhs at the work site. The appellant also produced several letters (Exs. P5, P6 and P7) by which the appellant has informed the respondent that there was no progress in the work and that the building material are lying waste. G Apart from these letters, the appellant has also produced photographs (Exs. P18 to P28) to substantiate their claim that the building material like bricks, size stones and other materials were stocked at the work site. Even though the appellant has claimed rupees six lakhs on account of loss of the material stocked, as the appellant had not produced any H bill relating to purchase of material nor produced authentic trip sheet,

the trial court rightly awarded rupees one lakh only on account of loss of building material. As noticed earlier, based on the evidence of PWs 1 and 3 and other documents, the trial court has awarded amount on various other heads viz., the amount payable in respect of:- (i) extra earth work; (ii) embankment work; (iii) extra soiling work; (iv) extra bed concrete work and (v) extra stone masonry work. The amount so awarded by the trial court under various heads is based on evidence and material on record.

16. The Appellate Court may not interfere with the finding of the trial court unless the finding recorded by the trial court is erroneous or the trial court ignored the evidence on record. The High Court reversed the decree passed by the trial court without discussing oral and documentary evidence and several grounds raised before the trial court. The High Court veered away from the main issue and went on to elaborate on the law of arbitration and the mode of setting aside the arbitral award under Section 34 of the Arbitration Act, which in our view, was not warranted. Without considering the oral and documentary evidence, the High Court erred in interfering with the factual findings recorded by the trial court and the impugned judgment is liable to be set aside.

17. Trial court directed the respondent to pay a sum of Rs.3,23,000/- to the appellant with interest at the rate of 12% per annum from the date of suit till the date of realization. To award interest from the date of suit to date of decree and from the date of decree till the date of realization is entirely discretionary. The terms of the contract do not specify any rate of interest. In the facts and circumstances of the case and having regard to the fact that the matter is pending for over two decades and in the interest of justice, it is appropriate that the interest of 12% per annum awarded by the trial court is reduced to 6% per annum.

18. In the result, the impugned judgment is set aside and the appeals are allowed. The judgment and decree passed by the trial court is restored with the modification of reduction of interest at 6% per annum from the date of the suit till the date of realization. In the facts and circumstances of the present case, no order as to costs in these appeals.

Kalpana K Tripathy Appeal allowed.