

State of U.P. Vs. Chandra Gupta and Co.

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Court : Allahabad

Decided On : May-04-1976

Reported in : AIR1977All28

Judge : R.B. Misra and ;K.C. Agrawal, JJ.

Acts : [Contract Act, 1872](#) - Sections 70 and 74; Limitation Act, 1908 - Schedule - Articles 56 and 115

Appeal No. : First Appeal No. 405 of 1964

Appellant : State of U.P.

Respondent : Chandra Gupta and Co.

Advocate for Def. : Radha Krishna, Adv.

Advocate for Pet/Ap. : Standing Counsel

Disposition : Appeal dismissed

Judgement :

K.C. Agrawal, J.

1. This is a defendant's appeal from the judgment and decree dated 22-8-1964 passed by the learned Additional Civil Judge, Meerut, decreeing the suit of the plaintiff-respondent partly for a sum of Rs. 14,283. The suit was filed by the

plaintiff-respondent in the following circumstances.

2. The Executive Engineer, Ganges Canal, Meerut Division, Meerut, issued a notice dated 13th August, 1957, inviting tenders for constructing a new Tail Fall V. R. B. at Mile 7-0-330 of Jani Escape. The tender submitted by the plaintiff-respondent, in pursuance of the aforesaid notice, was accepted on the 19th of August, 1957, and a formal contract in that behalf was, thereafter, executed on November 4, 1957. The plaintiff started the work, but as the officers of the defendant began to harass him, he had to stop it on January 24, 1958. Upon the understanding arrived at, the work was resumed soon thereafter but it was finally again stopped by the plaintiff on March 21, 1958. Admittedly, the plaintiff had not executed the entire work undertaken by him under the contract. It was, thereafter, got done by the defendant through another agency. The plaintiff, however, filed the suit, giving rise to the present appeal, for recovery of a sum of Rupees 34,780.71 Paise. Schedules A to H appended to the plaint give the details of the amount claimed in the plaint. As in the present appeal we are concerned only with the claims under Schedules B, D, F, G and H, we need not mention the facts relating to other Schedules. The claim under Schedule B was for the payment of Rs. 13,770 regarding reinforced concrete work (briefly stated as R.C.C.), which according to the plaintiff was extra work not otherwise provided for in the contract. The total quantity of the work was 1,02,000 Cft. The claim has been made @ 35% per Cft., whereas the payment was made only @ 21.50% Cft. The claim under Schedule D was for a sum of Rs. 1265.08 Paise regarding the amount unduly recovered. Under Schedule F, the plaintiff claimed Rs. 283 on account of shuttering that was done by the plaintiff, it had been left and could not be removed due to the position being behind glacis. Schedule G was for the sum of Rs. 2,148 as the price of the stores which had been supplied by the plaintiff for execution of the work, to the Government. The last item under Schedule H was for the recovery of Rs. 6,650, which had been deducted by the defendant from the bill paid on 15-3-1959 by way of penalty.

3. The suit was contested by the State of U. P. and it was denied that the plaintiff was entitled to any amount claimed in the plaint. The defendant disputed that the plaintiff had done any extra work as claimed by him in Schedule B. The claims

made under other Schedules were, also controverted. Admitting that a sum of Rs. 6,650 had been deducted out of the amount payable to the plaintiff, the defendant stated in the written statement that as the plaintiff was guilty of having not performed the contract within time the defendant had authority under the contract executed between the plaintiff and the defendant to deduct the amount.

4. As stated above, the trial court decreed the suit of the plaintiff for Rs 14,283 only. This decree was in respect of the amounts claimed under Schedules B and F. In respect of amounts claimed under other Schedules, the finding given by the court below is that the plaintiff could not prove that he was entitled to it and, therefore, the suit regarding them was liable to be dismissed. Feeling aggrieved by the judgment and decree of the trial court, the State of U. P. has filed the present appeal challenging the decree only in respect of Schedule B. The appeal is accordingly, valued at Rs. 13,770. The plaintiff has filed a Cross-Objection valuing it at Rupees 10,352 for the items covered by Schedules D, F, G and H.

5. We propose to take up the appeal filed by the State, of U. P. first. As stated above, the claim under Schedule B was in respect of extra, work. The details of the extra work have been given in the aforesaid Schedule. The same are as under:

'Reinforced concrete paid as plain concrete.

This work has been executed under instructions of the Supervising Staff in the following situations:

(a) Horizontal and vertical reinforcement to connect different layers of 1:4:8 concrete.

(b) Welded reinforcement net work on Girder piles near the Wall.

(c) Net work of steel reinforcement in foundations of down stream wing wall's Where pipe fules have been provided.

(d) In block foundations.

(e) In Glacie portion to bind 1:4:8 Cement Concrete with 1:2:3.

(f) To bind brick work with foundation concrete.'

6. The plaintiffs case with regard to this item was that under the contract the plaintiff was required to do cement concrete, but as it was ordered by the officers concerned to do R.C.C., it rendered the R.C.C. of 10,2000 Cft The defendant, however, instead of making payment for the R.C.C. has paid only for the cement concrete and, therefore, it was entitled to have payment for the R.C.C. The dispute under this Schedule is with regard to the work done in the bed glacie portion, enjoining the layers, Wing Walls, in the pipe piling of the foundation, in the toe wall by fitting and by making a net work of iron bars. The contract, however, provided not only the drawing Ext. 1, which was given to the plaintiff, but also for the execution of these items by cement concrete. According to the plaintiff, he was subsequently ordered by the Engineer Incharge to do R.C.C. instead of cement concrete and, accordingly, the orders were carried out In support of his case, Jai Prakash, who was the partner of the plaintiff, has appeared as P.W. 2. In his statement, he has clearly stated that he was asked by the Engineer Incharge to do these works by the R.C.C. instead of cement concrete and the same was, thereafter, done in the ratio of 1:4:8. The plaintiff has also produced Ex. 2 dated 22-2-1958, the second drawing supplied to him. The plaintiff had to execute the work in accordance with this drawing. The second drawing Ex. 2 shows some alterations and changes in the nature of work, i.e., R.C.C. In the lower part of the design in Ex. 2, a provision has been made for using of iron bars while this was not shown in drawing Ex. 1. This change in the drawing itself is significant, and establishes that the Engineer Incharge and others concerned subsequently changed their minds and desired the items mentioned in Schedule B to be carried in R.C.C. instead of cement concrete.

7. The defendant in support' of its case that the plaintiff did not do R.C.C. but only cement concrete, produced S. V. Sharma and Kailash Chandra as D.Ws. 2 and 3 respectively. S. V. Sharma was an Assistant Engineer posted at the Site at the relevant time. He has clearly admitted in his statement that he was the Engineer Incharge of this work. According to his statement in examination-in-chief, the work of items of Schedule B was done in plain concrete and that the same having been done in the ratio of 1:4:8, it could not be considered as R.C.C. In his cross-

examination, he however, admitted some extra work was also done by the plaintiff, and that he did not know if the plaintiff had received payment for the same. On further cross-examination, he had to admit that iron bars were placed horizontally and fixed up vertically. He further showed his ignorance as to whether iron bars were further used in girders. Likewise, he could not deny whether iron bars were fitted in the foundation, but this much was admitted by him that at those places where iron bars were fitted they were all done under his instructions. He further admitted that photos were also taken when bars were fixed. These photos had been produced by the plaintiff and have been marked Exts. 7, 8, 10 and 11. The next witness on this question is Kailash Chandra Jain. He was then the Overseer Incharge of the work. Although he has denied that any R.C.C. work was done by the plaintiff but he admitted at the same time that the work was done by the plaintiff in the ratio of 1:4:8 in brick ballast. Thereafter, he stated that iron to the quantity of 367.38 C.W.T. was used. According to him. R.C.C. work was done in the bridge by debitale agency. He, however, could not show from the Measurement Book, which was produced in the court, that this work was got done through debit-able agency and not by the plaintiff. He admitted that iron bars were fitted in blocks and sheet piling.

8. Apart from the oral evidence adduced on its behalf, the defendant has also filed a letter Ex. A-1 dated 5-8-1958 along with a report on the claims of the plaintiff. Item 3 of this report deals with the claim of the plaintiff regarding R.C.C It has been mentioned in this report that although the work had been done by the plaintiff in the ratio of 1:4:8 with ballast, but the same could not be considered as R.C.C. The report of the Assistant Engineer was endorsed by the Executive Engineer and, thereafter, by the Superintending Engineer.

9. Another circumstance which deserves notice at this place is about the fixation of dowels on the various works mentioned in this Schedule. The case, of the plaintiff was that these dowels were used by him in order to cover the R.C.C. work which was done on various dates. The case, however, of the defendant was that dowels were fitted because the plaintiff was not doing the work continuously and, therefore, they were fixed for the purposes of protecting the cement concrete work. There is no proof on the record that the dowels had to be used because the

plaintiff did not work continuously while laying the concrete. The fact of the use of dowels having not been disputed, it appears to us that they had, in fact been used by the plaintiff to protect the R.C.C.

10. Having considered the evidence given by the parties on the aforesaid question, we find that iron bars having been used by the plaintiff in the completion of the work mentioned in Schedule B, the work which the plaintiff did was R.C.C. and not cement concrete. Ex. A-1, the contract entered into between the plaintiff and the defendant, also gives the detailed specifications and special conditions of contract. In paragraph 58 of this contract, the nature of the work of cement concrete has been given. It provides that the concrete shall consist of Portland cement fine and coarse aggregate mixed with water in a proportion to be specified by the Engineer Incharge from time to time, whereas this very contract in paragraph 80 deals with reinforcement Taking into account these two Clauses of the contract, it appears to us that the plaintiff having used iron bars in the various items mentioned in Schedule B should be deemed to have done R.C.C. R. Greenhalgh in his book 'The Practical Builder' at page 294 has given the definition of 'concrete' as below:

'Concrete as a rule is a mixture of cement aggregate (such as gravel, crushed stones, and crushed bricks), fine aggregate (such as sand and crushed stones) and suitable binding material (cement).' The word 'reinforced concrete' has been explained in Encyclopadia Britannica, 1968 Edition, Vol. VI, at page 264, as:

'When steel bars are embedded in the concrete the result is called 'reinforced concrete'.....

Two fundamental properties permit concrete and steel to work together as a composite material. Their coefficients of a thermal expansion are approximately equal;.....,

Finally, steel bars are used to increase shearing strength and to prevent cracking that would otherwise result from wide temperature changes.'

11. The definitions given above clearly make out a distinction between the cement concrete and reinforced concrete. It would be found that when steel bars are embedded in the concrete, it becomes reinforced concrete. In the instant case, we have found that steel bars were used by the plaintiff in carrying out the works covered by items of Schedule B. Consequently, the plaintiff having embedded steel bars in the concrete should be held entitled to the payment for R.C.C. work, in fact, R.C.C. has become one of the mainstays of modern construction which is not only economically competitive with the steel frame construction but its advantageous properties have had a radical speed of designs. The submission made by the learned counsel for the State, however, that as the work was done in the ratio of 1:4:8 and that too with brick ballast instead of stone ballast, it could not be considered as R.C.C., does not impress us. The main thing, as stated above, is that steel bars were embedded in the concrete. This is determinative of the character of the work, and not the ratio. In fact, the concrete specifications differ from work to work, Therefore, simply because the work was not done by the plaintiff in the ratio of 1:2:4 that does not mean that the plaintiff had not done R.C.C. and he was not entitled to the payment for the same. In this connection, reference may be made to page 382 of the 'Practical Builder', in which it has been said that there may be various reasons for variation of specification of concrete. Hence, merely because the work was done in the ratio of 1:4:8 and not in the ratio of 1:2:4 would not be a deciding factor. It would be seen that the ratio of cement in the work done by the plaintiff was the same as it would have been done in the ratio of 1:2:4, as urged by the plaintiff's counsel. Cement is the most suitable binding material and is also the most costly component in concrete. As its quantity was not reduced, it cannot be said that simply because the quantity of sand and ballast was changed, that would change the character of the work done by the plaintiff. Hence, we are unable to accept the submission of the counsel for the State that the plaintiff having not done the R.C.C. was not entitled to get its price.

12. Another submission made by the defendant's counsel was that Clauses 41 and 44 of the Special Conditions of the contract required the plaintiff to obtain an order before executing the work, and as the plaintiff did so without obtaining such a permission, he was not entitled to get the price. The submission made cannot be accepted for two reasons. The first reason being that the evidence filed by the

plaintiff shows that he had been orally asked to do the R.C.C. work. The statement made by Jai Prakash, P.W. 2, has already been referred to by me above. There is nothing in his cross-examination which could shake his testimony. It shows that he had been orally instructed for the work which is in dispute. Reference may also be made to Condition No. 5 of the Detailed Specifications, which requires that all work shall be carried out in accordance with the detailed drawing to be supplied or as directed by the Engineer Incharge from time to time'. As the work was done by the plaintiff in accordance with the oral instructions received by him from the Engineer Incharge, therefore, it cannot be said that the plaintiff was not entitled to get the price for R.C.C. work. Ext. dated 22-2-1958, the second drawing also shows alterations and changes in the nature of work, i.e., reinforced concrete work. Therefore, 'this exhibit itself can be treated as an order in writing. Accordingly, the submission of the counsel for the State that as the plaintiff had not obtained any order in writing, he could not get the price for this item, is liable to fail.

13. Another aspect of the matter which deserves notice at this place is as to whether the plaintiff could recover the -amount under Section 70 of the Indian Contract Act, despite the fact that no formal document was executed between the plaintiff and the defendant for the extra work. The term 'extras' is generally used in relation to the works which are not expressly or impliedly included in the original contract and, therefore, not included in the original contract price, provided the work is done within the frame work of the original contract. Whether a particular work is extra or not will depend upon the terms and conditions of the contract, its specifications, plans, drawing, nature of the work etc. In the instant case, it cannot be denied that the R.C.C. work covered by Schedule B is not expressly or impliedly included in the contract. It is only on account of the oral instructions given by the Engineer Incharge that the said work was done. This work having been thus done within the framework of the contract is liable to be treated as extra work. Since the defendant has received benefit by this extra work, it is liable to pay for the same. Section 70 of the Contract Act is not founded on contract, but embodies the equitable principle of restitution and prevention of unjust enrichment. A Government is also not outside the operation of Section 70 and, therefore, whenever it receives any benefit it is obliged to pay for the same under this section. This controversy came up for decision before the Supreme Court in State

of West Bengal v. B. K. Mondal (AIR 1962 ,SC 779). This was a case where a contract as required by Section 175(3) of the Government of India Act, 1935, had not been executed between the State Government and B. K. Mondal & Sons. B. K. Mondal & Sons having done some work for the State of West Bengal, made a claim for the same. One of the questions which arose for decision before the Supreme Court was whether B. K. Mondal & Sons could get the amount under Section 70 of the Contract Act as no formal document, as required by Section 175(3) of the Government of India Act, 1935, was executed. Answering the aforesaid question, the Supreme Court observed that what Section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Government. In this view of the matter, the Government was held liable to pay for the goods delivered to it. The principle laid down by the Supreme Court in this case was followed in subsequent cases by the Supreme Court. Applying the law, enunciated in this case, we also find that the defendant having received the benefit is liable to pay for R.C.C. to the plaintiff.

14. Before dealing with the question of limitation, which was urged by the learned counsel for the State, we think it appropriate to deal with the cross-objection filed by the respondent. As stated above, the cross-objection has been filed in respect of Schedules D, F, G and H. The claims with regard to Schedules D, F and G need not detain us long inasmuch as findings given by the learned Civil Judge on these Schedules appear to us to be correct. Counsel appearing for the respondent attempted to challenge these findings but could not satisfy that the learned Civil Judge committed any error in deciding them against the plaintiff. We have considered the evidence given by the parties on these items, but fail to find any error in the judgment of the court below.

15. Coming to Schedule H, the claim of the plaintiff was that the defendant had no power to deduct the amount of Rs. 6,650 from the final bill. The deduction has been attempted to be justified by the defendant on the ground that as the plaintiff did not perform the work within time, the aforesaid sum being 10% of the value of the contract, was liable to be forfeited under Clause 2-B of the contract. The question that arises for determination is as to whether the State could under this Clause deduct the amount. The relevant portion of Clause 2-B extracted is as

under:

'Time is the essence of the contract The contractor shall complete the work within the period specified in the tender.

If the contractor fails to comply with this condition he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as the Executive Engineer may decide on the said estimated cost of the whole work for every day that the quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the provision of this Clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender.'

16. It appears from the Conditions of the Contract that the defendant at the time of making the payment for the work done under the contract had deducted a sum of Rs. 6,650 from the amount payable to him, an exercise of the power given by Clause 1. The amount deducted was kept by it by way of security. As stated above, the deduction was justified by the State Government on the ground that the plaintiff having not done the work within time and having left the same unfinished, was liable to forfeiture. The submission made by the counsel for the respondent was that as the defendant had debited the plaintiff with the actual cost which was spent in getting the remaining work done, therefore, it was not entitled to forfeit the amount of security left with it. The submission is well founded. The State of U. P. having deducted the excess amount which it had to pay to the debiting agency for getting the unfinished work done and completed, it is not entitled to forfeit the security deposit as it would result in conferring double benefit to the State.

17. Sri Radha Krishna, counsel appearing for the plaintiff urged that as no damage was suffered by the State Government it could not forfeit the security deposit made by the plaintiff. Reference was made by him in this connection to Section 74 of the Contract Act, which reads as under:

'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to

receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

17-A. The submission made on behalf of the respondent was disputed by the learned counsel appearing for the State on the ground that the security deposit having been taken from the respondent in order to ensure the due performance of the contract and the respondent having defaulted the entire amount was liable to be forfeited.

18. After having heard counsel for the parties, we are inclined to accept the submission advanced on behalf of the respondent. Section 74 of the Indian Contract Act entitles a person to get reasonable compensation and does not entitle him to realise anything by way of penalty. If a contract is not duly performed but still no damage is suffered on account of non-performance, the promise would not be entitled to get damages.

19. A similar question regarding the right of the Union of India to forfeit the security came up for consideration before the Supreme Court in *Maula Bux v. Union of India*, (AIR 1970 SC 1955), in that case, Maula Bux had entered into a contract with the Government of India for the supply of certain goods and had deposited certain amount of security for the due performance of the contract. It was stipulated in the contract that the amount of security was to stand forfeited in case the appellant neglected to perform his part of the contract. On Maula Bux committing default in the supply, the Government did not only rescind the contract but also forfeit the security deposit. Holding that a case of forfeiture of earnest money was different from forfeiture of security deposit for due performance of the contract, the Supreme Court held that under Section 74 only reasonable amount can be forfeited if a contract is not performed. But, where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of penalty. It further held that the amount deposited by way of security for guaranteeing the due performance of the contract could not be regarded as earnest money. Applying the law to the facts of the

present case, we find that as the defendant, admittedly, did not suffer any damage it was not entitled to forfeit the security deposit, inasmuch as forfeiture of security would amount to imposition of penalty. This case was followed by the Supreme Court in Union of India v. Rampur Distillery and Chemicals Limited (AIR 1973 SC 1098). It was held in this case that the party to a contract taking security deposit from the, other party to ensure due performance of the contract is not entitled to forfeit the security deposit on the ground of default, when no loss is caused to him in consequence of such default, We, accordingly, find that the learned Civil Judge was not right in holding that the forfeiture of security by the defendant in the instant case was justified. We, therefore, hold that the plaintiff is entitled to get a decree for the sum of Rs. 6,650 under this head.

20. The only other question which remains to be decided is about limitation. Counsel for the State urged that the period of limitation applicable to the reliefs sought for by the plaintiff was Article 56 of the old Limitation Act, whereas counsel for the respondent submitted that as there are no specific articles in the said Act providing for the reliefs claimed in the suit, the residuary Article 120 would apply. He also, in the alternative, relied on Article 115 of the old Limitation Act and submitted that even if this Article is applied, the suit is within time. These three Articles of the old Limitation Act are quoted below;

Art. 56.

For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.

Three years.

When the work is done.

Art. 115.

For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.

Three years.

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.

Art. 120.

Suit for which no period of limitation is provided elsewhere in this Schedule.

Six years.

When the right to sue accrues.

Article 56, quoted above, will show that it prescribes a period 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. In this eventuality, the period of limitation starts running from the date when the work is done. In the instant case, however, we find that Clause 7 of the Conditions of Contract provides for payment on intermediate certificate to be regarded as advances. Under this Clause, a contractor is entitled to receive a monthly payment proportionate to the part thereof then approved for such purpose by the Engineer In-charge. Similarly, a provision for final payment has also been made in Clause 6. Accordingly, as the contract provides for the time when the payment is to be made, Article 56 of the old Limitation Act would not be applicable to the claim for the extra work. The other Articles which were relied upon by the plaintiff were Articles 120 and 115 of the said Act. Article 115 will apply to a claim of compensation for breach of any contract, express or implied. The period of limitation in such cases is three years and it commences to run when the contract is broken. Although it was vehemently urged by Sri Radha Krishna that the correct Article applicable to the claim for the extra work was Article 120, but as we find that even applying Article 115, the suit of the plaintiff is within time, we do not think it necessary to examine the question as to whether Article 120 applies. The facts of the case, stated above, would show that the claim of the plaintiff was rejected by the State of U P on 15-3-1959, whereas the suit was filed by the plaintiff on 16-5-1962. The plaintiff having given two months'

notice to the State of U. P., was entitled to the exclusion of this period of two months, and as 15th of May, 1962, was a public holiday, the plaintiff could, therefore, file the suit on 16-5-1962. Accordingly, the suit filed by the plaintiff on the aforesaid date was within time. This view of ours is supported by a decision of a Division Bench of this Court in *State of U. P. v. Suraj Prasad Gupta* (First Appeal No. 351 of 1968, decided on 3-2-1976) (All), In this case also it was held that to a claim like the present, the limitation applicable is that provided by Article 115 of the old Limitation Act.

21. There remains to consider the question as to whether the claim made by the plaintiff for the refund of the security deposit forfeited by the State was within time. The real question in this case is about the character of the deposit made by the plaintiff as a contractor. The amount was deposited as security for due performance of the contract. The question of limitation as to the refund of security amount came up for consideration before a Division Bench of the Punjab and Haryana High Court in *Zila Parishad, Ambala v. Banarsi Dass*, (AIR 1973 Punj & Har 276). The Bench observed that a suit for return of security deposit is not for compensation for the breach of any contract; the deposit remains a deposit whether the depository has a right to deduct anything there from or not. Thus, the suit would be governed either by Article 145 or 120 of the Limitation Act. In *Datt Singh v. Srihar Singh*, (AIR 1955 NUC (All) 3551) the learned single Judge also was required to consider a similar controversy. The commentator has digested the observations made by the learned Judge in the following terms:

'The claim for a return of the deposit money cannot by any stretch of the language of Article 115 be considered as a suit for compensation for breach of any contract. When an employee makes a deposit for due performance of the duties, the deposit is in the nature of a trust and the proper Article in such a case is Article 145 which provides for a greater period of limitation than Article 120. Even if Article 145 is not applied, there is no escape from the conclusion that the other Article applicable to a case of this type is Article 120.'

22. For the reasons given above, we find that a suit relating to a deposit would fall under the residuary Article 120 of the Act. The period provided under this Article is

six years, Applying this period, we find that the suit is within time and, therefore, the claim of the plaintiff for the refund of the security deposit cannot be defeated on the ground of limitation.

23. For these reasons, the appeal is dismissed with costs. The Cross-Objection is allowed partly. Accordingly, the decree of the court below is modified, and the suit stands decreed for a further sum of Rs. 6,650 with interest @ 3% per annum from the date of institution of the suit till its payment, in view of the divided success of the parties in the Cross-Objection, we direct them to bear their own costs.

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