

Delta Foundations and Constructions Vs. Kerala State Construction Corporation Ltd.

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Court : Kerala

Decided On : Jan-17-2003

Reported in : AIR2003Ker201; 2003(1)KLT626

Judge : K.S. Radhakrishnan and; J.M. James, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 47, Rule 1; [Limitation Act, 1963](#) - Schedule - Article 55

Appeal No. : R.P. No. 638 of 2001 in A.S. No. 739 of 1996

Appellant : Delta Foundations and Constructions

Respondent : Kerala State Construction Corporation Ltd.

Advocate for Def. : M.V. Thampan,; K.M. Beena and; K.B. Sajeeadh, Advs.

Advocate for Pet/Ap. : K.L. Varghese and; Santha Varghese, Advs.

Disposition : Petition allowed

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. This Review Petition has been preferred by the defendants in the suit stating that this Court while applying Article 55 of the Limitation Act had committed an error apparent on the face of the record, consequently liable to set right the error.

2. Counsel appearing for the review petitioner placed reliance on the decision of the Apex Court in *Raja Shatrunjit v. Mohammed Azmat Azim Khan* (AIR 1971 S.C. 1474) and contended that the grounds for review under Order XLVII of the Code of Civil Procedure includes mistakes or errors apparent on the face of the record. Error apparent on the face of the record must be an error which must strike on mere looking at the record and would not require long drawn process of reasoning on points on which there may conceivably be two opinions. An error which is not self evident and has to be detected by a process of reasoning can hardly said to be an error apparent, on the face of the record justifying the court to exercise its powers under Order XLVII Rule 1 of the Code of Civil Procedure. As held by the Apex Court in *Parsion Devi and Ors. v. Sumitri Devi and Ors.* (1997 (8) SCC 715) if there is a clear distinction between an erroneous decision and an error apparent on the face of the record the first can be corrected by the higher forum while the latter can only be corrected by exercise of the review jurisdiction.

3. We may in the light of the above mentioned principle examine whether the decision rendered by this court is an erroneous decision or whether there is an error apparent on the face of the record.

4. For disposal of this case, we are not concerned with the facts of the case. The only question raised is whether the suit was hit by the law of limitation. Suit was instituted for realisation of money. Plaintiff is a public limited company engaged in construction contracts. First defendant is a partnership firm and defendants 2 and 3 are its partners. First defendant undertook some work for which agreement was entered into between the parties on 24.3.1987, but the work was terminated on 22.4.1988. Suit was instituted by the Corporation on 7.11.1991 claiming damages of Rs. 1,92,839.66. The suit was resisted by the defendant contending that the suit was barred by the law of limitation. Issue No. 3 was raised by the trial court and the trial court held as follows:

Issue No. 3: The suit is essentially one for the loss sustained by the plaintiff consequent to the rearrangement of the work. The contract with the defendants was terminated as per Ext. A8 dated 22.4.1988. It was contended by the learned counsel appearing for the plaintiff that his party could assess the loss only on rearrangement of work which was done on 9.11.1988 and the cause of action could be reckoned only from that date in which case the suit is within the time. It was further urged that the amounts claimed and sought to be recovered is in the nature of compensation and that Article applicable is to the instant case Article 113 of the Limitation Act.

The ascertainment of the amount of damages in the suit is quite distinct from the very occasion of ascertainment, which in fact is the real cause of action. The article provides for the breach as the starting point. The amount now sought to be recovered is not compensation in its strict sense. The argument do not stand to merit in view of the specific averments in the plaint regarding the nature of claim. As per Article 55 of the Limitation Act time begins to run from the date contract is broken. So the present suit which is filed after three years from the date of accrual of cause of action is barred by limitation.

On the above mentioned findings the suit was dismissed by the trial court holding that the same was barred by the law of limitation. Aggrieved by, the same plaintiff had approached this court by filing A. S. No 739 of 1996. Contentions of the parties were more or less the same as in the suit. Counsel appearing for the review petitioner submitted that while applying Article 55 the court committed a mistake which is liable to be reviewed. We may extract the order of the Division Bench which reads as follows:

'Article 55 of the Limitation Act relates to the suit for compensation for the breach of any contract express or implied and not otherwise specially provided for. The starting point of limitation is when the contract is broken or the breach in respect of which the suit is instituted, occurs and the period provided is three years. To the extent the court below has held that a suit for compensation for breach of contract, it is Article 55 of the Limitation Act that applies, the trial court may be correct. But the question is whether on the terms of the contract between the parties a cause of

action could be said to have arisen in favour of the Corporation for recovery of the amount due from the firm as compensation for the breach. Obviously the Corporation could decide whether it had in fact suffered damages by the breach of contract committed by the firm only on re-tendering the work and finding that the re-tender has cost the Corporation more. In fact if it were a case of the amount being less than the amount for which the firm had tendered for the work, normally the Corporation could not recover any amount by way of compensation for the breach. In such a situation, it appears to us that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation. Apparently the contract in this case was admittedly entered into on 9.11.1988. It is only on that date that the Corporation was in a position to judge whether it had incurred a loss and whether it could claim any Compensation from the firm on the plea that the firm had committed a breach of the contract. The suit was filed on 7.11.1991, within three years of the entering into a fresh contract in respect of the balance work to be completed. We are of the view that in such a case time would start to run only on the fresh contract being entered into leading to a quantification of the liability of the original contracting party which was allegedly in breach.'

We are of the view while applying Article 55 court has committed an error which is apparent on the face of the record. The court having held that Article 55 would apply the court held that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation, We may in this connection refer to Article 55 of the Limitation Act, which reads as follows:

Description of suit

Period of limitation

Time from which period begins to run

55. For compensation for the breach of any contract, express or implied 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.

This is a case where contract stood terminated alleging breach on 22.4.1988. Claiming compensation for breach of contract period of limitation fixed under Article 55 is three years. Time from the period begins to run is when the contract is broken. Contract was broken when it was terminated on 22.4.1988. Consequently suit ought to have been filed within three years from the said date.

5. We are of the view while applying the said Article the Bench has committed an error in holding that the plaintiff could decide whether it had in fact suffered damages by the breach of contract committed by the defendant only on re-tendering the work and finding that the re-tender had cost the Corporation more. The Bench held that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation. In our view the error is writ large on the face of the record. At the moment breach occurs, time begins to run, and the starting point of limitation for suit for compensation for breach of contract is when the contract is broken. Bench has taken the view that only when the work is re-tendered plaintiff would be able to consider the damages caused. We are of the view that would be going against the law of limitation. The Supreme Court in *Essar Constructions v N.P. Ramakrishna Reddy* (2000) 6 SCC 94) held that statute of limitations assumes the existence of a cause of action and does not define or create one. In our view Bench has committed an error in interpreting Article 55 which is an error apparent on the face of the record, which in our view is liable to be reviewed. Counsel appearing for the review petitioner also submitted that while reversing the decision of the trial court on the point of limitation, the Division Bench has relied on three decisions such as, *Eastern Traders (I) Ltd v. Punjab National*

Bank (AIR 1966 Punjab 303), Shanti Swarup v. Munshi Singh (AIR 1967 SC 1315) and Bell Alloy Steels Pvt. Ltd v. National Small Industries Corp. Ltd (Legal Surveyor 1980 (1) Madras 85). Counsel submitted that these decisions were not put to the review petitioner. Consequently he was not in a position to explain that those decisions would not apply to the facts of the case. Counsel submitted that review petitioner is entitled to get an opportunity so as to explain that those decisions are not applicable to this case. There is an additional ground according to the counsel available under Order XLVII Rule 1 C.P.C. for reviewing the judgment. Counsel appearing for the Corporation on the other hand contended that no grounds for review have been made out. Counsel submitted that assuming that the decision is erroneous in law the remedy is to file an appeal.

6. The court relied upon decisions which were not cited at the bar and applied those decisions to the detriment of the petitioner, which in our view, would be a sufficient ground to review. The first decision relied upon by the Bench was Eastern Traders (I) Limited v. Punjab National Bank (AIR 1966 Punjab 303). That was a case of damnification in case of injury which arose out of liability to the bank to indemnify under Section 24 of the Limitation Act correspondent to Section 23 of the present Act which refers to compensation for acts not actionable without special damages. Law and facts are entirely different. We are of the view counsel was right in his contention that the principle laid down by the Punjab and Haryana High Court would not apply in a case where Article 55 of the Limitation applies. We may now examine whether the decision of the apex court in Lala Shanti Swarup v. Munshi Singh and Ors. (AIR 1967 SC 1315) would apply. In that case Supreme Court was dealing with Section 124 of the Indian Contract Act which refers to contract of indemnity. The Apex Court held that time in that case runs under Article 83 of the Limitation Act. We fail to see how that decision would apply to the facts of the present case. The Bench then referred to the decision in Bell Alloy Steels (P) Ltd v. The National Small Industries Corporation Limited (Legal Surveyor) 1980 (1) Madras 85). We are of the view the decision in the above case is in a different fact situation. In that case the court referred to Articles 55 and 113 of the Limitation Act. Further in that case agreement provided for re-sale of the machinery by the owner and for his claiming resultant loss. The hire purchase agreement thus having specifically provided for recovery of only the resultant loss after re-sale of

the machinery the cause of action arises only on re-sale. The right to recover the loss arises out of the contract and the said right can accrue only on re-sale and not before. Under such circumstances it was held that the suit was not hit by law of limitation. We are of the view, the three decisions relied on by the Bench would be of no assistance to the contention advanced by the respondent.

7. In the aforementioned circumstances we are of the view the Bench has committed an error apparent on the face of the record. Judgment in the appeal is accordingly reviewed. The trial court is right in rejecting the suit on the ground of limitation since suit was not filed within three years of breach. Re view petition is allowed and the appeal would stand dismissed on the ground of limitation.

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