Privy Council Appeal No. 28 *of* 1947

The Municipality of Hyderabad - - - - - - - *Appellant*

v.

Mangharam Hukumatrai - - - - - - - - *Respondent*

FROM

THE CHIEF COURT OF SIND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER 1949

Present at the Hearing:

LORD SIMONDS
LORD MACDERMOTT
LORD RADCLIFFE
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD RADCLIFFE]

This is an ex parte appeal from a Decree of the Chief Court of Sind dated 26th May, 1942, which reversed a judgment of the First Class Subordinate Judge, Hyderabad, dated 8th October, 1938. The dispute to which the appeal relates arises out of a contract which the parties entered into on 15th February, 1934, and the interpretation of that contract is the central issue of the case. There was a marked divergence between their respective submissions as to the construction of the contract, and a divergence not less marked in the evidence that they tendered on certain important issues of fact. The trial judge interpreted the contract in a sense favourable to the appellant's contention, while the appeal Court took the opposite view. Nor did the two Courts agree as to the proper findings of fact to be made on the evidence available. But their Lordships think that, once the question is settled as to the interpretation of the contract, the treatment of the evidence presents no great difficulty.

In the year 1933 the appellant was engaged in putting through an engineering project known as the East Kacha Storm Water Disposal Project. Apparently the contractors for the construction of the drain or channel required were a concern called the Hindustan Construction Co. The appellant desired at the same time to let out a contract for filling up and consolidating the earth in hollows along the sides of the drain and a low lying area round it. Accordingly in June, 1933, the appropriate Committee of the Municipality gave the Municipal Engineer, Mr. Kirpalani, authority to invite tenders for this work. They had before them his estimate that the probable expense involved was Rs.36,937 and that the earth work would amount to 24,00,180 cu. feet. His previous estimate had been 18,71,030 cu. feet.

The respondent was one of those who tendered for this contract. It is not necessary to refer to the circumstances in which three successive sets of tenders were obtained, for it is not in dispute that on the third occasion his tender (Exhibit 41) showed the lowest total amount, Rs.29,696, and was accordingly accepted on 26th January, 1934. Both Courts in India have proceeded to the interpretation of the contract on the basis that

this tender forms part of and is to be read with the formal contractual document that was later executed by the parties. That may be so. Certainly the contract refers to the tender for the schedule of rates per 100 cu. feet: and, if the rates themselves are incorporated in this way, it may be hard not to go further and incorporate the conditions and qualifications that are in a sense part of the rate. Their Lordships have not found it necessary to form any decided opinion on this point, for in their view the nature of the contract appears the same, whether it is ascertained from the formal document itself with no more reference to the tender than is involved in a mere reading off of the figures of the rates or whether the two documents are read together to make one whole. But, since both Courts in India have treated the question on the latter basis, it is convenient to make some reference to the tender.

The document was, of course, drawn up and issued by the Municipality. All that the tenderer had to do was to fill in his proposed rates and sign it. Now it was described as a tender for works, and underneath the heading was a short description of the filling up and consolidating work required. The words " estimate amount Rs.33503 " followed. Their significance has not been satisfactorily accounted for, although it is possible to discover from the record that this figure represented the total amount of an earlier tender by the Hindustan Construction Co. However that may be, the important part of the tender consisted of the schedule, entitled " schedule of rates." It was divided into five columns, of which the first was headed " Quantities estimated, but may be more or less." The other columns were successively headed " Description of items," " Rate," " Unit of calculation " and " Total according to estimated quantities." The first two columns would have been filled in by the appellant's officers, and from them it appeared that for the execution of the work 5,00,000 cu. feet would have to be taken from a lead up to ½ mile, 9,00,180 cu. feet from a lead over ½ mile up to 1 mile, and 10,00,000 cu. feet from a lead over 1 mile up to 1½ mile : all " more or less." The next three columns would have been filled in by the respondent, and in the first two of them he inserted his tendered rates per 100 cu. feet for the work to be done according to the estimated quantities to be drawn from the different lengths of lead, and in the last column he showed the resulting sums " according to estimated quantities." On this basis the estimated aggregate of his tender was Rs.29,696.9.0 and this figure was shown at the foot of the column and repeated in writing below, above his signature. One more feature should be mentioned. In the second column " Description of Items " there appeared as part of the first item the following words " The measurements will be allowed as under :—Before filling in any particular lengths, levels will be taken and cross section prepared. The contractor will be required to sign them. After filling in has been done, cross section will be taken and the quantity thus worked out will be paid for. Earth will be taken from the places as ordered by the Municipal Engineer."

If the contract rested on this document of tender their Lordships would entertain no doubt as to the nature of the bargain entered into by the parties. The appellant had indeed undertaken that the respondent should be the only contractor employed to carry out this particular work, although even so another condition inserted in the second column reserved to the Engineer a right to cancel any quantity of earthwork at any time during construction, without the contractor having any right to compensation for the reduction. But, clearly, the appellant had not undertaken that in carrying out the full work the respondent would find 24,00,180 cu. feet of filling to be done : or that, if it turned out, as work proceeded, that a greater or a less volume of filling was required, the respondent should yet be entitled to receive no more or no less than Rs.29,696. The stipulation about measurement and payment according to measurement is inconsistent with such a conception, even if it were not otherwise contradicted by the form of the tender.

The respondent's tender having been accepted, a formal contract was entered into on 16th February, 1934. It was, evidently, a standing form

of the Municipality that was used. The body of the agreement contained an undertaking by the respondent to "execute the following work at my tendered rates and duly accepted by the Corporation . . . the work to be done according to the terms and conditions as specified in the attached printed memorandum of conditions duly signed by me." The work was then described in the same terms as in the tender and opposite the description appeared the words "Rate tendered and sanctioned Rs.29696.9.0." The "tendered rates" referred to were, of course, those which the respondent had inserted in the tender. The words "rate tendered and sanctioned Rs.29696.9.0" might conceivably produce some misunderstanding if they stood by themselves, as lending some colour to the argument that the contract was in reality one for a lump sum of that amount of rupees. Even so, the operative word is the word "rate." And indeed the phrase is not in any way inappropriate to describe the contractual rate under an agreement in which the sum ultimately payable is to be ascertained on the basis of Rs.29,696 for 24,00,180 cu. feet of earth drawn from the various leads in the estimated proportions.

But, that apart, their Lordships are satisfied that the true meaning of the contract is that the contractor is to be paid for work actually done at the scheduled rates and that there is no undertaking that he is to get Rs.29,696 so long only as the work is properly completed. To construe it in the latter sense is to ignore the significance of his agreement to execute the work "at the tendered rates": and to fail to give effect to the specified conditions which form part of the contract. The determining condition is No. 7, which runs as follows:—"On the completion of the work the contractor shall personally . . . to make a final measurement with the Officer appointed to superintend the work and to sign his final bill within one month, failing which the measurements of the work shall be considered as correct and payment made accordingly, and the contractor shall have no further claims against the Municipality on that account. . . ." In the face of this condition it seems impossible to conclude that what the appellant is due to pay under the contract on completion depends on anything else than a final measurement of the amount of earth that the respondent has filled in.

It follows from this that the only remaining question of fact would be to determine whether there had been a final measurement for the purposes of Condition 7, in which event the measurement so made would be conclusive: or, if no such final measurement had ever been made, to ascertain what had been the total volume of work performed by the contractor. Now the respondent's claim in the Suit was to the effect that under the contract he was required to fill in a total quantity of 24,00,180 cu. feet of earth and that he had in fact completed the entire work of that amount: a coincidence which in itself would have been remarkable. Since he had only been paid a sum of Rs.15,961.6.0. (the amount of this payment is not in dispute) he claimed accordingly an unpaid balance of Rs.13,735.3.0 which together with a sum representing interest made a total of Rs.14,816.11.0 in all. He claimed in addition certain sums by way of damages amounting to Rs.6,286 and Rs.392 to cover additional work, outside the work contracted for, on 12,394 cu. feet of earth. The essence of the defence put in by the appellant in reply to this claim was that under the contract the respondent was only to be paid for the quantity of work actually done (an amount which was stated to be 16,24,920 cu. feet) and that he had in fact been paid at the agreed rates for everything that he had done.

The case went to trial on 16 issues and an abundance of evidence, oral and documentary. The trial judge in an exhaustive judgment came to the conclusion (1) that the true meaning of the contract was that the contractor was to be paid for the actual work done on measurement and (2) that the appellant's officers had taken measurements of the work done from time to time, that these were accurately recorded in the running bills which they supplied to the respondent for the purposes of interim payments, and that the quantity shown in the final bill, viz.

16,22,839 cu. feet ought to be accepted as the best evidence of the total quantity of work done. It was true that this bill, as the running bills, had been signed by the respondent "under protest": but the learned judge after hearing the parties held that the protests related not to the measurements of the quantity of earth put in but to certain deductions claimed in the calculation of the sums due. Obviously, if the work had been finished with only 16 lacs cu. feet of filling instead of the 24 lacs estimated in the form of tender, there was a large gap between the amount of work originally forecast and the amount of work that experience had shown to be necessary. This the judge described as being not a reduction of work but a reduction in quantity, and he found that three causes had brought this about. It is not necessary to go into them in detail, but briefly the quantity of filling had been reduced by the fact that (1) hollows had been partly filled up with town debris since the estimates were made, (2) certain land adjoining the storm water channel was found to be private property and was not filled under the contract, and (3) there was a reduction in the height of the channel walls which, in turn, reduced the height of the surrounding filling. In the result the judge held the respondent entitled to a decree for Rs.2,202 and no more, with interest at the rate of 6 per cent. per annum from the date of the first notice of claim. This sum of Rs.2,202 was made up of three sums:—(*a*) Rs.1,250 for an extra in respect of removing brickbats instead of earth, (*b*) Rs.560 for 56,000 cu. feet filled in during the first days of the contract before the appellant's initial measurements were taken and (*c*) Rs.392 for another head of extra work.

The respondent was dissatisfied with this and appealed to the Chief Court at Sind. His appeal was allowed, the judgment of the trial Court being set aside and a decree made to the effect that he was entitled to a sum of Rs.25,801.14.11, less Rs.15,961.6.0 already received, with interest. Certain cross-objections were dismissed. They have not been argued by the appellant before this Board and need not be referred to further.

The basis of the Chief Court's decision was the interpretation that they placed upon the contract. It is not easy to ascertain from the judgment exactly what that was. The learned judges appear to have regarded the alternative before them as being a choice between a "contract for a specified work" on the one hand and a "jobbing contract or a contract merely for the payment of labour charges" on the other. But those are not the true alternatives. Certainly the contract was one for a specified work, but the essential question is whether, it being such a contract, the contractor was to be paid for doing it according to measurements of what he had done or a lump sum irrespective of such measurements. The Chief Court seem to have construed it as involving a lump sum payment, for they say that "there can be no doubt that the formal contract Ex. 44, read alone, entitled the plaintiff, when the work . . . was completed, to the payment of a sum of Rs.29,696.9.0" and they held further that, although the document containing the tender might be read with the formal contract, it could not be so read "as to change fundamentally the nature of the contract." Their Lordships have given their reasons for holding that such an interpretation of the contract is misconceived, and they are bound to treat the Chief Court accordingly as having erred in law in respect of the principal point of the appeal.

If then the respondent is only entitled to be paid according to measurement, how much is he to be treated as having done? Here again the two Courts are at issue. The trial Court, as has been said, decided that the measurements recorded in the final bill, subject to a small qualification, represented an accurate record of the total quantity. The Chief Court rejected this view and arrived at a finding that the respondent had in fact filled in substantially 24 lacs of cubic feet of earth. It is not altogether clear whether the learned judges, in making this finding, distinguished between the question of fact whether the respondent completed the contracted work and the question of fact whether in doing so he had filled in 24 lacs of cubic feet. If it were necessary for their Lordships, for the purposes of this appeal, to decide between the finding

of the trial judge and the finding of the Chief Court there is much to be said for the appellant's contention that the finding of the trial judge ought to be preferred. Certainly the Chief Court's finding seems to be based mainly on their own view of the probabilities of the matter and on the very large gap between the quantity of filling estimated and the quantity of filling done, and to give too little weight to the fact that the running and final bills were themselves prepared from contemporary measurements taken by the officers of the Municipality. Nor could it tell in favour of the respondent's version that he failed to produce before the Court any of the cross-sections which were taken at the time and supplied to him by the appellant's officers for the purposes of checking measurements, and that he had destroyed his kacha books in which appeared such records of the progress of work as he himself made from time to time. If he was really engaged in continual dispute as to the accuracy of the measurements shown in the appellant's bills, would it be a likely action that he should destroy his own records?

But in their Lordships' view the conditions of the contract into which the parties had entered make it impossible to treat the question of measurements as if it were an isolated issue of fact. Condition 5 calls for a monthly ascertainment by measurement of the quantity of work done. Measurements were taken at intervals, although they could not be described as regular monthly measurements. As the trial judge found, the respondent or his agent was present on each occasion when the levels and cross-sections were taken, except for one occasion, when, though invited, he refused to attend. Now Condition 7 requires the contractor to attend on the completion of the work to make a final measurement with the officer appointed to supervise the work and to sign his final bill within one month, "failing which the measurements of the work shall be considered as correct and payment made accordingly." Undoubtedly the appellant's officers made what they regarded as a final measurement and tendered a final payment accordingly. The respondent accepted the money and signed the bill. Admittedly he signed only "under protest." But in their Lordships' opinion it would be to ignore the whole purport of a condition such as Condition 7 if a contractor were, merely by signing under protest, to be allowed to reserve a right years after completion to maintain that the measurements themselves were quite wrong and to prove other measurements unsupported by a single contemporary record. They think therefore that for this reason alone the trial judge's finding of fact in this issue ought to be accepted and that the right conclusion is that, subject to the special sums allowed in his Order, the respondent had received before Suit all that he was entitled to under or arising out of the contract.

Their Lordships will humbly advise His Majesty that the Order of the Chief Court of Sind dated 26th May, 1942, should be set aside and the Order of the First Class Subordinate Judge, Hyderabad, dated 8th October, 1938, should be restored, and that the respondent should pay the appellant's costs of the appeal to the Chief Court. It does not appear from what is said in the Chief Court's judgment that the respondent could have incurred any appreciable costs in meeting the appellant's cross-objections, which were either abandoned or not pressed at the hearing. The respondent must pay the appellant's costs of this appeal.

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In the Privy Council

THE MUNICIPALITY OF HYDERABAD

v.

MANGHARAM HUKUMATRAI

[DELIVERED BY LORD RADCLIFFE]

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