V. R. SUBRAMANYAM
v.
B. THAYAPPA AND OTHERS.

1961

February 1.

(J. L. KAPUR and J. C. SHAH, JJ.)

Building contract—Defective work—Additional work not covered by agreement—Compensation, when can be allowed—Indian Contract Act, 1872 (9 of 1872), s. 70.

The appellant entered into an agreement with the respondent who was a building contractor entrusting him with the work of constructing a house and shops. The respondent undertook the work but before it could be completed disputes arose between them and the appellant claimed compensation for effecting repairs to rectify defective work done by the respondent, and the respondent claimed compensation at certain rates set up by him for work for which there was no express provision in the written agreement. Suits based on their respective claims were filed by the appellant and the respondent which were partly decreed by the trial court. The High Court dismissed the appellant's suit in its entirety and remanded the respondent's suit directing the appointment of a qualified engineer for determining, according to the directions given in the judgment, the amount payable to the respondent for work done in addition to the agreed work under the contract. The appellant contended that the respondent having failed to prove the oral agreement pleaded the respondents' suit should have been dismissed and compensation *quantum meruit* which was not claimed should not have been awarded.

Held, that if a party to a contract rendered service to the other not intending to do so gratuitously and the other party had obtained some benefit, the former was entitled to compensation for the value of the services rendered by him. The respondent not intending to do gratuitous work was entitled to compensation for additional work not covered by the written agreement.

Even if the respondent failed to prove his claim for compensation at the prevailing market rate under an oral agreement the court had jurisdiction to award compensation for work done under s. 70 of the Contract Act.

The appellant's suit having been dismissed by the High Court and no appeal having been preferred against it, it was not open to him to reagitate the same question of compensation in the companion suits in which no equitable set-off was claimed.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 321 and 322 of 1956.

Appeals by special leave from the judgment and decree dated September 21, 1951, of the Mysore High Court in Regular Appeals Nos. 3, 24, 13 and 25 of 1948-49, arising out of the judgment and decree dated

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January 9, 1948, of the Principal District Judge, Bangalore, in Original Suits Nos. 55 of 1946-47 and 117 of 1945-46 respectively.

S. K. Venkataranga Aiyangar and *S. K. Aiyangar*, for the appellant.

B. K. B. Naidu, for the respondents.

1961. February 1. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—V. R. Subramanyam, the appellant herein is the owner of plot No. 29, Subedar Chattram Road in the town of Bangalore. B. Thayappa respondent is a building contractor. The appellant entrusted the respondent with the work of constructing a house and shops on the plot, on terms and conditions set out in a written agreement dated October 1, 1942, which was slightly modified on October 6, 1942. By the agreement the respondent was to construct for the appellant on the plot six shops abutting a public road, the main building at the rear of the shops, an out-house and a garage according to a site plan. The respondent was to be remunerated at rates specified in the agreement: for constructions with R. C. C. roofing, the rate stipulated was Rs. 4-2-0 per square foot and for "tiled construction" it was Rs. 3-2-0 per square foot. The Municipality of Bangalore did not sanction the plan as proposed by the appellant. The plan was altered and it was sanctioned, subject to those alterations. By the alterations the shops were deleted from the plan, the area of the out-house was increased, and a *puja* room on the ground floor and an extra room on the first floor were added to the plan. A compound wall was also to be constructed. The respondent carried out a substantial part of the construction work according to plan and the appellant paid to him diverse sums of money and delivered building materials. The aggregate amount accordingly received by the respondent was Rs. 20,200. But before the work could be completed disputes arose between the appellant and the respondent about the work done by the latter. The appellant claimed that the work done was defective and that he was entitled to compensation for effecting

repairs necessary to rectify the defects. The respondent claimed compensation at certain rates set up by him for work done for the appellant for which no express provision was made in the written agreement. Each party set up an oral agreement about the remuneration to be paid to the respondent for the extra work which was not included in the original agreement.

The appellant filed a suit in the court of the Subordinate Judge, Bangalore, against the respondent which was later transferred to the court of the Principal District Judge, Bangalore, and numbered O. S. 54 of 1946-47, for a decree for Rs. 8,515-4-0 being the amount of compensation which the appellant claimed he was entitled to receive from the respondent for defective work and for delay in completion of the construction. The respondent filed a suit against the appellant which was later transferred to the Court of the Principal District Judge, Bangalore, and numbered 55 of 1946-47. By this suit, the respondent claimed a decree for Rs. 5,988-12-0 being the remuneration due to him for the work done in constructing the house less Rs. 20,200 received from the appellant. The respondent filed another suit No. 117 of 1945-46 for a decree for Rs. 15,001-10-9 with interest and notice charges being the amount due to him for the construction of the out-house, godown, first floor room and flight of steps and the value of some building materials which the respondent claimed he had left in the premises of the appellant and which the latter had wrongfully removed.

The trial court granted to the appellant a decree for Rs. 3,000 in suit No. 54 of 1946-47. To the respondent, he granted a decree for Rs. 2,989-6-0 in suit No. 55 of 1946-47 and in suit No. 117 of 1945-46, he granted a decree for Rs. 13,329-10-9. Both the parties felt themselves aggrieved by the decrees passed in the three suits and six appeals were preferred to the High Court of Judicature of Mysore at Bangalore against those decrees. The High Court reversed the decree passed in suit No. 54 of 1946-47 and dismissed the appellant's claim in its entirety. The decrees

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passed in suit Nos. 55 of 1946-47 and 117 of 1945-46 were also set aside and proceedings were remanded to the District Court with a direction that a qualified engineer be appointed as Commissioner to determine the amounts payable to the respondent for work done in addition to the work agreed to be done under the written contract. The High Court ordered that the same be determined "in accordance with the directions" given in the judgment. The appellant has appealed to this court against the decrees in suits Nos. 55 of 1946-47 and 117 of 1945-46 with special leave under Art. 136 of the Constitution and he challenges the directions given in the order of remand.

The dispute between the parties related to the construction of the out-house, garage, *puja* room, the room on the first floor, the stair case leading to the upper floor room and the compound wall. In respect of these constructions (except for the compound wall) the District Judge awarded compensation to the respondents at the rate of Rs. 4-2-0 per square foot and in respect of the compound wall he awarded compensation at the rate of Rs. 5 per running foot, and certain additional charges. The High Court held that the respondent was entitled to receive compensation at the prevailing market rate for constructions which were not covered by the agreements dated October 1, 1942 and October 6, 1942. The High Court negatived the plea of the respondent that the appellant had agreed to pay him at "extra rates for deviations and additions not specifically contained in the original agreement." The High Court then held that for the construction of the out-house, *puja* room and the upper floor room, the respondent was entitled to receive compensation at the rate of Rs. 4-2-0 and for the out-house he was entitled to receive "some extra amount for the additional constructions." In these items, according to the High Court, there was no material deviation from the original plan. The High Court further directed that for the flight of stairs compensation be paid either "by way of a lump sum or on cubical content whichever was more practicable or common according to the rates which they proposed to indicate for such

additional work." The High Court however held that there was substantial variation from the original contract in the construction of the garage, and therefore the garage could "not be covered by the contracted rate" and must be paid for at the rates current at the end of the year 1943. The High Court also directed that "if the extra items not covered by Exs. VII and VII(a) have been constructed or supplied by the defendants as claimed in his bills Exs. XXI, XXII and XXIII are to be paid for in addition to the flat rate, the basis on which they should be paid for may,.....be fixed in accordance with the rates contained in Ex. II."

Counsel for the appellant submitted that as in the view of the High Court the respondent failed to prove the oral agreement pleaded by him, the suit should have been dismissed, and they should not have awarded compensation *quantum meruit* which was not claimed. It was urged that the respondent must succeed or fail on the case pleaded by him, and not on a cause of action not pleaded. In our view, there is no substance in this contention. As we have already observed, in respect of the additional work done by the respondent, both the parties set up conflicting oral agreements. These were not accepted by the High Court. If a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. Evidently, the respondent made additional constructions to the building and they were not done gratuitously. He was therefore entitled to receive compensation for the work done which was not covered by the agreement. The respondent claimed under an oral agreement compensation at prevailing market rates for work done by him : even if he failed to prove an express agreement in that behalf, the court may still award him compensation under s. 70 of the Contract Act. By awarding a decree for compensation under the Statute and not under the oral contract pleaded, there was in the circumstances of this case no

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substantial departure from the claim made by the respondent.

It was then urged that the High Court was in error in directing assessment of compensation for the additional work "in accordance with the rates mentioned in Ex. II." The plaintiff's witness T. S. Narayana Rao had admitted that the rates in Ex. II were the current market rates for building construction work similar to the appellant's building. In the view of the High Court, the rates set out in that bill were not excessive. If with a view to restrict the scope of the enquiry, the learned judges of the High Court gave a direction to the Commissioner for assessing compensation on the basis of rates which were approved by the plaintiff's witness, it cannot be said that any serious error was committed in incorporating that direction which would justify our interference.

Finally it was urged that the appellant was entitled to claim the loss suffered by him on account of defective work by way of an equitable set off in the claim made by the respondent in suits Nos. 55 of 1946-47 and 117 of 1945-46. But the appellant made a claim in a substantive suit for compensation for loss suffered by him because of the alleged defective work done by the respondent. That suit was dismissed by the High Court and it is not open to the appellant thereafter to seek to reagitate the same question in the companion suits when no appeal has been preferred against the decree in suit No. 54 of 1946-47, and no plea of equitable set off has been raised in the written statements in the companion suits.

In our view, there is no substance in any of the contentions raised. The appeals therefore fail and are dismissed with costs. One hearing fee.

Appeals dismissed.