Privy Council Appeal No. 1 *of* 1923.

Allahabad Appeal No. 29 *of* 1919.

Sahu Ram Kumar .. .. *Appellant*

v.

Muhammad Yaqub and another .. .. *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH FEBRUARY, 1924.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 4th March, 1919. This decree reversed that of the Additional Subordinate Judge of Moradabad dated the 30th September, 1916, decreeing the plaintiff's claim.

A building contract by way of offer and acceptance had been concluded between the plaintiff, appellant, who was the owner of certain land, and the respondent, a builder apparently in a humble way of business, who was a contractor. Certain subsidiary matters of accounting were referred to in the minute argument delivered before the Board. Even if that argument had been in all points sound, it would have resulted in a relatively trivial readjustment of the figure of the alleged balance. Their Lordships content themselves with observing that the appeal is decided upon a consideration of the only ground which appears

in the reasons of the appellant. It is not legitimate to raise at this Board other and subsidiary points which were apparently neither raised nor canvassed in the Courts below.

The reasons for the appellant's appeal to this Board are substantially confined to one point. That has reference to a 10 per cent. allowance, to be made by the contractor to the owner " for commission."

The Board will now proceed to discuss the matter in the light of the contract between the parties. The form of the suit is by the owner against the contractor for a sum amounting to nearly Rs. 10,000, on the allegation that that Rs. 10,000 consisted of over-payments made by him as compared with the sums to which the contractor was entitled under the bargain. The appellant made certain strong allegations against the respondent and declined to make further advances, and the work was stopped.

Their Lordships refer in particular to the offer of the 27th May, 1913. The early portion of that offer is in these terms, and it is that early portion which raises, and completely raises, the question now at issue before the Board :—

> " In compliance with your order the undersigned applicant "—that is, the contractor—" is willing to construct the new ' kothi ' in the bagh near the distillery in mauza Manpur at the rate specified below, less Rs. 10 per cent. for commission. Rs. 500 will remain as an advance, which will be deducted from the amount of the last bill. If the work is done honestly and well, something by way of reward may kindly be allowed to the undersigned from the Rs. 10 per cent. commission."

There is further reference in the acceptance to what is manifest, and is agreed, was a most important circumstance, namely, that the work was to be done within one year. In the acceptance of the offer this and another point are made clear, namely (1) " you should within a year construct " the building, and (2) " if you would require money during the progress of the work you will continue to get money weekly also according to need." Finally it may be stated that under the contract no provision or bargain is made as to additions or alterations.

Their Lordships have carefully considered the ambit of these clauses. It appears to the Board to be clear that the contract refers to one particular building, the size, dimensions and even plans of which had already been fixed. The new kothi thus singularised was that which had been the subject of an application, with submitted plans, to the local authority and by that date approved.

As this contract work proceeded, however, it was found that the views of the owner were very much larger than those for which he had obtained the specific sanction. Within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner. To speak roughly, those consisted of the doubling of the size of the main building itself; it was converted into a two-storey instead of a one-storey building; a large, and apparently extensive, compound was walled in, and various other buildings, including a temple. These were made the subject of orders from the

owner, and work proceeded accordingly. None of these items, as already mentioned, were within, at least, the express scope of the original contract.

Their Lordships are clearly of opinion that the arrangements thus made, forming an addition of a kind so substantial as to increase the original cost from Rs. 21,000 to nearly Rs. 42,000, must be attributed to a new arrangement between the parties, and that that arrangement could not, in point of fact, have been completed within anything like the stipulated period of 12 months applicable to the first and definitely limited contract.

In those circumstances it was quite clear that the builder still required, and possibly in even a fuller degree, to be accommodated with cash to enable him to undertake the heavy and fresh obligations under the new contract. It is also further clear on the facts that when payments to account, or payments to discharge builders' accounts or the accounts of persons supplying material, were made no deduction of 10 per cent. commission was in fact made from these. These facts have a real bearing on the question of what was the stage at which such an allowance was to be made.

It appears to their Lordships that upon a review of the first contract it is plain that the arrangement by way of rebate or a deduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at the end of the year were to be made up. Upon that occasion the Rs. 500 originally advanced was to be deducted from the cumulative sum due to the builder, and further the estimate of the 10 per cent. commission would be made, not from the sums paid but from the scheduled rates for the articles supplied, whatever their cost had been. After this reckoning was made within or at the close of the year, there would be completely determined the amount of the debt falling under the 10 per cent. commission charged. It was then, in those circumstances, that the opportunity would have arisen to the owner, to forego making that large deduction from his contractor's prices, and to limit the 10 per cent. by such an allowance as was left to his own good-will. But the conditions for making such a deduction never arose; the contract was not possible of completion within the year; it in point of fact was not completed; and the Board agree with the High Court that the failure to complete was not due to any fault on the contractor's part. The stipulation accordingly disappeared.

A fortiori, in their Lordships' opinion such a deduction was never agreed to with regard to the further work. What was done was that it entered into the head of the owner that he had largely over-paid the contractor. As it turns out this idea of his was illusory; he had not done so. On the best computation that can be made the accounts were fairly square, even at the old rates.

In those circumstances, when a suit was brought for the sum of nearly Rs. 10,000 of alleged over-payment, the parties must

sensibly agreed that a skilled referee should settle the amounts. Nor does the Board question the propriety of their having said to the referee that they were willing that the rates charged in the original schedule should be made applicable to the extra works executed. But the question remains as to what was to be done with regard to what one might call the prolocation of the right to deduct 10 per cent. commission. In the opinion of the Board there was no such prolocation. It would have required a special and particular contract to make such a charge applicable to a condition of affairs entirely new.

Their Lordships, however, are further relieved to find that the referee, looking over the charges and the work, does go into the question of whether the work was fairly charged at the contract rates without any allowance being made for the 10 per cent. commission. He gives evidence which is thus narrated in the judgment of the High Court: "Rustanji"—that is, the arbiter—"admits that the work was well done and worth the full rates entered in the schedule of the 27th May, 1913, without any Rs. 10 per cent. deduction." No injustice as between these parties entering into this mercantile contract is to ensue. The contrary is the case. The allowance of the 10 per cent. which is now claimed in this suit by the owner of this piece of land would be an allowance which would permit him to pay only 90 per cent. of the value of the work which is actually on his property.

Their Lordships are satisfied that the result arrived at by the High Court is sound; and they will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

SAHU RAM KUMAR

v.

MUHAMMAD YAQUB AND ANOTHER.

DELIVERED BY LORD SHAW.

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