IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

AIZAWL BENCH

RFA No. 1 of 2011

APPELLANT:

Sh. Lalrinawma Sailo,
S/o Zoliana (L),
R/o Republic Veng,
Aizawl.

By Advocate:

Mr. Zochhuana.

RESPONDENTS:

1. Sh. Vanlalzawna
S/o F. Lalhranga,
R/o Tuikhuahtlang,
Aizawl

2. Mizoram University
(Through the Registrar)
...Proforma Respondent.

By Advocate:

Mr. L.H. Lianhrima.

BEFORE
HON'BLE MR. JUSTICE N. CHAUDHURY

Date of hearing : 12.08.2013

Date of judgment and order : 12.08.2013.

JUDGMENT AND ORDER (ORAL)

This first appeal is directed against the judgment and decree dated 27.9.2010 passed by Civil Judge Senior, Aizawl in Civil Suit No. 22/2008 decreeing the suit for realization of 50% of Rs. 52,83,119/- after deduction of expenditures incurred by the parties for construction of Mizoram University Boundary Wall Phase- 1.

2. Respondent Sh. Vanlalzawna as plaintiff instituted Civil Suit No. 22/2008 in the Court of Civil Judge Senior, Aizawl stating that the defendant Sh. Lalrinawma Sailo being husband of his first cousin entered into an agreement with him on 25.10.2006 whereby it was agreed upon between the parties that the contract work for construction of Boundary Wall of Mizoram University Phase-1 of Mizoram University allotted to the said defendant on 18.10.2006 would be performed by both of them. By the said agreement, it was undertaken, *inter alia*, that both of them would share expenditure incurred in the work equally, that they would borrow Rs. 30 lakh from Bank in the name of the defendant No. 1 and they would also pay off the personal loan of Rs. 9, 20,000/- already borrowed by them. It was also undertaken that the remaining money would be shared equally between two of them. According to the said agreement, an account

book should have been maintained by both of them and checked and verified by them as well as by other persons whenever required. Finally, by paragraph 8 of the agreement, it was decided that profit derived from the work would be shared equally by them. The plaintiff further stated that he brought one Sahab Uddin for supply of labour force to do the job at the rate of Rs. 400/- per sq. metre and plaintiff remained present at site all throughout when work was done. According to the plaintiff, the loan incurred by them was repayed from the 1st and 2nd bills but the defendant No. 1 took away the money derived from 3rd, 4th and 5th bills without giving any share to the plaintiff. Hence, the plaintiff claim sum of Rs. 27,62,920/- on the basis of the aforesaid agreement dated 25.10.2006.

3. Appearing in the case, the defendant No. 1 submitted written statement and contested the suit claiming, *inter alia*, that the so called agreement dated 25.10.2006 was neither valid nor acted upon. According to the defendant No. 1, the plaintiff did not make any payment at all towards expenditure incurred in performing the contract and as such plaintiff was not entitled to claim any amount. In regard to agreement dated 30.10.2006 executed by the plaintiff in favour of one Sahab Uddin authorizing the letter to perform the contract at the rate of Rs. 400/- per square metre was in no way binding on the defendant No. 1 as because he was

neither a party to the agreement nor was he in the agreement.

4. According to him, he got the contract performed at his own money. On the basis of the aforesaid pleadings of the parties, the learned trial Court framed as many as two issues:-

1) whether the suit is maintainable in its present form style; and

2) whether the plaintiff is entitled to the reliefs claimed by him. If so, to what extent?

5. The plaintiff examined two witnesses including himself. PW1 is the plaintiff himself whereas his father F. Lalhranga was PW2. The plaintiff exhibited six documents while defendant did not exhibit any document although he examined himself as sole witness (PW1).

6. The learned trial Court on perusal of the materials on record and after hearing the parties passed judgment on 27.09.2010 decreeing the suit by deciding both the issues in favour of the plaintiff and thereby holding that the plaintiff is entitled to get 50% of the contract amount of Rs. 52,83,119/- after deducting the expenditures incurred in the contract work. It was further decreed that the defendant No. 1 would make payment within a period of 60 days from the date of

decree order and the proforma defendant, the Registrar, Mizoram University who was the Principal of the contract in question was also directed to release the balance performance guarantee of Rs. 2,98,260/- to the plaintiff.

7. It appears that appeal was admitted on 9.3.2011. But there is nothing on record to indicate as to whether any order under Rule 5 of the XLI staying execution of the impugned decree was passed or not. It is also not clear as to whether any execution proceeding was instituted by the plaintiff at all.

8. From the pleadings of the parties as well as the findings of the learned trial Court, the only point for determination in this appeal would be whether on the basis of the agreement dated 25.10.2006, plaintiff is entitled to get any amount from the defendant in regard to payment of money by the proforma defendant for performance of the contract i.e. construction of boundary wall of Mizoram University. The said contract work was valued at Rs. 52,83,119/- and time for completion of work was three months w.e.f. 23.10.2006. By the said contract awarded to the defendant No. 1 by the proforma defendant on 26.10.2006, the defendant No. 1 was to provide all the labour, materials, scaffoldings, plant materials and other necessaries for the execution of the work. It appears from the pleadings of the

parties that the contract work was performed and that is why last and final payment being Rs. 7,55,762/- was released to a defendant No. 1 on 20.03.2008. Further, there is no dispute between the defendant No. 1 and defendant No. 2 in regard to completion of the work. The only dispute, if there be any, is between the plaintiff and the defendant No. 1 as to whether the defendant No. 1 is liable to make any payment to the plaintiff on the basis of agreement dated 26.10.2006.

9. The agreement dated 25.10.2006 has been proved as exhibit-P2 by the plaintiff. The exhibit-P2 is quoted below:-

"AGREEMENT FOR THE CONSTRUCTION OF MZU BOUNDARY WALL PHASE.

Lalrinawma Sailo, Upper Republic and Vanlalzawna Tuikhuahtlang have both made an agreement as per the following terms and conditions.

1. ***We will both share any expenditure incurred on this work equally.***
2. ***We will first pay off our expenditure from our first bill and then the remaining amount will be shared equally between us.***
3. ***We will borrow 30,00,000 rupees from the bank under the name of Lalrinawma Sailo and from that money we will pay off the 9,20,000 rupees that we have already borrowed. The remaining money will be shared equally between the two of us.***
4. ***To repay the Bank Loan, we will use the money from our bill and repay it equally as per the repayment terms and conditions decided by the bank.***
5. ***All the expenditure incurred on this work should be agreed upon by both of us. We will maintain an account book which can be checked and verified by the other person whenever required.***
6. ***On this work, we both should consult each other and also make decisions together.***
7. ***Any laborers to be employed should be decided together by both of us.***
8. ***Any profit gained from this work should be shared equally.***

9. We should work and look after this job continuously.

10. We should wholly agree to the above mentioned terms and agreement.

Ext P-2(c)
Sd/- 03/02/10
CJS
Sd/-25/10/06
(LALRINAWMA SAILO)
Upper Republic

Ext P-2(a)
Sd/-03/02/10
CJS
Sd/-25/10/06
(VANLALZAWNA)
Tuikhuahtlang

Ext P-2
Sd/- 10/12/08
CJS
Witnesses
Sd/-25/10/06
(F.LALHRANGA)
Sd/-25/10/06
(LALBIAKZAMI)"

10. PW1 (plaintiff) in course of his examination-in-chief did not claim that he made any contribution to defray expenditures required for construction. In paragraph 10 of the examination-in-chief, he claimed that he collected all the required materials for construction and looked after and supervised the construction works right from the beginning till the same was completed. In fact, he had to stay in the place of work throughout the day and night in order to ensure proper execution of the works. Moreover, he took a bold stand by stating that the Mizoram University engineers were the eye witnesses to the proceeding. But in cross examination, the plaintiff admitted that he did not make any contribution towards expenditure. A suggestion was given to him that Sahab Uddin with whom plaintiff had entered into an agreement on 30.10.2006 in writing whereby one Sahab Uddin was authorized to perform the job, did not do any construction work and the plaintiff denied the said

suggestion. Neither Sahab Uddin nor the University engineers are examined to support his claim.

11. PW2, F. Lalhranga is father of the plaintiff. He stated in his examination-in-chief that defendant hired laborers on his own. The said witnesses has indicated in the cross examination that although plaintiff did not share the expenditures still then he was entitled to share in the profit. On the basis of statement made by these two witnesses of the plaintiff along with Exhibit-P2 and Exhibit-P5, it appears that the plaintiff allegedly entered into contract with one Sahab Uddin on 30.10.2006. Neither Sahab Uddin nor these two witnesses mentioned in Exhibit-P5 were examined to prove the content of the said document. Assuming that such a document was executed, but what would be the out come of the said document i.e. Exhibit-P5, according to the recital made therein? Sahab Uddin agreed to perform the contract work of fencing wall at Rs. 400/- per square metre. He undertook to complete the work in carefully in time. So, from the recital of this document of the plaintiff, it appears that the work contracted to defendant No. 1 by the proforma defendant No. 2 was sub-contracted by the plaintiff to Sahab Uddin and in return Sahab Uddin was to get Rs. 400/- per square metre. This Sahab Uddin appears to be a labour contractor and so it was his responsibility to get the work completed at the aforesaid cost of Rs. 400/- per square metre

and as such neither defendant No. 1 nor the plaintiff had any responsibility to oversee the day to day work. While it was the specific case of the plaintiff that he remained present at work site throughout whole period to oversee the contract work, such presence was neither required nor necessary if plaintiff's own document, namely, Exhibit-P5 is to be believed in. The plaintiff admitted not having shared expenditure of the contract work and his alleged continuous presence at work site not being a requirement under the Exhibit-P2 or under Exhibit-P5, such purported continuous personal presence cannot in anyway be construed to be performance of any contract whatsoever between the plaintiff and defendant No. 1. Moreover, PW2 having stated in his examination-in-chief that defendant No. 1 hired laborers on his own to get the work performed, the necessity or truthfulness of the episode leading to execution of Exhibit-P5 and or utilities thereof becomes very much doubtful. Assuming that Exhibit-P2 was really in existence, in that event also to get the equal share of profit as pledged under paragraph 10 of Exhibit P2, the plaintiff is duty bound to plead and prove that he performed the liability cast on him vide paragraph 1 of the said document, namely, equal sharing of the expenditure. Although plaintiff has exhibited as many as six documents but not a single scrap of paper has been brought on record to indicate that plaintiff had really

made any contribution whatsoever in expenditure required for performance of the contract work. Even no receipt from aforesaid Sahab Uddin has been brough on record to prove participation of the plaintiff in the financial transaction. Even if the Exhibit-P2 is presumed to be genuine, there is no proof as to the fact that the same was at all acted upon. Having agreed to share the expenditure, the plaintiff was given the assurance to share the profit. In short, plaintiff having miserably failed to prove that he shared expenditure in performing the contract he is not entitled to make claim to share the profit. Sharing of profit is contingent to his sharing of expenditure and the contingency having not being satisfied the question of getting the profit cannot arise. The learned trial Court has committed error in appreciating Exhibit-P2 and Exhibit-P5. Exhibit-P2, if at all a contract, may be a contingent one. Conversely, Exhibit-P2 may be a contract if equal contribution in expenditure is construed to be the consideration. Consideration is an essential element of valid contract. Consideration not having been proved contract does not become a conclusive one and accordingly, no benefit can be derived out of it. It is not the case of the plaintiff here that he has performed his part of the contract as stated in Exhibit-P2. The stand taken by the plaintiff is beyond Exhibit-P2. Exhibit-P2 does not warrant physical presence of the plaintiff at work site. What is required of the

plaintiff in Exhibit-P2 is equal sharing of the expenditure. Exhibit-P2 also requires that a proper account of the work is maintained. If the plaintiff claims to have been present at work site all throughout, it is to be understood that he participated in the work fully and in that event he was supposed to maintain the account. It is the case of the plaintiff that the defendant did not remain present and the consequential signal from such stand is that he performed the job through his men, Sahab Uddin on the basis of Exhibit-P5. Thus, it becomes all the more necessary for the plaintiff to show as to how the expenditure was made. He has taken a stand that he collected the required materials for construction work. Then where are the vouchers? The plaintiff having failed to bring the accounts including the vouchers to prove that he had collected the materials, or that conducted the work, it is to be understood that Exhibit-P2 was never acted upon and consequently, plaintiff is not entitled to any amount as claimed. Plaintiff's suit is liable to be dismissed.

12. The learned trial Court did not consider, these aspects of the matter. The appeal, therefore, has merit. Accordingly, the same is allowed. The impugned judgment and decree passed by the learned Senior Civil Judge, Aizawl on 27.9.2010 in Civil Suit No. 22/2008 is hereby set aside. The suit of the plaintiff is dismissed. Draw up decree accordingly.

13. Send back the record after framing of the decree.

14. Considering the facts and circumstances of the case, the parties shall bear their own cost.

JUDGE

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