

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

C.C.C.A.No.120 of 1998

JUDGMENT:

The unsuccessful plaintiff in the Court below preferred the instant appeal aggrieved by the judgment dated 27.07.1996 in O.S.No.844 of 1989 passed by I Additional Judge, City Civil Court, Hyderabad, whereby and whereunder learned Judge dismissed the suit filed by the plaintiff for declaration of title and perpetual injunction.

2) The factual matrix of the case is thus:

a) As per the plaintiff, he is the Class—I Contractor and by two separate agreements dated 23.03.1983 he was awarded works of “Construction Glacis type gate spillway with 6 vents of size 12m x 6m at Vattivagu Project, Asifabad Taluk Adilabad District”. The agreement LS AB No.23/1982-83 dated 23.03.1983 relates to the work of “Bit No.II Intermediate pier No.3 and 4 and glacis apron including upstream and downstream protective works in vents No.3 and 4” and its value is Rs.22.55 lakhs. The agreement LS AB No.24/1982-83 relates to the work of “Bit No.III, Right Abutment Wings, return and pier, intermediate per No.5, gracie apron including upstream and downstream protective works in Vent No.5 and 6” and its value is Rs.27.08 lakhs.

b) The plaintiff's further case is that he mobilized men and material for completion of work within the stipulated

period and he commenced the work as per work schedule. During the course of actual execution, excavation in sand stone rock was met with and hence he informed the same to defendant No.2 by letter dated 20.04.1983 stating that supplemental item was not covered by original agreement and requested for entering a supplemental agreement for the said item.

c) The further case of plaintiff is that when he commenced quarrying operations from Donuppalagutta quarry, the forest officials prevented him from proceeding with the quarrying operations as the quarry lies within the reserve forest area and therefore, the plaintiff informed the same to defendant No.3 by letter dated 06.09.1983 vide Ex.A3 and requested to provide alternate quarry for procuring stone and metal. Though the plaintiff employed sufficient labour and machinery, the progress of work was hampered mainly due to the defendants' default in not making available the site for procuring stone and material. The plaintiff contended that defendants have knowledge that Donuppulgutta quarry is in the reserve forest area and the officials of forest department refused to give permission to quarry in the said area and thus the defendants misled the plaintiff while executing the suit agreements. After several correspondence the Government refused to accord permission to quarry in Donuppalagutta village. Then the defendants provided alternate quarry at Mangi village. It is the case of plaintiff

that though the said quarry is situated outside reserve forest area, it involves a lead of 45 Kms. including ghat section. Therefore, he requested to provide another site for quarry operations. Accordingly, the defendants provided quarry at Metapipri village which also involves a lead of 49 kms. Thus, till February, 1985 the plaintiff was not made available the quarry site for procuring stone and metal.

d) The further case of plaintiff is that due to earth tremor which occurred on 27.03.1984, he was orally asked by the defendant authorities to suspend the work and after inspection of site by geologist only the work was again commenced. Therefore, the delay, if any, occurred is neither wilful nor wanton and the defendant authorities without considering all these factors into consideration, unnecessarily imposed fine to a tune of Rs.35,000/- and he paid the said amount under protest. Besides collecting fine amount the defendant authorities threatened to take action under clauses 60 and 61 of APDSS. It is also the case of the plaintiff that before the time schedule and when the work was in progress, the defendant authorities by invoking clauses 60 and 61 of APDSS terminated the contract which is highly unsustainable. Hence, the suit for declaration and perpetual injunction restraining the defendants from forfeiting the EMD and for recovery of Rs.4,21,027/- with interest at 18% p.a.

e) The defendant No.3 filed written statement stating that as per agreement, two works in Bit No.II and Bit No.III were awarded to the plaintiff under two agreements dated 23.03.1983 with a condition to complete the same within 18 months from the date of handing over the site. As per addendum to Schedule 'A' clause (3), the plaintiff is bound to execute all supplemental items that are incidental and inevitable during the execution of the work. As per the agreement, quarry was provided at Donuppulgutta near Moinda village and it is clearly mentioned in the agreement that the quarry was located in reserve forest area and the plaintiff has to make his own arrangements for procuring material. The plaintiff though claimed that he completed excavation of foundation by June, 1983, even now the balance of excavation work remains unfinished whereas the contractor in Bit—I has completed the work under the same conditions. In response to plaintiff's letter dated 12.12.1983 the defendants sent a notice dated 06.01.1984 making it clear that the plaintiff has to make his own arrangements for procuring material from the reserve forest and hence there was no misleading of the plaintiff. He should have raised his objections, if any, before entering into agreement and the Government is not responsible for paying extra charges for extra lead.

f) The defendant denied that as per their instructions, the plaintiff started quarrying operations at Mangi village

and contended that he never conveyed stone and metal from Mangi and the said allegation is incorrect. Insofar as Metapipri village is concerned, it is contended on the representation of plaintiff only the said quarry was allotted to him through Government Memo No.06.02.1985 and he was permitted to procure metal from that quarry but he failed to complete the work even after 72 months and he could complete only 60% and on intimation only fine was imposed on the plaintiff.

g) It is further contended the plaintiff was never asked to stop the work due to earth tremor. This fact was intimated to him vide office letter No.346/M dated 18.06.1985 and 336/M dated 12.06.1985. The contractor of Bit-I has completed the earth work excavation, concreting of cut off walls, concreting of apron and masonry work even after earth tremor, whereas the plaintiff who was doing similar works in Bit Nos.II and III has not shown any improvement in the progress of work in spite of letters dated 13.03.1985 and 20.10.1984. Due to his slow progress Government put to loss of Rs.50 lakhs and decided to let out the balance work at the present SSR rates to some third parties. However, to avoid further delay, reasonable extension of time was granted to the plaintiff bearing extra expenditure for cement and steel. By letter No.183/M dated 21.05.1987 it is made clear that if the plaintiff worked as per the

programme, there would not have been shortage of cement. The plaintiff cannot take shelter of shortage of cement. It was made clear that payments were never delayed to the plaintiff and whenever the work was done payment was arranged to him. There was no shortage of cement and cement was supplied to the plaintiff as per the requirements. Plaintiff failed to complete the work in spite of extension of time from time to time.

h) The total work done by plaintiff at the end of March, 1989 in Bit—II was worth Rs.14.88 lakhs and Bit—III was worth Rs.17.26 lakhs as against Rs.22.55 lakhs and 27.08 lakhs respectively and thereby, the Government suffered loss of Rs.50 lakhs due to escalation of cement and steel and the plaintiff was aware of this fact. In fact the department, as per the agreement, fulfilled the obligation in supplying the steel and cement without changing any rates, the plaintiff was slow in executing the work in time and put up a false claim raising excess rates. As per the request of plaintiff, he was asked to make up the shortfall and complete the balance work by 31.05.1989, but he suddenly suspended the work in both Bits from 06.04.1989. Hence, clause 61 of APDSS was invoked and requested the plaintiff to witness to close the measurements on 16.04.1989 for Bit III and on 29.04.1989 for Bit II of spillway and letter dated 12.04.1989 was issued to him and site was taken away for undertaking the work departmentally. Therefore, there

is no fault on the part of defendants and plaintiff alone is responsible for the delay in execution of the work and as such contract was terminated under clause 61 of APDSS and thus prayed for dismissal of suit.

i) Defendants 1 and 2 filed a memo adopting the written statement filed by defendant No.3.

j) Basing on the above pleadings, the trial Court framed the following issues:

- 1) *Whether the suit is bad for want of Section 80 CPC notice?*
- 2) *Whether any dispute has to be referred to arbitration only?*
- 3) *Whether the plaintiff is entitled to recover the suit amount?*
- 4) *Whether the plaintiff is entitled to the declaration and permanent injunction?*
- 5) *To what relief?*

k) The trial Court after full-fledged trial and hearing both sides dismissed the suit filed by the plaintiff holding that he failed to complete the work even within the extended time and hence there is nothing wrong on the part of defendants in terminating the contract by invoking clause 61 of APDSS. The trial Court further held that the plaintiff failed to establish his entitlement to recover the suit amount.

Hence, the appeal.

3) Heard arguments of Sri P.V.Sanjeeva Rao learned counsel for appellant and learned Government Pleader for Arbitration for respondents.

4) The parties in the appeal are referred as they were arrayed before the trial Court.

5a) Learned counsel for appellant fulminated the judgment of the trial Court mainly on the following arguments. Firstly, he vehemently argued that the plaintiff had absolutely no knowledge of the fact that the Donupulgutta quarry lies in reserve forest area prior to entering into agreement and though the defendants knew this fact and addressed letters to Deputy Director of Mines, Warangal and Chief Conservative of Forests seeking permission to conduct quarry operations in Donupulgutta quarry prior to entering into agreement with the plaintiff, still they suppressed this fact and entered into Ex.A1 and A2—agreements and therefore, the defendants are guilty of suppression of material facts. Due to such suppression of material information, the plaintiff was put to much harassment as the forest officials in that area obstructed quarry operations by the plaintiff and thereby plaintiff had to address repeated letters to the defendant authorities to contact forest officials and obtain permission for quarry operations which they failed to do so and later on much persuasion defendant authorities provided alternate quarry firstly in Mangi village which

caused an extra lead and extra expenditure and later in Metapipri village which was also a distant one. The suppression of material facts on the part of defendants also had an impact of delay in filling up the foundation work etc. However, the trial Court erred in holding that plaintiff had knowledge about location of stone quarry even prior to the submission of tender and cannot attribute laches to the defendants.

b) Secondly, he argued that the contract period was extended by the defendants upto 31.05.1989 as per Ex.A14 which indicates that the delay till then was only due to defendants. However, abruptly and audaciously the defendants invoked clauses 60 and 61 of APDSS under Ex.A16 dated 12.04.1989 which is illegal. The trial Court ought to have held that such invocation of clauses 60 and 61 of APDSS by the defendants is untenable in the light of facts and evidence but it erroneously held that the defendants were right in cancelling agreement to complete the remaining work departmentally. He thus prayed to allow the appeal and set aside the judgment and decree the suit.

6 a) Per contra, learned Government Pleader opposing the appeal argued that it is preposterous to contend that plaintiff was not aware of the location of Donuppulgutta quarry in reserve forest area since its location is notified in the agreement itself and the said fact was mentioned in

Ex.B2 and B3—letters. Hence, it was the duty of the plaintiff to get the permission from the forest authorities and other authorities for making quarry operations. The alternate quarries were shown by the defendants to plaintiff on his request only but not as a part of their duty. He vehemently argued the plaintiff cannot harp suppression of material facts by the defendants and also cannot take excuses for his delay in executing the contract under the pretext that Donuppulgutta quarry was not indicated in advance to him.

b) Nextly, refuting the argument that the defendants abruptly invoked clauses 60 and 61 of APDSS, learned Government Pleader argued that as can be viewed from the letter correspondence time was extended by the defendants as a matter of good gesture as the work was in the mid way but not due to laches on the part of defendants. Even though time was extended till 31.05.1989 under Ex.A14 still the plaintiff failed to put his efforts and show any progress and on the other hand, he suspended the work on 06.04.1989 by which date still about 40% of the work was to be completed and in those precarious circumstances the defendant—department had to take harsh decision to invoke clauses 60 and 61 of APDSS under Ex.A16. This action of the defendants was in the best interest of public to save time and expenditure and also to complete the remaining work within time departmentally and thus trial Court approved the action of

the defendant authorities. He argued that there are no merits in the appeal and prayed for dismissal.

7) In the light of above rival arguments, the points for determination are:

1) *Whether the defendants are guilty of suppression of material facts with regard to location of Donuppulgutta quarry of Moinda village in reserve forest area and thus caused financial loss to plaintiff on one hand and delay in execution of contract on the other?*

2) *Whether the action of defendants in invoking clauses 60 and 61 of APDSS before completion of extended time till 31.05.1989 is factually and legally valid?*

3) *To what relief?*

8) **POINT No.1:** The admitted facts in this case are that plaintiff is Class—I Contractor and works relating to Bit—II and Bit—III Vattivagu Project, Pahadibanda Village, Asifabad Taluk Adilabad District were entrusted to him by the defendants under Exs.A1 and A2—agreements. The value of the work under Bit—II is Rs.22.55 lakhs and Bit—III is Rs.27.08 lakhs and time specified for completion of both the works under agreements was 18 months from the handing over of the site on 23.03.1983.

a) Then, the plaintiff claimed that he scrupulously started work on 23.03.1983 itself and proceeded with the execution of excavation and during the execution some

impediments came in his way one of which was that while he was excavating quarry for stone and metal chips for filling the foundation and laying spillway, the forest officials have obstructed his quarrying operations on the ground that Donuppalagutta stone quarry was located in reserve forest area and there was no permission for him. As per plaintiff, of the several hindrances he faced in execution of work, the suppression of material fact by defendants and the refusal of forest department and inaction on the part of defendants and subsequent showing of alternate quarries having extra lead, heavily contributed for delayed execution and cost escalation. In paras—3 to 6 of the plaint the plaintiff attributed that defendants were guilty of misleading him by suppressing the factum of Donuppulgutta quarry locating in reserve forest area. He narrated therein how the forest officials prevented him from proceeding with quarry operations and his writing repeated letters to defendants to make available the site for procuring stone and metal or arranging an alternate quarry and at last the defendants showing alternate quarry in Mangi village in Wakidi Taluk which involved a lead of 45 Kms. causing extra financial implications to him and in that view of the matter, the defendants again showing another quarry near Metapipri village which also involved a lead of 49 Kms. etc. Thus, predominantly the plaintiff's case was that by din't of defendants suppressing material fact of location of the Donuppulgutta

quarry in reserve forest area and the subsequent events occurred to the disadvantage of the plaintiff, the project was delayed.

b) The defendants in para-6 of the written statement staunchly denied above allegation and contended that as per terms and conditions of the agreement the location of Donuppulgutta quarry in reserve forest area was mentioned and the plaintiff knowingly entered into agreement and hence the question of suppression of material fact does not arise. They contended that plaintiff ought to have raised objection about the location before signing the agreement. Referring the tender condition item No.7 at page-2 the defendants pleaded the tenderor was expected to know before quoting rates for the proposed work and also inspect the quarries and also satisfy the quantity and availability of materials and the Government will not, however, after acceptance of contract rate pay any extra charges for lead or for any other reason. Regarding the showing of alternate quarries in Mangi and Metapipri the defendants contended that basing on the representation of plaintiff only alternate quarries were shown and not because of laches of defendants. They contended that under similar circumstances and conditions, another contractor by name Parameshwar Rao has completed the contract work relating to Bit—I within the stipulated period and therefore the plaintiff cannot plead any excuses except

his own lapses.

9) Coming to the evidence, though the plaintiff has not specifically deposed about the alleged suppression of material facts by the defendants, still the totality of his evidence if taken into consideration, his claim is as such. Therefore, the pertinent question is whether defendants are guilty of suppression of material fact which cast dearly to the plaintiff. On a careful perusal of evidence on record, it must be said that allegations of the plaintiff in this regard are quite untenable for the following reasons.

a) In Ex.A3—letter dated 06.09.1983 for the first time the plaintiff raised the issue of obstruction to his quarry operations by the forest officials in Donuppulgutta quarry. He wrote to Superintending Engineer, Irrigation Circle, Nirmal that forest officials were objecting to lift the materials on the ground that area was situated in reserve forest and requested the Superintending Engineer to show the alternate quarry for stone and metal. In subsequent letters under Exs.A4 and A5 also he made similar request. In those letters the plaintiff did not make any specific allegation that defendants were guilty of suppression of factum of Donuppulgutta quarry locating in reserve forest area prior to entering into the agreements. The tone and tenor of these letters was only in the nature of explaining his difficulties due to obstruction made by forest department for quarry operations and his request to

show a specific alternate quarry. In reply to Ex.A4, the Executive Engineer, Vattivagu Project Division addressed Exs.B2 and B3 letters to plaintiff wherein he mentioned that as per schedule 'D' of LS agreement No.23/82-83 and agreement No.24/82-83, it was clearly mentioned that stone quarry was located in reserve forest and contractor has to make his own arrangements during the execution of work throughout for quarrying and conveyance of materials to the site of the work and his quoted rate should be for the finished item of work and the reasons put-forth by the plaintiff in his letters are not acceptable. He was thus requested to execute the work as per the terms and conditions of the agreement and accelerate the progress of the work. Hence, the defendants by aforesaid letters have clearly indicated that in the agreement the location of the disputed quarry in reserve forest was clearly mentioned and the plaintiff has to make his own arrangements for execution of the work throughout. The plaintiff has not sent any reply notice denying the averments made in Exs.B2 and B3. Thus, it firmly establishes that the plaintiff knows very well about the location of the quarry even by the date of his entering into agreement and it was his look out to make arrangements for execution of the work.

b) As contended by the defendants, before quoting the rate it is the bounden duty of the every tenderor to physically inspect the work site including quarries

allocated to satisfy about the availability of materials and also to make an estimate of the expenditure involved in execution of the work to be assigned to them. Therefore, it is too naïve on the part of plaintiff to claim that he was not informed about location of the quarry in reserve forest and he had no prior knowledge about it.

c) For another reason also the plaintiff's argument of suppression of material fact cannot be accepted. Assuming that the defendants suppressed such material fact and the agreement was also silent about the location of quarry in reserve forest area and plaintiff came to know about it only during the course of execution of the work, the plaintiff being a Class-I Contractor and having sufficient experience in the field cannot be expected to keep silent when the forest officials obstructed him for quarrying operations and he would have issued notice to defendants making hue and cry of suppression of facts. That he did not do so is evident from Exs.A2 to A5 letters wherein he only made request to show alternate quarries. If really the defendants were guilty of suppression of material facts and alternate quarries showed involved heavy expenditure due to excess lead, he would have demanded the defendants to execute supplemental agreement for payment of extra lead involving extra implications to him as he admittedly did in the case of sand stone rock which was found while he was

conducting excavation operations wherein he obtained supplemental agreement for sand stone excavation work on the ground that such excavation of sand stone rock was not the part of original agreement.

d) Under Exs.A6, A7 and A15 the defendant authorities showed alternate quarries in Mangi, Metapipri and Khagaznagar villages respectively without making any commitment that extra amount would be paid for extra lead. Rather, in Ex.A15 it was mentioned that Khagaznagar would not amount to any extra lead. In those letters we do not find any intimation that because of their earlier suppression of location of Donuppulgutta quarry in reserve forest area, they were showing the alternate quarries with an undertaking to pay extra amount for extra lead involved. So, from the factum of defendants showing alternate quarries, one cannot conclude that earlier they suppressed material fact. Therefore, the letters under Exs.A6, A7 and A15 are only to be understood as a good gesture on the part of department since the work was already delayed and in the midway but it cannot be understood in the sense projected by the plaintiff. So, the plaintiff cannot attribute the defendants with suppression of material facts or causing him extra expenditure and contributing for the delay. This point is answered against the appellant.

10) **POINT No.2:** As stated supra, in Exs.A6 and A7 the

defendants showed alternate quarries on the request of plaintiff and so by March, 1985 the plaintiff was shown alternate quarries but even by 1989 he could not complete the work as is evident from Ex.A10—letter addressed by the Executive Engineer to the plaintiff. As rightly observed by the trial Court, in that letter the department has tabulated total quantity of different works, the extent of work to be completed by June, 1987 and work done by the plaintiff by April, 1987 etc. For instance, the total earth work excavation was 38325 cubic meters and this extent was expected to be completed by June, 1987 but the plaintiff completed only 31608 cubic meters by April, 1987 leaving behind 6717 cubic meters. Similarly, in respect of other works also he was lagging behind. Hence, in Ex.A10 it was noted that work in progress by the end of April, 1987 was far behind the agreed programme. It was also mentioned that the extent of work done was measured and paid to plaintiff and there was no need of further measurements at that time. The defendants further mentioned that had the plaintiff done the work as per the programme, the shortage of supply of cement would not have taken place and so he cannot take shelter under the shortage of cement. As by the date of Ex.A10 there was acute power cut and the factories were not supplying the sufficient cement required, it was mentioned that after improvement of power supply the cement would be supplied as required and it was also

mentioned suitable extension of time would be recommended for the period. Subsequently the defendants, it appears, sent a notice dated 13.05.1988 stating that it would determine the contract as per clause 61 of APDSS. The copy of notice was not marked by either party but the plaintiff gave an extensive reply under Ex.A11 blaming the department for the delay on one hand and asking to enhance the payment for completing the work. In this reply no doubt he alleged as if burden rests on the defendants to hand over the quarry to him after taking permission from the forest department and as they failed to do so he could not quarry any stone and fault thus lie with the department. This allegation in the light of finding drawn in point No.1 is not sustainable.

a) Be that it may, even after Ex.A10—letter and subsequent notice the plaintiff did not proceed with the work but demanded for payment of amount at the enhanced rates. Thereafter, the defendants sent Ex.A12—letter clearly mentioning that in respect of work relating to Bit—II, out of contract value of 22.55 lakhs, he did only work worth Rs.14.34 lakhs by the end of December, 1988 leaving balance work of 8.21 lakhs. It was also mentioned that time was extended to him from time to time upto 31.03.1987 for finishing the balance work. Similarly, in respect of Bit—III, out of contract value of Rs.27.08 lakhs he completed the work worth Rs.16.01 lakhs leaving behind the work worth Rs.11.07 lakhs and time was

extended upto 31.03.1989. So Ex.A12 which was not controverted by the plaintiff would show the extent of work unfinished by the plaintiff in respect of Bit—II and Bit—III and extension of time granted till 31.03.1989. Following Ex.A12, defendant issued another notice under Ex.A13 dated 17.02.1989 wherein it was made clear that there was no progress of the work since 12.02.1989 and therefore final chance was given to plaintiff to accelerate the progress of the work failing which contract should be closed as per clause 61 of APDSS. It appears the plaintiff has submitted a representation to Ex.A13, but the copy of said representation was not filed. The defendant issued a reply under Ex.A14 for the said representation and requested the plaintiff to accelerate the work and extended time to complete the work upto 31.05.1989. In Ex.A14, it was also mentioned that progress of the work will be critically watched by 15.05.1989 and if it was found the progress was not upto mark, site would be taken over by the department and closing measurements would be taken on 25.05.1989 and it was cautioned that Ex.A14 should be taken as a notice under clause 61 of APDSS. The defendants' contention is that in spite of Ex.A14 giving a clear caution mentioned supra, there was no progress in the work and therefore, defendants were constrained to terminate the contract by invoking Clause 61 of APDSS.

b) Now, the point is whether the action of defendants terminating the contract under Ex.A16 is factually and legally sustainable. It is a fact that time for completion of the work was extended till 31.05.1989. However, Ex.A16 reads that work was stand still on 12.04.1989 which necessitated the department to take a harsh decision to terminate the contract and take up the balance work departmentally without further loss of time. In Ex.A14 it was clearly mentioned that the progress of the work would be critically watched and if the progress falls short of satisfaction, the department would take the site on 25.05.1989. In spite of Ex.A14 notice, the plaintiff did not show any reasonable progress in the work and on the other hand he left the work in stand still position on 12.04.1989. In this back drop, the defendant authorities cannot be found fault in terminating the contract even before expiry of time till 31.05.1989. The balance work left over was about 40%. As per clause 61 of APDSS the department can terminate the contract when the contractor suspended the work or he sublets the work or portion of work, without sanction of concerned Executive Engineer. In this case, as observed, in spite of repeated extensions of time and caution under Ex.A14 that work would be critically watched, the plaintiff did not evince any interest in showing progress of the work. Hence, under the facts and law, department authorities are fully justified in terminating the contract and plaintiff cannot impute

them with any *mala fides*.

11) So, on a conspectus of entire facts and evidence, none of the points raised by the appellant are sustainable to set aside the judgment of the trial Court. Hence, this point is accordingly answered against the appellant.

12) In the result, this CCCA is dismissed by confirming the judgment of the trial Court in O.S.No.844 of 1989. However no costs in the appeal.

As a sequel miscellaneous petitions pending if any, shall stand closed.

U.DURGA PRASAD RAO, J

Dt: 09.12.2015

Murthy