

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CCCA No.60 of 1996

JUDGMENT:

This appeal is preferred by 2nd defendant aggrieved by the judgment dt.20.07.1987 in O.S.No.400 of 1985 passed by the learned I Additional Judge, City Civil Court, Hyderabad.

2) Parties in this appeal are referred to as they stood before the trial Court.

3 a) The brief facts of the case are that the above suit was filed by the plaintiff alleging that the plaintiff is a construction company and it entered into a contract with the 2nd defendant for execution of "Repairs to Road in G.E.(North Area) Secunderabad" as per agreement CA.No.GE(N) SEC/13 of 1980-81 dt.12.12.1980 with an estimation of Rs.3,29,711-20 paise. The plaintiff had successfully completed the contract work. In the matter of payment of certain bills, some disputes arose between the plaintiff and the 2nd defendant and as per the terms of the agreement, the dispute was referred to by the parties to a sole Arbitrator i.e., the 1st defendant.

b) The plaintiff filed claim petition and 2nd defendant filed counter therein. On hearing both sides, the Arbitrator passed an Award in favour of the plaintiff for Rs.78,680/-

towards costs of Bitumen and rejected the other claims of the plaintiff and also the counter claim of the 2nd defendant.

c) The plaintiff requested the 1st defendant on 26.10.1982 to file the Award along with the relevant documents in the Civil Court and accordingly the 1st defendant sent the original copy of the Award and the relevant documents to the Court on 08.11.1982 and the same was received by the Court on 12.11.1982. 1st defendant intimated to both parties about the transmission of Award to the Court. The 2nd defendant did not choose to file any objection regarding the validity of the Award. The further case of the plaintiff is that subsequently he made several representations to 2nd defendant for payment of the Award amount and the 2nd defendant gave reply dt.28.04.1984 stating that the matter is pending with the higher authorities for taking further action in the matter.

d) Since the 2nd defendant has not paid the amount, the plaintiff filed the suit praying the Court to make the Award passed by the 1st defendant as a rule of Court and grant interest on the principle amount @ 12% per annum from the date of Award till the date of realization.

e) 1st defendant remained *ex parte*.

f) The 2nd defendant filed written statement contending

that on completion of the work, final bill was prepared and paid to the plaintiff deducting a sum of Rs.78,680/- for non-compliance of clause 18(c) of special conditions of the contract which provided that contractor shall produce to the Garrison Engineer and Engineer-in-charge the original purchase vouchers or invoices in respect of Bitumen from the manufacturers or authorized dealers. The said condition was incorporated with a specific purpose of ensuring that Bitumen of specified quality and quantity shall be secured by the plaintiff. In view of the flagrant violation of the said condition by the plaintiff, the 2nd defendant deducted a sum of Rs.78,680/- from the amounts due to the plaintiff. As the plaintiff had not admittedly produced any original purchase vouchers or invoices from the authorized dealers for purchasing the Bitumen, the plaintiff accepted the deductions imposed by the 2nd defendant without any protest. On the other hand, in his letter dt.29.12.1980 the plaintiff admitted that he has purchased Bitumen from outside agencies and made it clear that any recovery due to non-production of vouchers is acceptable to it. All these facts were brought to the notice of the 1st defendant/Arbitrator, but the 1st defendant misconducted himself by overlooking the clinching evidence on record and passed the Award. The letter of the plaintiff dt.29.12.1980 was also placed before the 1st defendant but it was also overlooked by the 1st defendant. Hence, there is error

apparent on the face of the Award and the same is liable to be set aside.

g) The 2nd defendant further stated that questioning the Award, the 2nd defendant filed O.P.No.151 of 1985 for setting aside the Award.

h) The learned I Additional Judge, City Civil Court, Hyderabad clubbed O.P.No.152 of 1985 with O.S.No.400 of 1985.

i) During trial, PW1 was examined and Exs.A1 to A8 were marked on behalf of the plaintiff. DW1 was examined and Exs.B1 to B3 were marked on behalf of the 2nd defendant.

j) The trial Court passed common judgment in both the aforesaid matters on 20.07.1987.

k) So far as O.P.No.152 of 1985 filed by the 2nd defendant is concerned, one of the contentions raised by the 2nd respondent i.e., plaintiff in O.S., was that the O.P. was barred by time. In that context, having regard to Ex.A4 letter dt.08.11.1982 addressed by the Arbitrator to the office of the petitioner requesting one Sri TKS.Murthy, Assistant Engineer to file the Award into the Court of I Additional Judge, City Civil Court, Hyderabad and accordingly the same was filed into Court by the said TKS.Murthy, the trial Court observed that the petitioner in the O.P. had

knowledge about the Arbitrator filing the Award into the Court through one of its officials but the petitioner had not filed the O.P. within 30 days from the date of Ex.A4 challenging the Award and hence, the O.P. was barred by limitation.

l) So far as O.S.No.400 of 1985 is concerned with regard to the contention of the 2nd defendant that the plaintiff violated sub clause (c) of Clause 18 of the special conditions of the agreement and thereby an amount of Rs.78,680/- was deducted and it was admitted by the plaintiff and hence the Award, wherein the said fact not taken into consideration, cannot be made rule of Court is concerned, the trial Court considered the contents of Ex.A6 letter addressed by the plaintiff to the 2nd defendant wherein he mentioned that the plaintiff approached the Bitumen manufacturing corporations and companies, who expressed their inability to supply the same and therefore, the plaintiff sought permission to use the Bitumen from outside agencies to avoid delay and further informed that 2nd defendant may test the quality of Bitumen if so desired.

m) Having regard to the above explanation in Ex.A6, the trial Court noticed that the plaintiff used the required quantity of Bitumen for laying the road and the 2nd defendant has not questioned the quantity or quality of said Bitumen and no evidence was placed before the Court that the Bitumen used by the plaintiff was of inferior quality. The Court further

observed that in Ex.A6 it was clearly disclosed that Bitumen was not available with authorized dealers and as such plaintiff purchased the same from some other dealers. Since there was no dispute with regard to the quantity or quality of the Bitumen used by the plaintiff, there was no justification for the 2nd defendant to refuse to pay the value of the Bitumen amounting to Rs.78,680/- to the plaintiff, simply because the plaintiff failed to produce the necessary vouchers from the authorized dealers. Thus the trial Court held that the Award passed by the Arbitrator is valid and not liable to be set aside. Accordingly, while confirming the Award passed for a sum of Rs.78,680/-, the trial Court granted 12 % per annum from the date of Award till the date of realization.

Hence the present appeal by 2nd defendant against the judgment and decree in O.S.No.400 of 1985.

4) In this appeal, though notice was served on both the respondents 1 and 2, there is no representation for them. Hence heard arguments of Sri B.Narayana Reddy, learned Assistant Solicitor General.

5 a) Learned Assistant Solicitor General firstly argued that the trial Court committed grave error in construing clause 18(c) of special conditions and also Ex.A6—letter. He would argue that as per the special clauses therein, the plaintiff had to procure Bitumen from authorized Corporations like

Bharat Petroleum Corporation, Hindustan Petroleum Corporation, Indian Oil Corporation and Andhra Asphalts Pvt. Ltd., etc. and produce vouchers issued by them only. This condition was stipulated to ensure the plaintiff purchasing the quality Bitumen for laying the road. However, the plaintiff failed to produce vouchers issued by the authorized dealer but in his letter under Ex.A6, dt.29.12.1980 stated that he could not procure Bitumen from the authorized dealers and he agreed for deduction of the amount in that regard and in fact he received the amount after deduction only. Therefore, the Award and judgment of the trial Court granting the amount, which was duly and lawfully deducted, is unjust and therefore the decree and judgment are liable to be set aside.

b) Secondly, he argued that the interest @ 12% per annum awarded by the trial Court is exorbitant and thus prayed to allow the appeal and dismiss the suit.

6) In the light of above arguments, the point for determination is:

1) Whether the judgment and decree passed by the trial Court are legally sustainable?

2) To what relief?

7) **POINT No.1:** On perusal of record, it should be made clear that the appeal is bereft of merits both legally and factually.

a) Legally this appeal is not maintainable because admittedly the present appellant filed O.P.No.152 of 1985 challenging the Award passed by the Tribunal and the said O.P. was dismissed by the trial Court in its common judgment holding that the O.P. was barred by limitation. Learned Assistant Solicitor General has not brought to the notice of this Court about its filing of any appeal challenging the judgment in O.P.No.152 of 1985. Since the issue involved in O.P. No.152 of 1985 and O.S.No.400 of 1985 are directly and substantially one and the same and as the judgment in O.P.No.152 of 1985 attained finality due to non filing of appeal against the said judgment, the present appeal only against judgment in O.S.No.400 of 1985 is not maintainable.

b) Coming to the factual side, it is true that as per clause 18(c) of special conditions, the plaintiff was expected to purchase Bitumen from the authorized dealers such as Bharat Petroleum Corporation, Hindustan Petroleum Corporation, Indian Oil Corporation and Andhra Asphalts Pvt. Ltd. However in Ex.A6, he made a clean breast of his case that inspite of his approaching the authorized dealers they expressed their inability to supply Bitumen and so as to avoid delay and also as the price of petroleum products were increasing, he sought permission from 2nd defendant to purchase Bitumen from outside agencies. He honestly informed that the Bitumen so purchased can be tested by

2nd defendant. It is true that the plaintiff admitted that if he fails to produce vouchers from the authorized dealers for purchase of Bitumen, he was agreeable to receive the amounts after deduction of amounts.

c) Be that as it may, as rightly pointed out by the trial Court, plaintiff used required quantity of the Bitumen procured from the outside agencies and laid the road and the 2nd defendant never raised its little finger accusing that the plaintiff either used lesser quantity or used inferior quality of Bitumen. Even during the trial also the 2nd defendant did not produce any evidence to that effect. In that view of the matter, the trial Court took it that merely because the plaintiff did not produce the vouchers from the authorized dealers, when explanation for such non production was manifest under Ex.A6 letter, the plaintiff cannot be mulcted with a deduction of Rs.78,680/-.

d) I find no illegality or irregularity in the said finding of the trial Court. It must be held that the plaintiff had substantially complied with the clause 18(c) of the special conditions in as much as per Ex.A6, he made an honest attempt to purchase Bitumen from authorized dealers and when they expressed their inability to supply Bitumen, then only after prior intimation to 2nd defendant, it appears the plaintiff purchased Bitumen from outside agencies. Therefore, the trial Court rightly observed that the deduction of amount of Rs.78,680/- was illegal as held by the arbitrator. Hence, in

that view also the appeal is devoid of merits.

8) Coming to the last argument of learned Assistant Solicitor General Sri B.Narayana Reddy, so far as the interest @ 12% granted by the trial Court is concerned, it appears to be excessive and hence the same is reduced from 12% per annum to 9% per annum.

9) **POINT NO.2:** In the result, this appeal is partly allowed and while confirming the decree and judgment passed by the trial Court insofar as making the Award of the arbitrator as rule of Court, the interest awarded by it is reduced from 12% to 9% per annum from the date of Award till the date of realization. There shall be no order as to costs.

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

U.DURGA PRASAD RAO, J

Date: 10.06.2016.

gra/scs