

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND

HON'BLE SMT JUSTICE ANIS

APPEAL SUIT No.803 OF 2008

JUDGMENT: *(per Hon'ble Smt. Justice Anis)*

The Appeal Suit under Section 96 of the Code of Civil Procedure, 1908 (for short, 'CPC), is directed against the decree and judgment, dated 11.01.2008, passed in O.S.No.118 of 2003 on the file of the V Additional District Judge (Fast Track Court), Ranga Reddy District, whereunder and whereby the suit filed for recovery of money was dismissed.

2. The first appellant is the plaintiff, who died during the course of appeal and the second plaintiff was brought on record as L.R. of first appellant vide A.S.M.P.2361 of 2010, dated 21.01.2011, and the respondents are the defendants before the trial Court. For better appreciation of facts, the parties are hereinafter will be referred to, as they are arrayed before the trial court.

3. The plaintiff filed the suit for recovery of Rs.47,19,478.50 Ps. along with interest at 12% per annum on the principal sum of Rs.30,65,400/- from the date of suit till the date of decree and subsequent interest at 6% per annum against the defendants 1 to 4, on the ground that he is a registered Special Contractor and participated in the tender for the work of maintenance of the Hyderabad Inner Ring Road from 0/0 km. to 11/450 km. (four lines) in Ranga Reddy District for the year 1999. His bid was accepted and he entered into an agreement on 27.01.1999 with defendant No.2. As per the contract, the time stipulated for completion of work was one year from 27.01.1999. The defendant

No.3 is responsible for supervising the contract, administering the contract and certifying the payments. The defendant No.4 is authorized to represent the defendant No.3. After commencement of work by the plaintiff, the Government of India enhanced diesel price from Rs.11.30 Ps. to Rs.11.72 Ps. per litre with effect from 24.04.1999 and in the month of November, 1999, again the diesel price was raised from Rs.11.72 Ps. to Rs.15.57 Ps., due to which the price of bitumen got enhanced by Rs.500/- per metric ton in April, 1999 and again it was enhanced to Rs.983/-. Further, there were heavy rains after 29.06.1999 till September, 1999 and the said fact was informed to defendant No.4 on 07.09.1999 and sought extension of time till April, 2000. After work was started on 04.01.1999, fuel prices were increased by 15% by the Government of India, which had an impact on the finance aspect of the plaintiff and it became difficult to mobilize the additional funds. Further, due to hike in the diesel price, there was a strike by the truck owners for about four weeks and there was no supply of bitumen by the companies as transport was paralyzed. The Government of Andhra Pradesh directed stone crushing units in the city and within the city limits to stop functioning of their units to prevent pollution, due to which the metal required for laying bitumen could not be produced and the plaintiff informed the defendants about the said fact. The plaintiff completed the contract work by 31.07.2000. According to the plaintiff, under Clause 44 of the conditions of the contract, he is entitled for compensation and the defendants did not take any action to reimburse any extra expenditure incurred to procure diesel, bitumen and crushed metal at higher rates and that the matter was referred to the technical experts under Clause 25 of the contract. The technical experts' decision is not correct in view of Clause 44 of the contract. As the defendants failed to pay

the amount to the plaintiff, he got issued notice on 25.06.2002 under Section 80 CPC for recovery of the suit claim along with interest.

4. The defendant No.4 filed Written Statement and the same was adopted by defendants 1 to 3. The brief averments made in the Written Statement filed by defendant No.4 are as follows:

The defendant admits that the plaintiff was awarded the work as claimed in the plaint with a condition to complete the same within 12 months from 27.01.1999 and the work was completed on 31.07.2000. There is no condition in the agreement with regard to payment due to variation in the prices. The engineer extended the date of completion of work up to 31.07.2000 as per the condition No.28. The plaintiff stopped the work laying bitumen from 21.06.1999 and in his application dated 07.09.1999, he informed about stoppage of the work. It is the duty of the plaintiff to execute the work as per the terms and conditions of the contract and increase or decrease of raw material to be procured by the contractor has no bearing. At the request of the plaintiff, the defendant extended the time upto 31.07.2000. The plaintiff knowing fully well that hike of price cannot be reimbursed during currency of the agreement because the plaintiff is only entitled to seek extension of time. The defendants did not interfere with the work of the plaintiff and Clause 44 envisages which eventually. The plaintiff did not give notice under Clause 32 as early warning. The strike of lorry transporters of metal crushing units as per the directions of Andhra Pradesh Pollution Control Board did not fall under Clause 44 and there is no provision in the agreement for diesel. The strike of lorry owners and increasing of rates of chips by crushing units, have no bearing on the agreement. The plaintiff

approached the arbitrator and the arbitrator passed order on 05.06.2002 rejecting the claim of the plaintiff. Therefore, prayed the Court to dismiss the suit.

5. Basing on the pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for payment towards hike in the costs of bitumen and diesel as per the terms of the agreement?
2. Whether the plaintiff is entitled for payment towards hike in the costs of chips under the agreement?
3. Whether the plaintiff is entitled for interest and if so, to what relief?
4. To what relief?

6. To substantiate the claim, the plaintiff himself was examined as PW1 and got marked Exs.A.1 to A.13. On behalf of the defendants, DW1 was examined and no documents were marked.

7. Basing on the evidence on record, the trial Court dismissed the suit filed by the plaintiff on 11th January, 2008.

8. Aggrieved by the decree and judgment of the trial Court, the plaintiff preferred the present appeal on the ground that the trial Court grossly failed to appreciate the bitumen, diesel and metal forms in the works of laying roads; that the trial Court failed to consider the steep rise of prices more than 35%; that the trial Court also erred in appreciating Clauses 33 and 44 of Ex.A.1; that in view of the express provision contained in Clause 44.2, the plaintiff is entitled for additional enhancement of contract price; that the trial Court failed to appreciate the oral and documentary evidence of the plaintiff and grossly erred in holding that the

contract of agreement Ex.A.1 does not provide payment of difference of prices of bitumen, metal and diesel prices, and finally contended that the plaintiff is entitled for the suit claim.

9. The learned counsel for the appellant/plaintiff argued that while executing the contract, the prices of diesel, bitumen and metal were enhanced, due to which the plaintiff incurred huge loss, therefore the appellant is entitled to recover the same from the defendants. It is further argued that the trial Court failed to consider the Clause 44 of Ex.A.1 which empowers the Engineer to take a decision regarding the enhancement of contract prices also. It is also argued that the trial Court grossly erred in appreciating the oral and documentary evidence produced by the plaintiff, more particularly, the Clause 44 of Ex.A.1.

The learned counsel in support of his contentions, relied on a case-law reported in *K.N.Sathyapalen (Dead) by LRs Vs. State of Kerala*^[1], wherein the Hon'ble Supreme Court held at Para 12 as follows:

“The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the Original Agreement and a specific prohibition to the contrary in the Supplemental Agreement, the appellant could have made any claim on account of escalation of costs and whether the Arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and M/s.Alopi Parshad's case

(supra) and also Patel Engg.'s case (supra). As was pointed out by Mr.Dave, the said principle was recognized by this Court in P.M.Paul's (supra), where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P.George's case (supra).

We have intentionally set out the background in which the Arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the Arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven months and that such delay could have been prevented had the State Government stepped in to maintain the law and order problem which had been created at the work site. It is also clear that the rubble and metal, which should have been available at the departmental quarry at Mannady, had to be obtained from quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which was far away from the work site entailing extra costs for the same."

The learned counsel further relied on a case-law reported in *P.M.Paul Vs. Union of India*^[2], wherein the Hon'ble Supreme Court held as follows:

"It was submitted that if the contract work was not completed within the stipulated time which it appears, was not done then the contractor has got a right to ask for extension of time, and he could claim difference in price. This is precisely what he has done and has obtained a portion of the claim in the award. It was submitted on behalf of the Union of India that failure to complete the contract was not the case. Hence, there was no substance

in the objections raised. Furthermore, in the objections raised, it must be within the time provided for the application under S.30 i.e., 30 days during which the objection was not specifically taken, we are of the opinion that there is no substance in this objection sought to be raised in opposition to the award. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and he has awarded as he did.”

The learned counsel also relied on a case-law reported in *Associated Construction Vs. Pawanhans Helicopters Pvt. Ltd.*^[3], wherein the Hon’ble Supreme Court held as follows:

“We are, therefore, of the opinion that in the light of the aforesaid judgments, that it was open to the contractor to contend that it was liable to be compensated on account of the fact that delay had been occasioned on account of reasons attributable to Pawanhans. It is significant that the Division bench of the High Court has been silent on this aspect of the matter and has not referred to the finding of the learned Single Judge with regard to the responsibility for the delay.

We are further of the opinion that clause 43 and 43(1) and (2) when read together clearly visualize escalation of price on account of reasons beyond the control of the contractor and attributable to the other side.”

and finally prayed the Court to allow the appeal.

10. On the other hand, the learned Government Pleader who appeared for the Government argued that after considering the oral and documentary evidence, the trial Court rightly dismissed the suit filed by the plaintiff. It is specifically argued that the plaintiff in

his cross-examination admitted that there is no clause under Ex.A.1 which enables him to claim more amount than the agreed amount on the ground of hike of oil prices, bitumen and chips and that DW1 clearly stated in his evidence that increase of prices of diesel and bitumen by the Government of India does not come under Clause 44(1)(h). It is further argued that Ex.A.1 does not provide payment of difference of prices of bitumen, metal and diesel and it is nowhere specifically stated. Lastly, it is argued that the trial Court after considering the oral and documentary evidence rightly dismissed the suit and the findings of the trial Court needs no interference, and prayed the Court to dismiss the appeal.

11. Now, the points that would arise for my consideration in this appeal are as follows:

1. Whether the appellant/plaintiff is entitled for the suit claim under Ex.A.1 for increasing of the prices of diesel, bitumen and metal chips by the Government of India?
2. Whether the decree and judgment of the trial Court warrants any interference of this Court and if so, to what relief?

12. **Points:**

A perusal of the oral and documentary evidence, it is evident that the plaintiff is a registered contractor whose tender was accepted for maintenance of Hyderabad Inner Ring Road from 0/0 km. to 11/450 km. (four lines) in Ranga Reddy District for the year 1999, as such the plaintiff and defendant No.2 entered into an agreement as per Ex.A.1. As per the agreement, the plaintiff has to start work from 27.01.1999 and he has to complete the work within one year. It is also an admitted fact that due to heavy rains,

the plaintiff stopped the work for some time and requested the defendant No.4 to extend time and basing on that the time was extended upto 31.07.2000.

13. In this case, the plaintiff himself got examined as PW1 and filed documents Exs.A.1 to A.3. In his examination in Chief, the plaintiff supported his claim. But, in the cross-examination, the plaintiff admitted that he accepted the contract as per Ex.A.1 and there is no clause under Ex.A.1 enabling him to claim more amount than the agreed contract amount on the ground of hike in oil prices, bitumen and chips. The plaintiff also admitted that he has not completed the work within one year from the date of Ex.A.1 and as per the agreement, he has to use his own machinery for executing the work.

14. A perusal of the above admissions made by the plaintiff clearly established that as per Ex.A.1, the plaintiff cannot claim more amount than what has been agreed under the contract. The plaintiff also admitted that as per Ex.A.11 – Technical expert opinion, he is not entitled for any sort of escalation of rates even though there was an increase in the rates of diesel and bitumen.

15. The main contention of the appellant/plaintiff is that as per Clause 44 of Ex.A.1, he is entitled to claim escalation of prices for diesel, bitumen and metal chips. A perusal of general conditions of the contract, it is clear that Clause 44 is related to compensation events. The plaintiff is relying on Clauses 44(1)(h) and 44.2 and nowhere it is mentioned that the plaintiff is entitled to claim extra amount other than the contracted amount due to escalation of prices of diesel, bitumen and metal chips. Therefore, as per Ex.A.1 and the admissions made by PW1 in the cross-examination clearly established that the plaintiff is not entitled to

suit claim. Hence, the trial Court rightly passed the decree and judgment dismissing the suit. The case-law relied on by the learned counsel for the appellant in *K.N.Sathyapalen's* case (1 supra), has no application to the facts of the present case as there is no failure on the part of the defendants to live up to its obligations and that there is no law and order problem. Further, though the appellant was prevented by heavy rains and there was a strike by the truck owners and that the Government of Andhra Pradesh directed stone crushing units to stop functioning, when the plaintiff informed the said fact to the defendants, they extended the due date from time to time. Likewise, the case-law in *P.M.Paul's* case (2 supra) has no application as the arbitrator does not find any delay in execution of the contract due to the conduct of the defendants. Even in the Written Statement, the defendants took a plea that the plaintiff already approached the arbitrator and the arbitrator passed order on 05.06.2002, rejecting the claim of the plaintiff. Similarly, the case-law in *Associated Construction's* case (3 supra) also has no bearing to the present facts of the case as nothing is attributable to the defendants on account of fact of delay. Therefore, in view of the above circumstances, we find no merit in the appeal and also find no error in the judgment of the Court below calling for interference.

16. Accordingly, the Appeal Suit is dismissed, confirming the decree and judgment dated 11.01.2008 passed in O.S.No.118 of 2003 on the file of the V Additional District Judge (Fast Track Court), Ranga Reddy District. No order as to costs.

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

JUSTICE V.RAMASUBRAMANIAN

JUSTICE ANIS

Date: 04.08.2016
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- [\[1\]](#) LAWS(SC)-2006-11-143 = AIR 2006 SCW 6222
[\[2\]](#) LAWS(SC)-1989-1-17 = AIR 1989 SC 1034
[\[3\]](#) LAWS(SC)-2008-5-182 = AIR 2008 SC 2911