

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.380 of 2011

JUDGMENT:

This appeal is filed, under section 100 CPC, assailing the judgment and decree dated 14.07.2010 passed in A.S.No.196 of 2007 on the file of II Additional District Court, Visakhapatnam, wherein whereby the decree and judgment dated 03.04.2007 passed in O.S.No.713 of 2002 on the file of IV Additional Senior Civil Judge Court (Fast Track) at Visakhapatnam, decreeing the suit filed by the plaintiff for damages, was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal are briefly as follows: The plaintiff issued a tender notice calling for quotations for demolition of buildings of 2 types of quarters which are 91 in number and for disposal of building material on "As is where is basis" with some terms and conditions. The defendant submitted his tender and quoted an amount of Rs.10,00,028.27ps. As the defendant quoted highest amount, the plaintiff accepted the tender of the defendant. On 24.06.1999, the defendant got issued a notice with false and untenable allegations. The defendant has not raised any objection prior to opening of tenders and there was no representation at all. Once the offer is accepted, a concluded contract comes into existence. As per para 1.3 of the

instructions to the tenderers, if the successful bidder fails to deposit Rs.72,000/- towards the value of 10% of security deposit within the specified time, the EMD amount of Rs.18,000/- stands forfeited. As the defendant did not fulfill the tender obligation, the EMD was forfeited as per the terms and conditions of the tender notice. The defendant, who committed breach of contract is liable to pay damages. The plaintiff again called for tenders and accepted the quotation of M/s. Sri Visakha Timber Furniture which is for an amount of Rs.7,36,299.98ps, as it was highest among the other quotations given by various bidders. Consequent to the breach of contract committed by the defendant, the plaintiff sustained loss of Rs.2,63,708.28ps. The EMD paid by the defendant was forfeited because of the breach of contract and the loss sustained by the plaintiff. The plaintiff got issued a notice on 27.01.2000 directing the defendant to pay the damages with interest at 24% per annum from the date of cancellation. The defendant got issued a reply notice on 19.02.2000 with all false and untenable allegations. Hence, the suit.

4. The defendant filed written statement admitting the issuance of tender by the plaintiff and submission of quotation by him inter alia contending that there is no concluded contract between the plaintiff and the defendant, therefore, the suit is not maintainable under law. The quantity of timber available in the quarters is not tallying with the drawings supplied by the

plaintiff. Hence, the plaintiff is not entitled for damages as claimed. Hence, the suit is liable to be dismissed.

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

1. Whether there is privity of contract between plaintiff and defendant?
2. Whether the plaintiff is entitled for suit amount?
3. To what relief?

6. To substantiate the case, on behalf of the plaintiff, the deputy manager of the plaintiff company was examined as P.W.1 and got marked Exs.A1 to A10. To demolish the case of the plaintiff, the defendant examined himself as D.W.1 and got marked Exs.B6 to B17. Exs.B1 to B5 were marked through P.W.1.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that there is a concluded contract between the plaintiff and defendant, therefore, the plaintiff is entitled for damages and consequently, decreed the suit. Feeling aggrieved by the judgment and decree of the trial Court dated 03.04.2007 in O.S.No.713 of 2002, the defendant preferred A.S.No.196 of 2007 on the file of the II Additional District Court, Visakhapatnam. The first appellate Court after considering the material available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiff is entitled for recovery of the suit amount from the

defendant and dismissed the appeal on 14.07.2010. Hence the defendant preferred the present second appeal.

8. Heard Smt.Nimmagadda Revathi, learned counsel for the appellant and perused the record.

9. The substantial questions urged by the learned counsel for the appellant are as follows:

1. Whether there is any concluded contract between the plaintiff and defendant?
2. Whether the plaintiff is entitled to claim damages in the absence of specific clause in Ex.B6 tender notice?

Point Nos.1 and 2:

10. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

11. Before advertng to the findings of the Courts below, this Court is placing reliance on the judgment in **Municipal Committee, Hoshiarpur v. Punjab SEB¹**, wherein, while dealing with the scope of Section 100 of CPC, the Hon'ble Apex Court held at paragraph No.16 as follows:

16. ... A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. ...

¹ (2010) 13 SCC 216

12. Let me consider the facts of the case on hand in the light of the above legal principle.

13. The plaintiff issued a tender notice Ex.B6 on 29.04.1999 calling for the quotations from different contractors for demolition of 91 quarters of the plaintiff and for disposal of the building material on "As is where is basis". In pursuance of the tender notification, the defendant submitted his quotation for Rs.10,00,008.27ps. On 27.05.1999, the defendant addressed a letter (Ex.P1) requesting the plaintiff to reduce the quotation amount from 10,00,008/- to Rs.90,000/-. The plaintiff accepted the quotation of the defendant on 09.06.1999 under Ex.A2. Legal notices were exchanged between the parties before filing of the suit. The crucial question that falls for consideration is whether there is a concluded contract between the plaintiff and the defendant. The defendant did not revoke the contract before acceptance of his quotation by the plaintiff on 09.06.1999. There is a specific condition in the tender notice that the tenderer/contractor has to inspect the premises before submitting the quotation. As per the terms and conditions of tender notice, there is an obligation on the part of the contractor to inspect the premises and submit his quotation. If really the timber on ground is not tallying with the drawings issued by the plaintiff, what prevented the defendant to inform the same to the plaintiff before submitting his quotation. If really there is a short fall of wood rafters, what prompted the defendant to submit his tender by quoting an amount of Rs.10,00,008/-.

The quotation submitted by the defendant amounts to an offer. The plaintiff accepted the offer of the defendant. The material on record clinchingly establishes that there is a privity of contract between the plaintiff and the defendant. As rightly pointed out by the learned counsel for the appellant, the defendant issued a letter Ex.B1 before acceptance of his quotation requesting the plaintiff to reduce the tender amount. Revocation of the offer is different to that of bargaining of the amount. It is not the case of the defendant that he revoked his offer before acceptance of quotation by the plaintiff. The recitals of Ex.B2 indicate that the defendant bargained with the plaintiff for reduction of the amount only. Viewed from any angle, Ex.B1 cannot be treated as revocation of offer submitted by the defendant. The trial Court as well as the first appellate Court considered the oral and documentary evidence in the light of Sections 5 and 6 of Indian Contract Act. Both courts arrived at a conclusion that there is a conclusive contract between the plaintiff and the defendant. The Courts below have assigned reasons much less valid and cogent reasons to its findings. I am fully endorsing with the findings recorded by the Courts below. Having regard to the facts and circumstances of the case, I am of the considered view that there are no grounds much less valid grounds to upset the findings recorded by the courts below on this aspect.

14. The next question that falls for consideration is whether the plaintiff is entitled to claim damages. As rightly pointed out

by the learned counsel for the appellant, there is no stipulation in Ex.B6 enabling the plaintiff to claim damages from the defendant. As per the terms and conditions of Ex.B6 tender notice, if the defendant failed to deposit an amount of Rs.72,000/- within the stipulated time, the plaintiff is entitled to forfeit the advance amount. Mere absence of a clause in Ex.B6 disentitles the plaintiff to claim damages or not is to be considered. The testimony of P.W.1 clearly reveals that they issued a second tender for the same work. One M/s.Sri Visakha Timber Furniture submitted a quotation for Rs.7,36,299/-. The variation between the quotation of the defendant and M/s.Visakha Timber Furniture is Rs.2,63,708/-. The material available on record clinchingly establishes that due to the acts of the defendant, the plaintiff incurred loss of Rs.2,63,708/-. Had the defendant completed the contract work, certainly, the plaintiff might have received Rs.10,00,008/-. Non execution of the contract work by the defendant causes a loss of Rs.2,63,708/- to the plaintiff.

15. A perusal of Section 73 of Indian Contract Act clearly demonstrates that a party to the contract is entitled to claim damages from the party, who has broken the contract. Even in the absence of clause in Ex.B6, the plaintiff is entitled to claim damages from the defendant in view of Section 73 of the Indian Contract Act. The trial Court as well as the first appellate Court considered the material available on record in touch stone with Section 73 of the Indian Contract Act and arrived at a

conclusion that the plaintiff is entitled to claim damages from the defendant. As observed earlier, as per the material available on record, the plaintiff incurred a loss of Rs.2,63,708/-. The plaintiff also claimed interest at 24% per annum from the date of issuance of legal notices till the date of realisation. The trial Court granted interest at 24% per annum prior to filing of the suit, whereas, the first appellate Court granted interest at 9% per annum prior to filing of the suit. The first appellate Court considered the material available on record in right perspective and reduced the rate of interest from 24% to 9%. The findings recorded by the courts below are based on evidence much less legally admissible evidence. There is no question of law much less substantial question of law involved in this appeal. Hence, the appeal is liable to be dismissed.

16. Accordingly, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

25.10.2018

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