

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON'BLE SMT. JUSTICE T. RAJANI

COM.C.A.No. 6 of 2018

JUDGMENT: (per Hon'ble Sri Justice C.Praveen Kumar)

1) Assailing the order, dated 06.04.2018, passed in I.A.No.475 of 2017 in Com.O.S.No.129 of 2016 on the file of the Principal District Judge, Karimnagar (Commercial Court, Karimnagar), wherein an application filed under Order 13-A of C.P.C., as amended under Section 16 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (for short "the Act"), to pass summary judgment by interpreting clause (4) of the order dated 06.01.2009 was dismissed, the present appeal came to be filed.

2) The facts in issue are as under:

The petitioner/ plaintiff filed the above suit seeking a declaration that clause (4) of the order, dated 06.01.2009, is inapplicable and inoperative, in respect of the contract awarded to the plaintiff by the 1st defendant and consequently to declare the act of withholding a sum of Rs.52,34,86,011/- upto 04.10.2016 by the defendants, as illegal and contrary to the terms of the contract and also to

declare the quantity of over burden executed by the plaintiff as on 05.10.2016 to be the total quantity under clause (5) of the order, dated 06.01.2009, apart from other reliefs relating to payment of interest and return of the bank guarantee.

3) A written statement came to be filed by the second defendant therein disputing the claim of the plaintiff.

4) At that stage I.A.No.475 of 2017 came to be filed under the amended Order 13-A of C.P.C., requesting the Court to pass summary judgment, by declaring clause (4) of the order dated 06.01.2009 as inapplicable and inoperative to the contract. Rejection of the said application, lead to filing of the present appeal.

5) The main ground urged by Sri D.Prakash Reddy, learned Senior Counsel appearing for the appellant is that interpretation of clause (4) does not require any oral evidence. He took us through clause (4) of the order dated 06.01.2009, and also the provisions of law to show as to how the Court below erred in rejecting the request. In other words the argument of the learned counsel for the petitioner is that during the course of execution of the contract, the petitioner was prevented from operating dump Nos.1 and 3 due to certain restrictions imposed and as such

the petitioner was compelled to dump at other place as per the instructions of the authorities which makes clause (4) inapplicable to the contract and hence withholding of the amount for the work done is un-warranted. He thus submits, to decide the issue involved no oral evidence is necessary as the entire case revolves around interpretation of clause (4).

6) On the other hand, the learned Special Government Pleader for Government of Telangana would submit that the issue involved contains certain factual aspects, which cannot be decided by interpretation of clause (4) of the order. According to him, evidence is required to be adduced to decide the issues involved. He took us through the subsequent agreements entered into by the plaintiff with the defendants, wherein the plaintiff is alleged to have agreed for the variations in lead distances. In view of the above he pleads that the matter requires to be dealt with by adducing evidence, meaning thereby that there has to be a full fledged trial.

7) Before proceeding further it would be useful to refer to clause (4) of the Order No.7600001590, dated 06.01.2009, which is as under:

“4. VARIATION IN LEAD DISTANCE:

The bench-wise lead distances are only average distances planned, subject to variation of $\pm 200\text{m}$. Whenever there is a change in the specified unloading/ dumping location resulting in variance in lead distance, the revised bench-wise rates and quantity of diesel will be calculated as per the formulae given below.”

8) A reading of the above clause would show that whenever there is a change of the specified unloading/ dumping location, resulting in variance in lead distances, the revised bench-wise rates and quantity of diesel will be calculated as per the formulas given therein.

9) Section 16 of the Code, states as under:

“16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes:

1. The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the schedule.
2. The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.
3. Where any provision of any rule of the jurisdictional High Court or any amendment to

the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.”

10) Order 13-A of C.P.C., which came to be inserted after Order 13 of C.P.C., deals with scope and classes of suits to which this order applies. It states that this Order sets out the procedure by which Courts may decide a claim pertaining to any Commercial Dispute without recording oral evidence.

11) At first blush, the argument of the learned Senior Counsel gave us an impression that the issue involved can be decided without adducing any oral evidence. But a perusal of the entire material reveals that the matter involves certain disputed factual aspects, which can be decided only after evidence is adduced.

12) As stated earlier, originally the work order is dated 06.01.2009. The minutes of the meeting held on 13.12.2011, at the office of Chief General Manager (Purchase) with the petitioner, in connection with the issues pertaining to OB removal work vide order dated 06.01.2009, deal with queries raised by the defendants and the response given by the plaintiff.

13) One of the query was that the defendants informed the plaintiff firm's representative that due to variation in the lead distances and considering the discussions held on 12.07.2011 and 26.07.2011, the bench wise quantities and total quantities, bench wise lead distances and total weighted average lead distance, bench wise excavation rates and bench wise diesel quantities were revised and communicated vide letter dated 05.12.2011 and requested to confirm the receipt of the same. To this query the firm's representative is alleged to have informed that they have received the letter dated 05.12.2011, wherein the revised bench wise quantities and total quantities, bench wise lead distances and total weight of average lead distance, bench wise excavation rates and bench wise diesel quantities were furnished and they accepted for the same.

14) Similarly, in the second query the defendants informed the firm's representatives that the amount to be recovered due to revision of excavation rates per BCM and diesel quantities to be supplied per BCM will be assessed up to the end of November, 2011 by considering the progressive operated lead upto the end of 2nd year and the revised excavation rates per BCM and diesel quantities to be supplied per BCM for the 3rd year upto November, 2011 and recovered along with interest from the running bills after

adjusting the amount already recovered on adhoc basis. The firm was further informed that till the recovery of the balance amount, Bank Guarantee shall be submitted. To this the plaintiff firm alleged to have stated that as per the original awarded order dated 06.01.2009, the lead variation clause is not application for 1st, 2nd and 3rd years as the operated progressive leads for the 1st, 2nd and 3rd years are 5.684 KM, 4.381 KM and 4.613 KM (as per projection) respectively which are more than the awarded weighted average lead of 4.546 KM. Hence, noted that excess payment, interest and submission of bank guarantee does not arise. As per the amendment of the order, overall weighted average lead is 3.653 KM. Lead variation clause has become applicable due to amendment of the order, hence requested (a) not to impose interest on the amount to be recovered and not to insist for submission of Bank Guarantee, (b) assess the amount to be recovered upto November, 2011, considering the progressive revised projected lead upto the end of 3rd year and recover the amount after adjusting the amount already recovered on adhoc basis, (c) make payments as per the revised excavation rates/ BCM & revised quantities of diesel/ BCM for the remaining 4 months of the 3rd year and to assess the progressive actual operated lead at the end of 3rd year and

reconcile the payments accordingly, (d) make payment for 4th, 5th and 6th years according to the revised projected year-wise bench-wise lead distances for the respective years and reconcile the payments at the end of 4th, 5th and 6th years respectively after assessing the progressive actual operated lead distances to avoid recoveries that may arise at the end of respective years as the revised projected year-wise weighted average lead distances for 4th, 5th and 6th years are less than the revised total weighted average lead distance of the contract.

15) The said minutes were signed by all concerned including the representative of the plaintiff company. Though the defendants informed the plaintiff that the same will be examined but the counsel for the defendants states that these terms were acted upon. The same is disputed by the learned Senior Counsel for the petitioner stating that acceptance, if any, in the meeting held on 13.12.2011 relates to O.S.No.128 of 2016 and not in this case. Hence, we feel that the issue involves certain disputed factual aspects, which can be adjudicated only after evidence is adduced. Hence, we hold that a direction cannot be given to the Court below to pass a summary judgment, interpreting clause (4) of the order dated 06.01.2009.

16) Accordingly, the appeal is dismissed. There shall be no order as to costs. As a sequel to it, miscellaneous petitions, if any, pending shall stand closed.

C.PRAVEEN KUMAR, J

T. RAJANI, J

10.07.2018
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