

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH
AS.No.42 of 2018

Between:

M/s. Balaji Hotmix Co.,
Someswar Village, Banswada Mandal,
Nizamabad District, rep., by its Partners.

..Appellants

and

The Superintending Engineer (R&B),
Nizamabad Circle, and 2 others.

..Respondents

JUDGMENT PRONOUNCED ON: 17th April, 2018

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

1. Whether Reporters of local
Newspapers may be allowed : Yes/No
to see the Judgments?

2. Whether the copies of
judgment may be marked to : Yes/No
Law Reporters/Journals?

3. Whether their Ladyship/Lordship
wish to see fair copy of the : Yes/No
Judgment?

C.V.NAGARJUNA REDDY, J

D.V.S.S.SOMAYAJULU, J

*** THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY**

AND

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

+ A.S.No.42 of 2018

% 17.04.2018

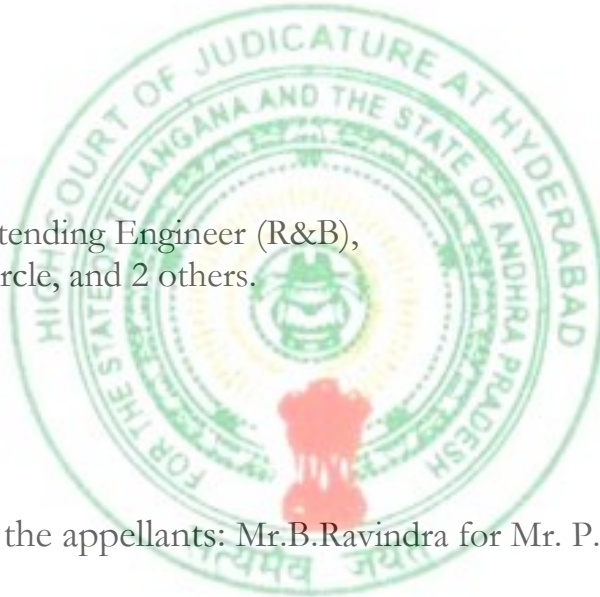
Between:

M/s. Balaji Hotmix Co.,
Someswar Village, Banswada Mandal,
Nizamabad District, rep., by its Partners.

..Appellants

Vs.

\$ The Superintending Engineer (R&B),
Nizamabad Circle, and 2 others.



! Counsel for the appellants: Mr.B.Ravindra for Mr. P.Sri Hari

Counsel for the respondent: G.P. for Appeals (T.S.)

<Gist :

>Head Note:

? Cases referred:

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

AS.No. 42 of 2008

17.04.2018

Between:

M/s. Balaji Hotmix Co.,
Someswar Village, Banswada Mandal,
Nizamabad District, rep., by its Partners.

The Superintending Engineer (R&B),
Nizamabad Circle, and 2 others.

..Appellants

and

..Respondents

Counsel for the appellants: Mr.B.Ravindra for Mr. P.Sri Hari

Counsel for the respondents: G.P. for Appeals (T.S.)

The Court made the following:

JUDGMENT: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This appeal by the plaintiffs in O.S.No.29 of 2001 assails decree and judgement, dated 21.06.2007, of the V Additional District Judge, (Fast Track Court), Nizamabad, FAC-VII Additional District Judge, (Fast Track Court) Nizamabad, Bodhan.

2. The facts, in brief, are that the appellants/plaintiffs entered into an agreement with respondent No.1 on behalf of the State of Andhra Pradesh for execution of the work of improvement of carriage way of Hyderabad-Medak-Bodhan road from Kilometer 106/6 to 112/0 - Nizamabad District under Ex.A.1 agreement dated 27.02.1999. The duration of contract was twelve (12) months from the date of handing over of the site. The contract provides for different milestones for completion of work. As the work could not be completed within the stipulated time, the contract was extended upto 31.03.2002. However, respondent No.1 has terminated the contract on 14.03.2002 and forfeited the Earnest Money Deposit (EMD) and Further Security Deposit (FSD) and the work done amount due to the appellants. A few months prior to the termination of contract, the appellants filed the aforementioned suit for passing a decree for Rs.46,21,468/- with future interest at 24% per annum from the date of filing of the suit, till the date of realisation. The said amount has been claimed under various heads, the details of which need not be referred to and it

would suffice to note that entire claim was made based on the plea that due to delayed payment of bills, the respondents have committed breach of contract, as a result of which, the appellants have sustained loss. The only head which is not related to the said plea is release of the EMD and FSD to the tune of Rs.4,00,000/-.

3. On behalf of the respondents, a written statement was filed wherein they, *inter alia*, denied the claim of the appellants. While refuting the allegations that there was delay in making payments, counter allegation was made in the written statement that the appellants have stopped the work and not resumed work after release of Lumpsum Deposit-II (LSD II) and part bill and that the work done portion was partly damaged due to non carrying out of Semi Dense Bituminous Concrete (SDBC) item. That on account of the failure on the part of the appellants to complete the work as per the agreement, the contract was terminated under Clause 60 (a) of the Preliminary Specifications to Andhra Pradesh Standard Schedules vide letter No.242, dated 14.03.2002 (Ex.B.9) (wrongly mentioned as 14.02.2002 in the written statement) and further payment for the work done was forfeited.

4. Based on the respective pleadings of the parties, the lower Court has framed the following issues:

1. Whether the plaintiff is entitled for damages? If so, to what extent?

2. Whether the plaintiff is entitled to a sum of
Rs.46,21,468/- inclusive of interest @ 24%
p.a. as claimed?
3. Whether the plaintiff is entitled to 24% p.a.
interest from the date of filing of the suit?
4. To what relief?

5. In support of their case, the appellants/plaintiffs examined PWs.1 and 2, its partners, and got Exs.A.1 to A.9 marked. On behalf of the respondents, DWs.1 and 2 were examined and Exs.B.1 to B.10 were marked. As DW.1 was not available for cross-examination on account of his transfer, his evidence was eschewed. On appreciation of the oral and documentary evidence, the lower Court has dismissed the suit.

6. At the hearing, Mr.B.Ravindra, learned counsel representing Mr.P.Sri Hari, learned counsel for the appellants, placed heavy reliance upon Clause 3.1 of 'Schedule-E' of Ex.A.1 and submitted that the respondents have committed breach of the said term as a result of which appellants could not procure certain material required to be used in the contract work in time as a result of which there was steep increase in market prices apart from the fact that continuity of work could not be maintained resulting in idle labour and machinery. The learned counsel also placed reliance on Section 73 of the Indian Contract Act, 1872 (for short 'the Act') to drive home his contention that on account of the delay, which is demonstrable from the record, the respondents are liable to pay

damages as claimed by the appellants in the suit. He has further submitted that the respondents have unjustly withheld the EMD and FSD in spite of the fact that their clients were the sufferers on account of the breach of the contract on the part of the respondents.

7. Opposing the above submissions, the learned Government Pleader for Appeals (TS) submitted that there was no delay in payments and that even if there was any such delay, the respondents are not liable for the consequences thereof, such as payment of interest or damages, in view of Clause 3.8 of Ex.A.1. As regards the forfeiture of the EMD and FSD, the learned Government Pleader submitted that the respondents have terminated the contract and forfeited the EMD and FSD and that as the appellants have failed to question the said termination, they are not entitled to claim the recovery of the EMD and FSD.

8. We have carefully considered the respective submissions made by the learned counsel for the parties with reference to the evidence on record. Clauses 3.1 and 3.8 of 'Schedule-E' of Ex.A.1, which are relevant for the present purpose read as under:

“3. PAYMENTS AND CERTIFICATES:

3.1 Payments shall be adjusted for recovery of advance payments liquidated damages in terms of condition 14.8 of tender notice and security for the due fulfilment of the contract, payment will be made to the contractor under the certificate to be issued at

reasonably frequent intervals by the Executive Engineer, within fourteen days of the date of each certificate, and intermediate payment will be made of a sum equal to 92½% (96½% in the case of contractors who have lodged standing security deposit of Rs.3.00 lakhs) of the value of work, as so certified and balance of 7 ½%, (3 ½% upto 50.00 lakhs, 2% from 50.00 lakhs to 1.00 crore and 1 ½ % above 1.00 crore in the case of contractor who have the standing security deposit will be withheld and retained as a security for the due fulfilment of the contract under the certificate to be issued by the Executive Engineer on the completion of the entire works the contractor will receive the final payment of all the moneys due or payable to him under or by virtue of the contract except earnest money deposit retained as security and a sum equal to 2 ½ percent of the total value of the work done, provided there is no recovery from or forfeiture by the contractor to be made under liquidated damages and clause 60 of APSS. The amount withheld from the final bill will be retained under deposit and paid to the contractor together with the earnest money deposit retained as security after a period of twelve months as all defects shall have been made good according to the true intent and meaning thereof.

3.8 INTERST ON MONEY DUE TO THE CONTRACTOR:

No omission by the Executive Engineer or the sub-divisional officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee fund or payments in a arrear, nor upon any

balance which may, on the final settlement of his accounts, the fund to be due to him.”

9. Though Clause 3.1 of Ex.A.1 as reproduced above stipulated payment of the bills to the contractor at reasonable frequent intervals, which were stipulated as fourteen days of the date of each certificate, equal to the percentages mentioned therein, wherever the contractors lodged standing security deposit, consequences thereof for non-payment have not been provided for in the said clause. However, Clause 3.8 of Ex.A.1 protects the State from being exposed to the risk of payment of interest or any other damages in the event of delayed payments. This Clause, therefore, completely bars the contractor from claiming any interest and damages on account of delayed payments. While Section 73 of the Act relied upon by the learned counsel for the appellants enables a party, who suffers breach of contract to claim and receive compensation for any loss, damage caused to him on account of such breach, this provision does not come to the aid of the appellants as Clause 3.8 of Ex.A.1, being part of the contract, protects the State. Clause 3.1 of Ex.A.1 has to be necessarily read in conjunction with Clause 3.8 of Ex.A.1 and not in isolation. If we read both these Clauses in that fashion, non-payment of the bills in time would not amount to breach of contract within the meaning of Section 73 of the Act. In this view of the matter, we do not find any merit in the submission of the learned counsel for the

appellants that due to alleged delay in payment of bills, the appellants are entitled to pay interest or damages for the alleged loss suffered by them. In the light of this finding, it is wholly unnecessary for us to adjudicate whether there was any delay in payments, and if so, whether the appellants have suffered any loss on account of such delays.

10. As regards the submission of the learned counsel for the appellants on claim for refund of the EMD and FSD, admittedly the contract was terminated under Ex.B.9 after the suit was filed. For the reasons best known to the appellants, they have not questioned the said termination either by seeking amendment of the plaint or by filing a fresh suit. Forfeiture of the EMD and FSD was made as a necessary consequence or corollary of termination of contract. Unless the appellants question the said termination and succeed in their challenge, they are not entitled to the relief of refund of the EMD and FSD.

11. For the aforesaid reasons, we do not find any reason to interfere with the judgement and decree dated 21.06.2007 of the lower Court. The Appeal is, accordingly, dismissed, however, without costs.

C.V.NAGARJUNA REDDY, J

D.V.S.S.SOMAYAJULU,J

Date: 17.04.2018

KLP

Note: L.R. copy be marked.

