

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Appeal Suit No.1217 of 1998

Between:

D. Sitharamaiah.

... Appellant/Plaintiff

AND

State of Andhra Pradesh,

Rep. by the District Collector, Guntur

and another.

... Respondents/Defendants

DATE OF JUDGMENT PRONOUNCED: 08.06.2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether His Lordship wish to
see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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! Counsel for Appellant : Sri N.Subba Rao

^ Counsel for Respondents : Government Pleader for Appeals (AP)

< Gist:

> Head Note:

? Cases referred:

1) AIR 1954 SC 44

2) MANU/TN/0864/2018

3) AIR 1928 Sindh 21



HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Appeal Suit No.1217 of 1998

JUDGMENT:

The challenge in this appeal, at the instance of plaintiff, is the judgment dated 08.09.1997 in O.S.No.66 of 1993 on the file of Subordinate Judge, Bapatla partly decreeing the suit for Rs.10,000/- with interest at 12% p.a. against the claim of Rs.3,50,000/-.

2) The parties in the appeal are referred as they were arrayed before the trial Court.

3) The factual matrix of the case is thus:

a) The plaintiff is the contractor of Government works. During 1989-90 the 2nd defendant called tenders for strengthening and black topping of Bapatla—Parchoor road from K.M.10.40 to 15.00 at an estimate of Rs.10,00,000/- vide CR.No.21/89-90. The plaintiff being the highest bidder the work was entrusted to him and plaintiff executed an agreement in favour of 2nd defendant vide CR.No.11/90-91 on 20.04.1990 and site was entrusted to plaintiff on the same date. Plaintiff with a view to commence the work paid advance to a tune of Rs.76,500/- for supply of metal from quarries and for transportation.

b) While so, there was devastating cyclone on 07.05.1990 thereby, the proposed site of suit contract was badly damaged forming breaches and pits at several points. There were rains continuously for sum more days after cyclone. Hence, the plaintiff and officials of the 2nd defendant jointly visited

the site and found the condition of the site not conducive to carry out black topping work proposed in the contract. The officials of 2nd defendant orally instructed the plaintiff not to proceed with the work and submit report about the condition of the site so that they may submit additional estimate and get it sanctioned for doing the work perfectly. Hence plaintiff sent a representation dated 21.06.1990 about the condition of the road and sought instructions for commencing the work. However, the plaintiff never expressed his inability or unwillingness to proceed with the work as per the agreement dated 20.04.1990. On the other hand, he was always ready and willing to carry out his part of the work. Basing on his representation, the 2nd defendant addressed a letter dated 30.08.1990 to the Engineer-in-Chief (R&B) A.P., Hyderabad appraising the bad condition of the road due to cyclone and the need for carrying additional work before commencing the actual work as per the agreement dated 20.04.1990. The 2nd defendant requested the Engineer-in-Chief to include the additional work in the special repair programme for the year 1990-91 and pending instructions he asked the plaintiff not to commence the work till the necessary orders for additional work were received from the Engineer-in-Chief. As there were no instructions from the 2nd defendant for a long time, the plaintiff addressed a letter dated 04.10.1990 to Executive Engineer (R&B) requesting to inform him about the decision taken by the 2nd defendant. However, to the surprise of plaintiff, he received a letter LR.No.WF/CR/11/90-91 AG dated 11.12.1990 from the Executive Engineer terminating the contract and ordering refund of the deposited amount. The said order is contrary to the terms of contract dated 20.04.1990.

The allegation in the said letter that the contract was terminated because of the difficulty expressed by the plaintiff to maintain uniform thickness of the road in question is false. On the other hand, the work could not be commenced because of the instructions of the 2nd defendant and his subordinate officials. Thus, the termination of the contract for no fault of the plaintiff was illegal. The plaintiff addressed several letters to 2nd defendant but no reply was given. The defendants thus committed breach of the contract due to which plaintiff suffered mental agony besides monetary loss. He deposited Rs.10,000/- by way of demand draft on 16.01.1990; he paid advances to a tune of Rs.76,500/- for transportation of metal which he could not recover; further, he suffered a loss of estimated profit of Rs.1,80,800/-. He claimed interest at 24% on the aforesaid three items and claimed total sum of Rs.3,50,000/- and filed the suit after issuing notice under Section 80 CPC.

c) Second defendant filed written statement denying plaint averments contending that the plaintiff executed agreement on 20.04.1990 and site was entrusted immediately to him. Due to cyclone in May, 1990 the way was completely sunken and sand has come out. The plaintiff failed to commence the work for about 8 months even after completing agreement and taking the site. But he has not started the work even to the date of determination of the contract in December, 1990 even though he has taken over the site on 20.04.1990. He stated in his letter dated 21.06.1990 that the road was completely damaged unravelling black top earth and hence metal layer cannot lay uniform thickness. He should have started work of packing the

road surface, spreading metal after bringing the levels of camber. Instead of that he started unnecessary correspondence only to avoid execution by lapsing 8 months time out of agreed period of 9 months for completion of the work. The plaintiff in his letter dated 19.12.1990 requested the Department to reconsider and issue orders for execution of the work within reasonable rates etc. The plaintiff's work was determined in the divisional proceedings dated 17.12.1990 considering the difficulties expressed by him in starting the work by duly refunding the deposits made by him. As such, the plaintiff's loss said to have been sustained by him is not acceptable to the Department.

d) It is further contended that the work originally entrusted to the plaintiff was to black top the road with two layers metalling. However, as per the present condition of the road, it is felt necessary to provide 200 mm thickness of gravel and one layer metalling with 65 mm HBG metal before the work is started. The cost of extra work was estimated at Rs.7,00,000/- which is to be taken separately under special repairs programme. In those circumstances, the position of the road was submitted to 2nd defendant by Executive Engineer (R&B) in his letter dated 18.08.1990 for taking up SR programme as a special case. The 2nd defendant in turn reported to Chief Engineer (R&B) through his report SE Lr.No.4263/J2/76 dated 30.08.1990. The Chief Engineer (R&B) in his Memo No.99163/TA2/W1(1)/76 dated 12.10.1990 had directed the 2nd defendant to close the contract and submit the estimate for scrutiny of CBR files. Accordingly, the 2nd defendant instructed vide Memo No.4263/J2/76 dated 25.10.1990 to close the contract of the above work and submit the detailed estimate with CBR values. In view of said

instructions, the contract was closed duly intimating the plaintiff. The 2nd defendant contended that as per Clause 59 of P.S. to APDSS, no claims for compensation can be entertained due to hindrance of work for whatsoever reasons. The defendant thus prayed to dismiss the suit.

e) The following issues were framed by trial Court.

1. Whether the plaintiff is entitled to the suit amount?

2. To what relief?

f) During trial, PWs.1 to 8 were examined and Exs.A1 to A10 were marked on behalf of plaintiff. DW1 was examined and Ex.B1 and B2 were marked on behalf of defendants.

g) As can be seen from the impugned judgment, the trial Court having considered the evidence on record opined that after the work was entrusted to plaintiff on 20.04.1990 there was heavy cyclone on 07.05.1990 which damaged the road and therefore, the work could not be executed by the plaintiff as per the agreement dated 20.04.1990 and the damage to the road was caused due to act of God and therefore, defendants were not liable to pay any damages and hence the question of ascertaining the quantum of damages as deposed by PWs.2 to 8 does not arise. Ultimately the trial Court held the deposit amount of Rs.10,000/- made by the plaintiff alone can be ordered to be refunded and accordingly decreed the suit for the said amount of Rs.10,000/- with interest @ 12% p.a. while dismissing the other claims.

Hence, the appeal.

4) Heard arguments of Sri N.Subba Rao, learned counsel for appellant and learned Government Pleader for Appeals (AP).

5) Severely castigating the judgment of the trial Court, learned counsel for appellant would argue that the work was entrusted to plaintiff on 20.04.1990 and the cyclone that lashed out Andhra Pradesh has damaged the contract road on 07.05.1990 and therefore, the plaintiff, though made arrangements to transport bitumen could not commence the work but, however, the plaintiff was always ready and willing to perform his part of contract and there were no laches on his part. He did not commence the work after cyclone only on the oral instructions of 2nd defendant and his subordinate officials and, therefore, no fault can be attributed to him. Learned counsel further argued, in the absence of pleadings and proof on the part of defendants that plaintiff committed breach of contract or that contract was impossible for performance by act of God, termination of the contract by unilateral decision of the 2nd defendant is quite illegal and therefore, trial Court ought to have considered efforts already put in by plaintiff and mental agony and monetary loss sustained by him, decreed the suit as prayed for. Learned counsel further argued that if, as per defendants, the damaged road required full-fledged repairs and relaying at an additional cost of Rs.7,00,000/-, they should have entrusted that work also to the plaintiff or defendants ought to have completed the additional work by themselves and ought to have entrusted the contract work to the plaintiff to enable him to perform the contract. Therefore, the defendants are liable to pay compensation to the plaintiff. He thus prayed to allow the appeal.

6) Per contra, learned Government Pleader argued that though the work of black topping of Bapatla—Parachoor was entrusted to plaintiff on 20.04.1990 and site was also entrusted to him on the same day with an understanding that the work should be completed within 9 months, plaintiff did not commence the work till 07.05.1990 and thereafter the cyclone intervened and damaged the road and made it impossible to execute the original contract but plaintiff thereafter also did not make any efforts except whiling away time by making some correspondence. The 2nd defendant sent a letter to Engineer-in-Chief (R&B) informing that the road needs special repairs at an estimated cost of Rs.7,00,000/- before proceeding with original work. However, the Engineer-in-Chief instructed the 2nd defendant to terminate the contract and submit revised estimates for full-fledged repairs and in those circumstances the contract was terminated in December, 1990 ordering return of deposit made by plaintiff. Learned Government Pleader vehemently argued that in the entire process there was no fault of defendants in cancellation of contract and it was only due to Vis Major. Therefore, the plaintiff cannot claim compensation. The trial Court rightly dismissed the suit. He thus prayed to dismiss the appeal.

7) In the light of above rival arguments, the points for determination in this appeal are:

- 1) *Whether the contract dated 20.04.1990 between the parties was frustrated due to Vis Major?*
- 2) *If point No.1 is held in affirmative, whether defendants are liable to pay compensation to plaintiff for cancelling the contract though because of Vis Major?*

8a) **POINT No.1**: In the pleadings, the plaintiff narrated that he executed an agreement on 20.04.1990 and site was also entrusted to him on the same day. Thereafter, on 07.05.1990 there was a devastating cyclone due to which the proposed site was badly damaged by forming breaches and pits at several points. There were rains continuously for some more days and therefore, the plaintiff and officials of 2nd defendant jointly visited the proposed site and found the condition of the road was not conducive to carry out the contract work as per the terms of the contract by the plaintiff. On their instructions he also submitted Ex.A6—letter to that effect. In his evidence also PW1 stated that just before transporting the material there was cyclone on 07.05.1990 and due to it the subject road was damaged to a large extent and base for laying road was damaged heavily. He took Deputy Executive Engineer, Bapatla to the work spot and shown the damage caused by the cyclone. The DEE asked him to stop the road work as no road can be laid as the base was damaged. The 2nd defendant addressed a letter to Engineer-in-Chief to include the said work in the repair programme for the year 1990-91. The 2nd defendant and his subordinates asked him not to commence the work till the instructions are received from the Engineer-in-Chief. Ultimately the Chief Engineer wrote a letter to 2nd defendant on 16.10.1990 to close the contract vide Ex.B2. Thus, according to plaintiff, the contract work could not be commenced due to devastating cyclone occurred on 07.05.1990.

b) Coming to defendants, in para-4 of the written statement it is pleaded that Deputy Executive Engineer (R&B) has submitted a detailed report that 150 mm thick sand cushion and 150 mm thick compacted gravel base was

provided in that reach during 1980-81; first layer of metal was laid during 1982-83; since 1983-87 no renewals were provided and during usage road was sunken and base was completely damaged and due to recent cyclone in May, 1990 the carriage way was completely sunken and sand has come out. In Ex.B1, the 2nd defendant informed the Engineer-in-Chief that due to recent cyclone and subsequent continuous rains, the carriage way was completely sunken and sand has come out and traffic was experiencing much difficulty to pass on the way due to bad condition. He further stated that black topping with two layers of metalling entrusted to the plaintiff was yet to be commenced and as can be seen from the present condition of the road, it is better to provide 200 mm thick compacted gravel base and one layer of metalling with 65 mm HBG metal before the work is started as otherwise black topping may not stand. The approximate cost of gravel base and one layer of metalling comes to Rs.1,50,000/- per one KM and total cost comes to Rs.7,00,000/-.

c) In his deposition DW1 stated that there was a cyclone on 07.05.1990, due to which the surface of the road was damaged to some extent. The departmental people have opined that further layer of crust at an estimate of Rs.7,00,000/- was required as per the technical standards. He of course stated that the plaintiff could procure metal and proceed with the work and at the time of spreading material the department could consider whether the road condition was suitable or not for executing the work.

9) Thus, as can be seen, as per the plaintiff, the work could not be executed because of the untimely devastating cyclone due to which subject road was badly damaged. On the other hand, the defendants in the written statement though not mentioned in same fashion with strong words, still they admitted that the cyclone dated 07.05.1990 damaged the road. Of course, defendants pleaded as if plaintiff could have made efforts to proceed with the work after cyclone. However, such a plea cannot be accepted in view of Ex.B1—letter in which the 2nd defendant himself stated that due to cyclone and subsequent rains carriage way was completely sunken and sand has come out and traffic was experiencing much difficulty to pass on the road due to its bad condition. In view of such bad condition, probably the Superintending Engineer (2nd defendant) stated in Ex.B1 that before the work entrusted to plaintiff was taken up, it was better to provide 200 mm thick compacted gravel base and one layer of metal work with 65 mm HBG at an estimate cost of Rs.7,00,000/- and requested for permission to undertake the additional work as special repairs programme. In Ex.B2 the Engineer-in-Chief while criticizing the 2nd defendant and his subordinate officers for entrusting the work without proper inspection, directed the 2nd defendant to close the contract and submit the estimate for scrutiny with the CBR values. So, at the outset, it can be stated that 2nd defendant also ultimately came to the conclusion that the contract work entrusted to the plaintiff could not be executed because of the devastating cyclone occurred on 07.05.1990.

10) It is to be noted that as per the correspondence among defendants, the original work cannot be commenced as planned without first undertaking

special repairs to the road because the base of the road was totally damaged and therefore, the work entrusted to the plaintiff cannot be undertaken without first completing special repairs. Having regard to this factual position emanated from the pleadings and evidence, there is no demur that the contract was frustrated due to Vis Major.

11) Section 56 of the Indian Contract Act, 1872 deals with the Doctrine of Frustration. It reads thus:

“56. Agreement to do impossible act—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

The first paragraph of Section 56 provides that an agreement to do an act impossible in itself is void. The 2nd paragraph provides a contract to do an act become unenforceable (a) if the contract is impossible or (b) for reasons of some events which the promisor could not prevent. It also provides it becomes unenforceable when the act becomes impossible or unlawful. The third paragraph places a liability on the promisor to

compensate the promisee where the promisor knew, or with reasonable diligence might have known, and the promisee did not know that act of promise was impossible or unlawful.

12) The Apex Court in ***Satyabrata Ghose vs. Mugneeram Bangur and Company***¹ observed as follows:

“Para-9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

13) The Doctrine of Frustration was well delineated in a recent decision of High Court of Madras in ***Puravankara Projects Limited vs. Galaxy Properties Private Limited***² as under:

“Para-60: The doctrine of frustration is really an aspect or law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and comes within the purview

¹ AIR 1954 SC 44

² MANU/TN/0864/2018

of Section 56 of Indian Contract Act. It would be incorrect to say that Section 56 applies only to cases of physical impossibility. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The doctrine of frustration of the contract is applied on the subsequent impossibility of the agreement when it is found that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, court can pronounce the contract to be frustrated. For that purpose Court has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are only evidences. On the evidence Court has to conclude whether the changed circumstances destroyed altogether the basis of the object. When there is frustration, the dissolution of the contract occurs automatically. It does not depend on the ground of repudiation or breach or on the choice or election of either of the parties. It depends on the effect of what has actually happened on the possibility of performing the contract.

Para-61: *The doctrine of frustration comes into play when a contract becomes impossible of performance after it is made on account of circumstances beyond the control of the parties. It is a special case of discharge of the contract. In the event of frustration of contract, the contract comes to an end and future performance is excused on both sides. To attract Section 56 of the Indian Contract Act, the following conditions must be fulfilled. (1) There should be a valid and subsisting contract between the promisor and promisee. (2) there must be some part of the contract yet to be performed (3) the contract after it is entered, becomes impossible to be performed. (4) the impossibility is by reason of some event which the promisor could not prevent (5) the impossibility is not induced by the promisor or due to his negligence.”*

14) Applying the above precedential jurisprudence, it is clear in the instant case neither party had foreseen the impending devastating cyclone when they entered into contract. Further, the aftermath of cyclone was such that the original contract could not be fulfilled in its original form without undertaking the special repairs. Thus, as already discussed supra, the contract can be said to be frustrated within the meaning of Section 56 of Indian Contract Act.

This point is answered accordingly.

15) **POINT No.2:** What remains for determination is whether the defendants are liable to pay compensation to plaintiff for rescinding the contract vide Ex.B2. The vehement contention of the plaintiff is that he advanced monies for procuring material which he cannot get back and further, he suffered loss of estimated profit on execution of contract and therefore, he deserves compensation. It is to be noted that he will deserve if either the agreement takes care of the present situation or his case falls within the ambit of paragraph-3 of Section 56. Coming to Ex.A1, in spite of intensive study, I find no clause in the agreement speaking about the payment of compensation when either party fails to perform the contract on account of Vis Major or due to other reason. The contract is silent and therefore, we have to rest upon Section 56 of Contract Act. The third paragraph of Section 56 ordains, a promisor to pay the compensation to the promisee only in the circumstances when the promisor knows and promisee did not know that the performance of contract is impossible or unlawful. In such an instance the promisor must pay

compensation to promisee for any loss sustained by him due to non-performance.

16) In Firm of ***Hussainbhoy Karimji vs. Haridas and others***³ it was held thus:

“Para-23:.... The question whether compensation is payable or not depends not merely on (i) whether it can in an abstract manner be said that the act agreed to be done is impossible (in itself) or unlawful, but upon (ii) the knowledge as to the act being impossible or unlawful, as well as the promisor using reasonable diligence in obtaining that knowledge; but this knowledge or absence of diligence must be coupled with (iii), the want of knowledge on the part of the promisee; and finally it depends also upon (iv), whether the promisor could have prevented that event which renders the act unlawful; in particular if the promisor knew, or with reasonable diligence might have known and the promisee did not know, that the act promised to be done was (or seem to become) impossible or unlawful, compensation must be made.

The real question that must be considered, when it has to be determined whether S.56 is applicable or not in any suit, except where the contract is sought to be specifically enforced, is not whether the contract was or became void, but whether the promisor has to make compensation for non-performance.

Anticipating the result of what I am about to say, I might add a fourth conclusion: that the substance of S. 56 (viz., the payment of compensation being excused) can only apply when there is no contract to the contrary, and that this is but stating in other words that S. 56 must be read (when possible) as an implied term in contracts.”

³ AIR 1928 Sindh 21

17) In the instant case, since the contract was frustrated because of cyclone i.e. Vis Major and neither party can be attributed with the pre-knowledge of the said event, the defendants cannot be mulcted with compensation on the ground that the plaintiff incurred some expenditure and suffered damage. The law does not permit awarding compensation in such instance. So, on a conspectus of facts and evidence, I find no illegality or perversity in the judgment of the trial Court.

18) In the result, the appeal is dismissed by confirming the judgment of the trial Court in O.S.No.66 of 1993. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 08.06.2018
Murthy

U. DURGA PRASAD RAO, J

