

(2003) 06 KAR CK 0008

In the Karnataka High Court

Case No : Regular First Appeal No. 593 of 2000 to 600 of 2000

Karnataka Neeravari Nigam Ltd.

APPELLANT

Vs

Sri Ramachandra Narayan Nayak and Others

RESPONDENT

Date of Decision : 12-06-2003

Acts Referred:

Citation : (2003) 06 KAR CK 0008

Hon'ble Judges : S.B. Majage, J;G.C. Bharuka, J

Bench : Division Bench

Advocate : V.N. Satyanarayan, for the Appellant; S.K. Sailesh, for R-1 and Sri M.R. Vijaya Kumar, HCGP for R-2 to 5, for the Respondent

Final Decision : Allowed

Judgement

1. These appeals arise out of a common judgment and decree dated 30.11.1999 passed in O.S. Nos. 35/97 to 42/97 on the file of the Court of Civil Judge (Sr. Dn.) Gadag, after all the said 8 suits having same set of facts involving same issues, were clubbed, tried and decided together by the trial court on common evidence recorded in O.S. No. 35/1997 So, for the sake of convenience and as same points are involved, they are taken together for consideration. The appellant, claiming that it has taken over the assets and liabilities of the Irrigation Department in the Government, filed these appeals impleading plaintiff and defendants as Respondents.

2. However, for the sake of convenience, the parties are referred hereinafter as plaintiff and defendants, as shown in the impugned judgment and decree.

3. Though the work in each suit related to different work of canal shown therein with different amount, in brief, the case of plaintiff in all the 8 suits was that, under tender contract, after executing necessary agreement, he had taken balance work of construction of that canal (which had been abandoned in the middle by other agency) relating to irrigation project in Dharwad District and accordingly, carried out the work of excavating the canal, putting up the

embankment, morum lining/casing but, inspite of repeated request made for supply of cement and other articles, Defendant No. 4 (Executive Engineer), who was to supply cement and RCC templates and concrete for putting them to the bed of canal and for other use, was unable to supply cement and not even informed about its non-availability nor authorised to purchase cement in open market and complete the work, even though it was obligatory on the part of the Defendant No. 4. So, he wrote a letter to the Defendant No. 4 informing non-supply of cement and cement materials and withdrawal of men and machineries from the spot with a request to the Defendant No. 4 to withdraw such of the items of work involving cement and cement materials from the tender agreement and to conclude the agreement without resorting to the penal clause as he was not at fault for the non-completion of the tender work and also requested to make payment of the final bill for the work executed by him. In spite of that besides request made again and again, Defendant No. 4 failed to do so. However, after a meeting held on 23/3/1992, he was requested to continue the contract at the old rates, but he did not agree. When things stood so, without any fault of his own and without any authority, putting blame on him that he had not collected metal, sand, etc, and not dressed the canal side (which were not relevant for supply of cement), the defendant No. 4 who, himself was at fault for non-supply of cement and other material, without finalising the bills and making payment, informed him that contract agreement with him has been rescinded and balance work would be carried out at his risk and cost and as per tender, maximum penalty of 7 1/2% of total cost of the work would be levied. So, he is entitled to recover the cost of the works executed by him along with security deposit, earnest money and other deposits. Accordingly, sought a declaration that the order rescinding the contract is illegal and not binding on him and a decree of permanent injunction restraining the defendants from forfeiting or adjusting the earnest money and security and other deposits in the construction of canal and also to restrain defendants from recovering the alleged risk cost and direct to settle his final bills and pay earnest money, security deposit with future interest on withheld amount, damages etc.

4. Defendants-1 to 3 adopted the written statement of defendant No. 4, who contested the said claim of the plaintiff. According to defendant No. 4, plaintiff has done some work and defendant/Department was to supply cement after the raw material, i.e. metal, sand etc, required were collected for bed concrete and slab lining but, as canal was not trimmed and dressed to the required section, the Defendant No. 4 was not bound to supply cement and in fact, the plaintiff was even requested to make his own arrangement for securing cement in the open market as per para 7 of Schedule-A of the agreement. However, without following the terms and conditions of the contract, with a bad motive, the plaintiff purposely stopped the work and abandoned it in the middle, knowing fully well that the balance work will be completed at his cost as per tender clauses and requested to close the work without any penalty against the contract agreement. Not only that, the plaintiff, who was at fault, did not resume the work

when requested for that and as such, considering the facts and circumstances of the case, defendant No. 4 was directed to take action as per tender conditions of contract work and accordingly, contract was rescinded and informed the action taken with maximum penalty imposed. Thus, denying the allegations made by the plaintiff, requested to dismiss the suit on facts and also on the ground of limitation besides as premature, etc.

5. The plaintiff examined himself and got marked 73 documents whereas, the defendants examined 8 witnesses and got marked 136 documents. After hearing argument, the learned Trial Judge decided following issues Nos. 1 to 5 in affirmative, issue Nos. 6 to 8 in negative and issue No. 9 in affirmative but in part and accordingly, decreed the suits of plaintiff.

1. Whether the plaintiff proves that defendant No. 4 did not supply cement and cement articles for completion of the work though requested by him on several occasions?

2. Whether he farther proves that due to the non-supply of those articles, the further progress of the work could not be carried put?

3. Whether he further proves that he is not at fault for non-completion of the work and is therefore, non-labile to pay any risk and costs amounts?

4. Whether the plaintiff proves that the recession of the contract by deft No. 4 is illegal as contended?

5. Whether he further proves that he is entitled to recover costs of the work already carried out by him without any deduction along with the security and other deposits along with the bank guarantees?

6. Whether deft No. 4 proves that he intimated the plaintiff on 11.10.1990 to procure cement from the open market as he had no stock of cement and cement articles?

7. Whether the defendant No. 4 further proved that the suit is premature as contended in para 3(a) of the written statement?

8. Whether suit is barred by time?

9. Is plaintiff entitled to the reliefs sought for?

6. It is against the said judgment and decree, the appellant, with permission to prosecute the matter, has filed this appeals on the grounds: that the plaintiff was required to give construction programme as per the agreement but failed to give the same inspite of requests and reminders; that he did not follow the procedure required to be followed for procuring cement and other material to be supplied by the Department, that too, to the extent of requirement and not for the entire work; that he requested for cement without attending other works required to be attended for the purpose of securing cement; that he had failed to make any arrangement for storing cement in good condition as required under Schedule-A

before he requested for the supply of cement; that he could have continued and completed the works as per the agreement but failed to do so; that just to have a ground to see that the works are not attended, he requested for supply of cement and cement material at the time though he had not done the required works for their supply by the Department and deliberately abandoned the work in the middle violating the terms and conditions of the agreement entered into by him with the Department and as such, the Department was right in forfeiting the security deposit amount and imposing penalty for the works left by him in the middle; that the trial court failed to consider evidence available in favour of the defendants and mechanically accepted the case of plaintiff without appreciating the evidence on record properly; that the findings arrived at by the trial court on the issues framed by it are not proper and consequently, the judgment and decree cannot be sustained and as such, requested to set aside the same and dismiss the suits.

7. We have heard the learned counsel for the parties and perused the records carefully

8. The points, which arise for consideration, are:-

1. Whether the inaction or failure on the part of the Department in supplying cement and cement material requested by plaintiff was in violation of the terms and conditions of tender agreement?

2. Whether on account of such inaction or failure to supply cement and cement material, the plaintiff could stop/abandon the tender work in the middle?

3. Whether recession of the tender contract by defendant No. 4 was against the terms and conditions of tender agreement or illegal?

4. Whether the action taken by the Department through Defendant No. 4 in imposing penalty, forfeiture, etc. when inspite of opportunity given to the plaintiff to resume the work (stopped in the middle), was proper or, in accordance with the terms and conditions of the tender agreement?

5. Whether findings recorded by the trial court on issues framed by it are proper and correct?

6. Whether interference by this court is required?

9. POINT NOS. 1 & 2: These points are inter-linked with each other So, to avoid repetition of discussion of evidence and also for the sake of convenience, they are taken together for consideration.

10. The admitted facts are The plaintiff took execution of balance work of construction of 8 canal works under 8 different but identical tender agreement made between him and defendant No. 4 in respect of each canal work relating to KM Nos. 1 to 6 of Alur Combined Branch Canal and KM Nos. 97 and 102 of Malaprabha Right Bank Canal Accordingly, work orders were issued in his favour, he took possession of the sites though, of course, belatedly, and he did some

works satisfactorily and was to do canal trimming and dressing work besides concrete work. It was at that stage, for the first time, he made correspondence by letters dated 25.5.1990 with the authorities requesting supply of cement within a week stating that he requires cement quantity, as mentioned in those letters, to do further work and if the same cannot be/is not supplied, he will remove his establishment from the site to avoid unnecessary loss and expenditure. For that, there was no response or reply from defendant No. 4. So, by subsequent letters, the plaintiff informed defendant No. 4 that since cement requested to be supplied to him was not supplied, as intimated in his earlier letters dated 25.5.1990, he has removed his establishment from the site, and requested to close the contract. Thereafter, there was various correspondence between the plaintiff, defendant No. 4 and others, in which the plaintiff asserted that that work had to be stopped and his establishment had to be removed on account of non-supply of cement whereas, the defendant No. 4 asserted that it was plaintiff, who had not stored metal and sand at the site and, also did not do the trimming and dressing work of the canal so as to supply cement for the concrete work and also not furnished construction programme and not followed terms and conditions of contract, etc, and as such, fault lies with him in the matter. There was inspection by the Superintendent Engineer and meeting by the Chief Engineer as well in the matter. Thereafter, plaintiff was asked to give his clear consent as to whether he is continuing the work or not. Admittedly, this was in the year 1992 whereas, the term stipulated in the tender agreement for completion of the works was over in the year 1991 itself. So, the plaintiff replied that, at that stage, when he had removed his establishment and when the period stipulated in the tender agreement is already over, there is no question of resuming the work and requested to final the work and make payment without imposing penalty, etc. However, the matter was examined by the Department and ultimately, it was decided that the contract given to the plaintiff be rescinded as per tender agreement and accordingly, as provided in the tender agreement imposed penalty, etc, rescinded the tender agreement in the year 1994. Against the said action taken by the Department, the plaintiff gone for arbitration, but later withdrawn the same and thereafter, filed writ petition in this court wherein he was directed to approach the civil court and consequently, approached the civil court by way of filing 8 different suits relating to each canal work. The said suits came to be decreed in his favour by the trial court and thus, aggrieved by those judgments and decrees, these appeals came to be filed.

11. The plaintiff examined himself as PW-1 without examining any witness. For the defendants, DW-1 C Gopinath, Executive Engineer from 9.9.1996 for MRBC Division No. 5, DW-2 Nagappa Fakirappa Shiraguppi, who was the earlier Executive Engineer from 1987 to 1990, DW-3 Shivapadayya Inamdar, Asst. Engineer from November 1988 to November 1990 with regard to canal work of KM No. 6, DW-4 Jagadishwarappa Andappa Gadagi, who was Asst. Executive Engineer from 1987 to 1991 with regard to work relating to KM No. 1, DW-5 Rustamalikhan Fakruddin Karimkhanavar, Assistant Executive Engineer from

1987 to 1992, DW-6 Virabhadrapa Shivapujappa Nayak, who was Asst. Engineer from 1986 to 1989, DW-7 Laxman Baskararo Kulkarni, Junior Engineer from 1987 to 1992 and DW-8 B. Gangireddi Venkareddi, who was Executive Engineer from the year 1987 to 1991, have been examined Here itself it may be noted that DWs-3 to 6 have been examined for the canal work relating to KM No. 6, 1, 3 and 97 respectively whereas, DW-7 was examined with reference to canal work relating to KM Nos. 5 and 102 DW-8, who was Executive Engineer, has been examined for all 8 canal works, as he was the concerned Executive Engineer for all the canal works in question during the period from 1987 to 1991 So also, both sides got marked number of documents, including correspondence between them However, what is important to note is that most of the facts deposed by witnesses are either covered by exhibited documents and/or not in dispute between the parties So, it is not necessary to consider each document filed by plaintiff or defendants as it will be sufficient if referred wherever it is necessary So also, evidence of each witness separately in view of the fact that most of the facts deposed by them are either covered by exhibited documents and/or not disputed by the other side and the entire controversy between the parties centers around the points under consideration only.

12. The entire case of plaintiff is based on his allegation that on account of failure of the Department to supply cement and cement material required for the construction of the canal works, he had to abandon the works and for that, he was not at all in fault in any manner and consequently, the defendant-Department was not justified in rescinding the; contract, imposing penalty, etc, challenged by him in the suits.

13. At this stage, it may be noted that the tender contracts between the plaintiff and Irrigation Department were governed by the agreement executed with regard to tender works taken by the plaintiff Hence, said agreement, which is not at all in dispute between the parties, form sheet anchor for the claim by or against the plaintiff and the defendant-Department So, let us see, at first instance, the tender agreement regarding supply of cement and other material by the Department.

14. In the tender agreement, firstly, reference can be had to the following clauses found at page 45 As per Clause 11, the contractor shall be supplied with such materials as may be required from time to time to be used by him for the purpose of contract only Similarly, according to clause 11(A)(i), the contractor shall see that only the required quantities of materials are indented As per condition No. 206 found at page 86, materials were to be supplied to the contractor on presentation of indents signed by him or his authorised representative and counter-signed by the Department Officers immediately incharge of works.

15. Said clauses and conditions found in the agreement make it clear that the contractor (plaintiff) was to be supplied with materials as required by him from time to time on presentation of indents signed by him or his authorised

representative and counter-signed by Department Officers.

16. However, neither it is the case of plaintiff nor it is in his evidence (both oral and documentary) that at any time he had presented any indent signed by him or his authorised representative for supply of cement and/or other material required by him in the execution of work undertaken by him. On the other hand, the statement of DW-8, the then Executive Engineer namely, Gangareddy that plaintiff had not given any indent for supply of cement and indent was to be submitted to the Junior Engineer, who was to send it to the Asst. Executive Engineer, who was to recommend the same and send it to Divisional Office for supply of the same, has remained unchallenged by the plaintiff. Above all, there is no indent placed before the court by the plaintiff to show that at any time he had presented any indent for supply of cement and/or cement material.

17. Of course, by the letters dated 25.5.1990, he requested defendant No. 4 (Executive Engineer) for the supply of cement to the extent of quantity shown therein within a week and if it is not possible, then, to finalise the bill. These letters are at Exs. P31, 37, 45, 59, 65, 70, which are equivalent to Exs. D28, 44, 62, 76, 102, 116 and 132 respectively. In fact, after taking possession of the site of the works, for the first time, the plaintiff wrote letters as per said exhibits in connection with request made by him for supply of cement and hence, the said letters are important. However, in the said letters also, nowhere it is mentioned that any indent had been prepared or presented by him or his authorised representative in connection with request relating to supply of cement and/or other material. Thus, there was non-compliance of condition No. 206 of the agreement referred to above. It is not the case of the plaintiff that in the tender contracts in question, he was supplied with cement without any indent made by him and as such, said clause had no significance.

18. That apart, as per condition No. 205 at page 86 of agreement, the plaintiff was required to maintain at all times proper records showing the basis of indents. When the plaintiff had not prepared nor presented any indent or indents at any time either for the supply of cement or any other material, it is futile to expect that he had maintained any record much less proper record showing basis of indents.

19. Not only that, the request made by plaintiff in the letters for supply of cement of the quantity shows that he had requested supply of cement agreed to by the Department for the completion of the entire work and not as per "construction programme". It is not that the Department had agreed to supply cement and/or other material to the plaintiff at a time. On the other hand, clauses 11 and 11(A)(i) referred to already, show that the plaintiff was to be supplied with such materials as may be required from time to time to be used by him for the purpose of contract work only and he was required to see that only the required quantities of materials are indented and not more than that.

20. In spite of the said specific conditions and clauses found in agreement, the

plaintiff requested the Department to supply cement in entirety that too, within a week. Thus, neither there was any indent nor the demand was as per the requirement from time to time for making use of the same in the contract works. So, the said conditions and clauses were violated by the plaintiff.

21. Now reference can also be had to the fact that the Department had asked the plaintiff to furnish "construction programme" contemplated in general condition No. 110 as is clear from its letters dated 26.6.1990 and 28.6.1990 at Exs. D19, 35, 50, 66, 91 and letter dated 30.6.1990 at Ex. D107. Even DW-8 Gangareddy has stated that as per tender agreement, contractor should have submitted construction programme, but plaintiff had not given it. This statement has remained unchallenged by the plaintiff. Even otherwise also, admittedly, construction programme was not at all submitted by the plaintiff either in the beginning or during the progress of the work or even after specific request was made by the Department in its letters.

22. As per clause Nos. 110 of General Conditions and Specifications at page 84 of the agreement, the contractor should prepare a detailed "construction programme" for the contract period for construction of work and get it approved from the competent authority. Vide construction programme attached. Construction programme attached to the agreement finds place at page 179. According to it, as per clause No. 110 under the heading "general conditions", a detailed construction programme for the contract period of 15 months has to be prepared and got approved before commencement of the work. However, the construction programme should be chalked out so as to fit in the targeted figures assessed below:-

23. In the said tender contract works, why construction programme was not furnished by the plaintiff at any time is not found on record. Simply because the Department asked construction programme in its letters subsequent to the letter of plaintiff, that cannot be an excuse for the plaintiff, not to submit construction programme because the construction work undertaken by him was to be done as per construction programme to be furnished by him under general conditions and specifications referred to above. However, for the reasons best known to the plaintiff, he had not submitted any construction programme at any stage of the canal work undertaken by him much less before he commenced the work, though it was mandatory on his part to submit such construction programme. Thus, the plaintiff failed to comply with the said condition relating to construction programme.

24. Now let us see whether the plaintiff could rely on the non-supply of cement and/or cement material to him, on which basis he had abandoned the contract works.

25. It is true, as per Schedule "A" at page 65 of the agreement, the Department had agreed to supply cement and other material shown therein. Though, as per Rule 7 of Schedule "A" at page 67 of the agreement, the materials mentioned in

Schedule "A" were to be supplied by the Department, if for any reason the Department was unable to supply or if there is any delay in supply, it was open to the contractor (plaintiff) to make his own arrangement and in such an event, the contractor should take specific approval in writing from the Executive Engineer.

26. Not only that, clause 44(B) of the agreement at page 58 reads as under:-

Clause 44(B): As there may be difficulty in obtaining certain materials in the open market with a view to facilitate the contractor the Government will supply the materials specified in Schedule "A" of tender form at the rate stated therein required by the contractor. As the supply of such materials may take time the contractor is therefore required to keep himself in touch with day to day position regarding supply of such materials from the Engineer in charge and so adjust the progress of work accordingly. It should be clearly understood that the Government shall not be in any way liable on account of any delay in supply of such materials by the Government

(underline supplied)

27. It is true that as per the demand made by the plaintiff in his letters dated 25.5.1990 and subsequent letters also, the Department did not supply cement and cement material though, of course, after letters dated 25.5.1990, 8.6.90, 9.6.90, 10.6.90, 11.6.90, 23.6.90, 24.6.90 and 25.6.90, the defendant No. 4(EE) wrote letters dated 26.6.90 or 28.6.90 at Exs. D19, 35, 50, 66 and 91 and letter dated 30.6.90 at Ex. D107 to the plaintiff stating that payment of bill is being made (or made) and requested to give construction programme as contemplated in general condition No. 110 to procure cement and question of concluding contract does not arise and accordingly, requested to bear with the Department.

28. However, by the time said letters were written to the plaintiff by defendant No. 4 under letters dated 8.6.1990, 9.6.90, 10.6.90, 11.6.90 at Exs. P32, 38, 46, 52 and 60 and letters dated 23.6.90, 24.6.90 and 25.6.90 at Exs. D30, 46, 60, 78, 104, 132, the plaintiff had already abandoned his organisation from the site and informed the same to the Department. It is not that after such alleged abandonment of his organisation from the site as informed by him in his letters referred to above, at any time subsequent thereto, he had again started work or brought back his organisation to the site to execute any work at the site either on the request made by the Department or on his own. On the other hand, the plaintiff solely relied on the fact that in spite of his letters, the Department did not supply cement and other material and as such, he was justified and right in abandoning his establishment/organisation from the site, as is clear from his letters available on record.

29. In fact, when Rule 7 of schedule "A" and clause 44(B) referred to above are seen, the plaintiff could not have relied solely on the ground of non-supply of cement and cement material to him in spite of his request made. This is because as per said Rule 7, if there was any delay in the supply or the Department was

unable to supply, it was open to the plaintiff to make his own arrangement with specific approval from the EE. However, no letter available on record shows that the plaintiff had made such a request at any time seeking specific approval in writing for making his own arrangement to secure cement and cement material to execute the works if he had made any such request, seeking specific approval or permission from the Department and Department had not considered, the matter would have been different, but not now. Said Rule 7 and clause No. 44(B) are crystal clear that the Government shall not be in any way liable on account of delay in supply of such material. When this is so, the plaintiff could not have fallen back only on non-supply of cement by the Department when he had not made any request to the Department seeking permission to make his own arrangement in case the Department was not able to supply cement and cement material requested by him.

30. In fact, DW-3 has stated specifically that the plaintiff did not take permission. So also, as per DWs-3 and 4, the plaintiff did not ask permission, though could have done as per tender agreement. Since it is not the case or evidence of the plaintiff that he had sought permission from the Department at any time, it is not necessary to go in detail into said aspect of the matter and suffice it to note that the plaintiff did not request for any such permission or approval from the Department to make his own arrangement in case the Department fails to supply cement and/or other material requested by him within time given by him.

31. The discussion made above makes it clear that the plaintiff neither indented nor sought permission to purchase cement and other material in case of delay or failure to supply the same within the time given him. On the other hand, the request in the form of letters was for supply of entire quantity of cement shown in the schedule "A" and not to the extent of the requirement of the work, which was to be attended by him at that stage if the construction programme referred to already is kept in mind, it cannot be said that quantity of entire cement agreed to be supplied by the Department to the plaintiff was required to be supplied by the Department when the plaintiff requested for it. In fact, as per DW-2, cement could not have been supplied at once and, as per working programme, supply of 400 to 500 bags at a time could be done though, of course, as per DWs-2 and 3, for each KM work, more than 2000 bags of cement were required. When this is so, why and how the plaintiff requested for supply of the entire quantity of cement, that too, without submitting any indent nor showing the basis for such requirement, though he was required to specify those things also whenever requested for supply of cement and/or other material, is not available on record.

32. It is true that according to DWs-2, 3, 4, 5, and 8, cement is necessary for bed concrete and trimming work. Still, it was necessary for the plaintiff to show the quantity required was for bed concrete and trimming work only and not the entire quantity of cement. It is not the case of plaintiff that he had done dressing and trimming works. On the other hand, it is stated by DW-8 that the plaintiff did

not do canal dressing and trimming work So also, DWS-2, 3 and 5 have stated that the plaintiff did not do canal dressing and trimming work, which was to be done before doing a concrete work in fact, DWS-2 and 3 have also specifically stated that trimming work was not done by the plaintiff So also, according to DW-4, bed concrete and trimming work were not done by plaintiff.

33. It has come in evidence of DWs-2, 3, 4, 5, 7 and 8 that the plaintiff had done canal work, canal bund, muroom lining and embankment work satisfactorily However, gradation test required to be made, as stated by DW-8, cannot be made without cement according to DWS-2, 3, and 4 So also, cement was necessary for bed concrete and trimming work as stated by DWs-2, 3, 4, 5 and 8 So, certain quantity of cement only was required by the plaintiff at the stage when he requested for supply of cement from the Department, but the request made by him was to supply entire quantity of cement and not to the extent of said works only, which were to be attended at that stage of request made.

34. It is also to be noted that the plaintiff had not made any provision for stocking cement at the work site in fact, it is stated by DWs-2, 3, 4 and 7 that there was no godown of the plaintiff at the site According to DWs-2, 5, 7 and 8, no arrangement had been made at the site for stocking cement though, as per DW-8, plaintiff was to construct godown at the site. It is also on record that the season, during which the plaintiff requested for supply of cement, was rainy season, as can be seen from the dates of letters referred to already apart from the specific statement of DWs-3, 4 and 7 In fact, it is specifically stated by DWs-2 and 4 that no arrangement had been made for stocking cement at the site by plaintiff though, as per Rule 8 of schedule "A", the contractor should have provided at site of work a satisfactory storage for not less than 15 days" requirement and the same should have been stored in good condition as per directions of the Engineer in charge However, there was no storage facility at all at the work site, as is clear from the evidence of witnesses referred to above, not challenged by the plaintiff nor specifically stated by him in his evidence that there was any such storage facility at the work site for stocking cement Thus, the plaintiff had even failed to comply with the said condition of having storage facility at the work site for stocking cement and other material

35. Incidentally, it may also be noted that DWs-2 to 5, 7 and 8 have stated that the plaintiff had not stocked sand and metal at the site of canal work Of course, according to the plaintiff, if metal and sand get mixed with soil, they cannot be used without cleaning in water and for that, there will be some expenditure, as stated by DWs-2 and 3, who, during cross-examination, stated that they do not remember that there was sufficient stock of sand and metal with plaintiff However, that cannot be taken to hold that there was stock of metal and sand at the site of canal works. In fact, according to DWs-2, 3, 5, 7 and 8, metal and sand were to be brought from approved quarries, but the plaintiff was required to get the same though DW-4 pleaded ignorance about it Be that as it may, as noted already, there was breach of various terms and conditions of the

agreement by the plaintiff and not by the defendants/Department though not supplied cement and/or cement material demanded by plaintiff and asked the plaintiff to carry out certain things for such supply At any rate, in view of terms and conditions of agreement, the plaintiff could not have stopped the work in the middle when he was at liberty to procure cement from open market.

36. The request made by the plaintiff for supply of entire quantity of cement within a week was not complied with by the Department and the Department asked the plaintiff to do certain things as per the terms of the contract to supply cement it is on record that the plaintiff made request without submitting indents nor showing the basis for making indent for the entire quantity of cement at a time, that too. without submitting construction programme, which were required to be submitted Even he had not done the work of canal dressing and trimming required to be done before putting bed concrete, requiring cement There was no storage facility for the cement at the work site though, the demand of cement was to the tune of more than 21,000 bags at a time by the plaintiff, that too, in rainy season So, there was nothing wrong in the Department asking the plaintiff to furnish/submit construction programme but the plaintiff failed to furnish it at any time it is also on record that after giving one week's time to supply more than 21,000 bags by the Department and without waiting for any reply or taking any other steps to secure cement from market with permission from the EE, the plaintiff stopped the works in the middle--Inspite of the fact that the period fixed for the work was to over in the year 1991

37. When asked, the plaintiff did not resume work inspite of voluminous correspondence made, though asked to submit his willingness to show whether he was ready to continue the works Why the plaintiff did not make attempt to have permission or approval from the EE to purchase cement in the open market inspite of such a provision provided under the agreement, is not at all on record if he had made any such attempt, then, of course, the matter would have been different, but not now All this and other material on record clearly show that the plaintiff was interested and intended only to stop the work in the middle on the ground of non-supply of cement even though his demand was not in accordance with the terms and conditions of the agreement However, the trial court has not adverted itself to any of the said terms and conditions found in the agreement nor considered the material on record with reference to such terms and conditions while appreciating the points in issue

38. Even if held that some quantity of cement was required by plaintiff for gradation test, trimming the canal, the plaintiff could not have demanded entire quantity of cement of more than 2000 bags (for 8 works totally more than 21,000 bags) at a time without submitting indent showing the required quantity of cement and without collecting metal and sand at the work site, that too, without having storage facility in rainy season Simply because cement was to be supplied on cost and not free of cost by the Department, it could not be said that the Department was not right in seeing whether or not, there was storage facility

because the unused/excess cement was to go to it only apart from the fact that cement would not have been used if exposed to rain water and in that event the department would have been asked to supply cement again it is true that the Department did not inform the plaintiff that cement was not supplied on account of not having its storage facility at the site but to have storage facility is also a condition in the agreement cannot be forgotten Of course, the said ground has not been pleaded specifically in the written statement, but pleaded that the plaintiff had not followed terms and conditions of agreement

39. The fact that departmental action was proposed against defendant No. 4 cannot come to the aid of the plaintiff to stop/abandon the work in the middle when he had not even attempted to make alternate arrangement as provided in the agreement to procure cement from open market, more so, in view of the specific terms and conditions of agreement and when even his attention was invited to clause 44(B), though late, and also to submit construction programme (which was to be submitted and got approved before commencement of work but not done at any time)

40. According to us, without considering other relevant material with reference to terms and conditions of the agreement the trial court has given undue weight to the admitted fact of non-supply of entire quantity of cement by the Department at a time inspite of request made by the plaintiff under his letters dated 25.5.1990 Simply because cement was required for some work to be attended at that stage on 25.5.1990, the trial court was not justified in passing an order in favour of the plaintiff holding that on account of that, plaintiff could not have stopped the work in the middle when he could have carried out the work by purchasing cement in open market when there was delay in supplying cement by the Department when requested

41. In the absence of any request by the plaintiff, it was not for the defendant to give permission to the plaintiff to purchase/secure cement in open market because it was for the plaintiff to make alternate arrangement as per the terms and conditions it was not that the Department was refusing to supply cement to the plaintiff, but the Department was requesting certain things to be done by the plaintiff to enable it to supply cement Since there was no refusal to supply cement, there was no question of informing the plaintiff the reasons for refusal to supply cement to the plaintiff Still, the trial court wrongly held that the defendants have not even informed the plaintiff the reasons for refusal to supply cement

42. Above all, non-observance of the terms and conditions by the plaintiff in making request for supply of cement and cement material, were not at all noticed nor considered by the trial court

43. Though the defendants have taken specific plea that the plaintiff without following the terms and conditions of the contract, with a bad motive, purposely stopped the work, the trial court has not considered the said plea

44. Thus, when considered the evidence on record with admitted facts only, it is clear that the plaintiff has failed to prove that there was any breach of terms and conditions by the defendant in not supplying cement and cement material requested by him and, that it was he who was not at fault in stopping the work in the middle on account of non-supply of cement by the Department Consequently, point Nos. 1 and 2 are answered in negative i.e. against the plaintiff

45. POINT NOS. 3 and 4: These points also are inter-linked with each other and as such, taken together for consideration for the sake of convenience and also to avoid repetition of the discussion of evidence to be made

46. Though there are various letters showing correspondence between the plaintiff and defendants between the period from 26.6.1990 to till Ex. D37 dated 20.11.1990, they are not necessary to be specifically referred nor considered since, suffice it to note that those letters/correspondence show that the plaintiff was throwing blame on the Department by plaintiff and the Department asking certain things, including submission of construction programme, to be submitted by the plaintiff, we can take letter at Ex. D37 under which Superintendent Engineer has requested the plaintiff to collect the required quantity of metal and sand and get the same tested from the quality control authority and to indent for the cement and even defendant No. 4 (Executive Engineer) was instructed in that letter to supply the required cement to the plaintiff after materials are tested and design mix is furnished by the quality control authority and plaintiff was informed that question of final the bill does not arise

47. Similar letters are at Exs. D53, 69 and 93 Not only that, there are letters dated 29.11.1990 at Exs. D5, 21, 38, 52 and 68 stating that question of concluding agreement is not tenable and the plaintiff was requested to complete all the items of tender as agreed So also, the letter dated 15.2.1991 by defendant No. 4 to the plaintiff

48. That apart, under letter at Ex. D94 dated 16.2.1991 addressed to the plaintiff by defendant No. 4, the plaintiff was requested to resume work immediately and complete it within 15 days, failing which action as per terms of the agreement will be taken

49. So also, by letters dated 28.2.1991 at Exs. D6, 23, 39, 54 and 70 attention of the plaintiff was invited to clause No. 2 of the agreement and he was requested to make good of the short fall in progress immediately otherwise action will be taken as per clause 2 Same is the letter at Ex. D96 dated 28.3.1991

50. Even there is letter dated 18.3.1991 at Ex. D95 by the Asst. Engineer to the plaintiff informing the due date as 24.3.1991 and not completing the work, with request to make good the short fall, failing which action will be taken Even there are another set of letters dated 6.5.1991 by defendant No. 4 to the plaintiff to fix the template works and lugs to the canal section within 15.5.1991, failing which action will be taken to fix the same by the Department at his risk and cost They are at Exs. P12, 34, 40, 48, 54, 61, 67 and 72 Of course, the plaintiff replied by

letter dated 9.5.1991 as per Exs. P14, 42, 49, 55, 62, 68 and 73 as to why said works could not be completed and as not obligatory on his part to carry out the work after tender period, etc, Further, there is a record proceedings dated 23.3.1992, but they do not help the plaintiff

51. Thus, when inspite of said correspondence and other correspondence also, the plaintiff did not resume the work nor shown his willingness to resume or complete the work under the terms and conditions of the earlier agreement nor requested for any fresh terms and conditions to complete the same, the Department was left with no option but to rescind the tender agreement, which is clear from correspondence between the parties till 29.8.1994 at Exs. D9, 24, 40, 55, 71 and 97 under which the Under Secretary to Irrigation Department requested the Chief Engineer to take action as per agreement So and in view of the findings given on point Nos. 1 and 2 also, no infirmity can be found in the action taken by the Department in rescinding the tender agreement and taking action as per the terms and conditions of the tender agreement Accordingly, point Nos. 3 and 4 are also answered in negative and affirmative respectively. POINT NOS. 5 & 6: On re-appreciation of the evidence made by us besides material on record, we are of the opinion that the findings recorded by it on the issues framed cannot be sustained as the trial court failed to keep in mind the relevant material and evidence without appreciating the same in right perspective and wrongly assumed certain things in favour of the plaintiff and against defendants-Department resulting in decreeing the suits of plaintiff wrongly So, the same require to be interfered with Accordingly, the points on hand are answered. In the result, the appeals are allowed with cost and set aside the impugned judgments and decrees passed by the trial court in OS Nos. 35/1997 to 42/1997 and consequently, the said suits stand dismissed