
(1976) 04 AP CK 0002
In the Andhra Pradesh High Court
Case No : C.C.C.A. No. 129 of 1973

The Andhra Pradesh State Electricity Board and Others	APPELLANT
Vs	
Patel and Patel and Others	RESPONDENT

Date of Decision : 23-04-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17
Contract Act, 1872 — Section 55
Electricity (Supply) Act, 1948 — Section 12, 82
Limitation Act, 1963 — Section 21

Citation : AIR 1977 AP 172

Hon'ble Judges : Lakshmaiah, J

Bench : Single Bench

Judgement

1. This appeal by the defendants is directed against the decree and judgment made in O. S. No. 317 of 1969 on the file of the Court of the Fifth Additional Judge, City Civil Court, Hyderabad dated 28th November 1972.
2. The suit giving rise to the above appeal was filed seeking the recovery of Rs. 9,850 being the costs of material supplied by the plaintiff to the defendant with interest at 9% P. A. and for costs of the suit.
3. The case of the plaintiff is that the Superintending Engineer (Operation) City Circle. A. P. State Electricity Board Hyderabad called for quotations from the plaintiff for supply of flexible copper earthing bonds and the plaintiff gave a quotation No. OP/CC/15/66, dated 13-12-1966, for the supply of the material from their ready stock at Calcutta stating therein that the validity of the quotation was for thirty days. The Superintending Engineer placed an order for 100 kgs. of Copper Earthing Board at the rate of Rs. 188-25 Ps. per K. G. through local purchase order dated 5-5-1967. The goods were delivered by the plaintiff to the Supervisor in the Office of the Assistant Engineer on 25-9-1967, for Rs. 9825/- was forwarded by the plaintiff. That amount has not been paid in spite of reminders on 15-11-1967 and 12-1-1968. On 9-11-1967 a letter was

received by the plaintiff from the Superintending Engineer, the third defendant, to the effect that the order was cancelled as the goods have not been supplied before 30th June, 1967. The plaintiff gave a reply to that on 15-11-1967 drawing attention to clauses Nos. 9 and 10 of the purchase Order according to which in the case of delay, the Board can impose penalty but cannot cancel the order. The material which was to be supplied before 30-6-1967 was supplied on 25-9-1967 and the Electricity Board and the defendants accepted the goods without any objection. Therefore, the 3rd defendant has no right to cancel the order. A legal notice dated 2-12-1968, was sent to the defendants for which the 3rd defendant sent a reply dated 9-2-1969 stating that the plaintiff can take away the goods supplied. The allegations made in that reply notice are wrong and incorrect. The delay in delivery of the goods was due to the delay caused in procurement of the material from the Principals at Calcutta as the sample approved was an imported one and these facts were brought to the notice of the defendants at the time of supply of the material. The goods were accepted by the defendants unconditionally. The defendants have placed many other orders with the plaintiff for other materials and accepted delivery in spite of delay and payments were effected without any objections. Clause 9(b) of the purchase order do not empower the Electricity Board to cancel the order. Therefore, the cancellation of the order and the non-payment of the bill are wrong.

4. In the written statement filed by the defendants it is stated that the A. P. State Electricity Board is a statutory corporation constituted u/s 5 of the Electricity Supply Act 1948. The Superintending Engineer (Operation) City Circle called for quotation from eight companies including the plaintiff and placed a local purchase order dated 5-5-1967, with the plaintiff for the supply of 100 kgs. of Flexible Copper Earthing Bonds at the rate of Rs. 188-25 Ps. per Kg. It was expressly stipulated in that order that the goods should be supplied before 30-6-1967 but the plaintiff sent the goods on 26-9-1967. The goods were provisionally received by the Supervisor, of the stores pending decision of the competent authority. The purchase order placed against the plaintiff was cancelled by the Superintending Engineer (Operation) City circle, by letter dated 9-11-1967 and the plaintiff was requested to take back the goods, through letters dated 16-11-1967, 2-2-1968 and 2-5-1968. Instead of taking back the goods the plaintiff filed this suit. The goods cannot be said to have been accepted by the Board merely because tentative and provisional delivery was made to the supervisor. The Section Officer simply acknowledged the receipt of the goods subject to the acceptance by the higher authorities and subject to the check measurement by the Assistant Engineer and Divisional Engineer. The Board is entitled to reject the goods and cancel the order of the plaintiff as per condition No. 9 of the order. It is open to the Board whether to accept the goods and levy penalty or to cancel the order if condition No. 9 is not complied with. In this case the Board exercised its rights to cancel the order. Breach of a vital term of the contract by the plaintiff entitled the board to rescind the contract. It is not true that the Board ever accepted the goods unconditionally. The plaintiff cannot

compel the Board to accept the goods merely because it was indulgent in other cases. The plaintiff is bound to take back the goods and can only sue for damages if it has a legal right. Having committed the breach of contract, the plaintiff cannot insist on the acceptance of the goods by the Board. The suit as filed against various officers of the Board in respect of matters concerning their official duties is not maintainable. The suit is barred by Section 82 of the Electricity (Supply) Act. No notice u/s 80, CPC has been given and the suit shall fail on this ground alone.

5. An Additional Written statement was filed by the first defendant stating that the first defendant was not a party defendant originally and the Board was substituted in the place of the Chairman A. P. State Electricity Board by order dated 8-12-1971. The cause of action for filing of the suit arose on 5-5-1967. By the time of the plaintiff filed this amendment, the claim is time barred against the defendant and accordingly this suit is barred by time against this defendant.

6. On the basis of the aforesaid pleadings, the following issues were framed:

1. Whether the plaintiff committed breach of contract by not supplying the goods within the stipulated time as alleged in the written statement.

2. Whether the suit is bad for misjoinder of parties.

3. Whether the suit is barred by Section 82 of the Electricity Supply Act.

4. Whether the suit is maintainable without notice u/s 80, Civil Procedure Code

5. To what relief ?

7. The Court below on a consideration of the entire material placed before it held against the defendant and in favour of the plaintiff and decreed the suit as prayed for.

8. Sri Raja Rao, learned counsel appearing for the appellants contended that the Board is entitled to cancel the contract under Clause 9 of the Contract and the cancellation is valid; it is the option of the Board either to levy the penalty or to cancel the contract; time is the essence of the contract, the contract being a commercial one, the delivery made by the plaintiff is no delivery at all in the eye of law; the suit is barred u/s 82 of the Electricity (Supply) Act., and the suit is barred against the Board u/s 21 of the Limitation Act as well.

9. Sri Uma Kant Naik, learned counsel appearing for the respondent- plaintiff on the other hand contended for the position that the Board erred in cancelling the contract, it is not as if the suit transaction is an isolated one, having regard, to the previous conduct of the parties, the plaintiff was under the impression that the penalty of cancellation would not be imposed on them the Board can impose a reasonable amount as penalty having regard to the fact that the goods shall have to be procured from Calcutta; the parties are aware of the fact that time cannot be considered to be the essence of the contract; and even otherwise, the defendants accepted the goods by taking delivery of the goods without any

objection, and, therefore, they do not have any power to cancel and the suit cannot be said to have been barred for one or the other of the reasons submitted by the counsel for the appellant.

10. The point that arises for consideration is whether the plaintiff committed the breach of the contract by not supplying the goods within the time stipulated.

11. Learned counsel for the appellants contends that time is the essence of the contract and, as such, the Board is entitled to rescind the contract on account of the respondents not supplied the goods within the time stipulated.

12. The appellants Board invited quotations for the supply of Flexible Copper Earthing bonds and the plaintiff offered his quotation on 13-12-1966, as per Ex. B. I. The goods were described there as flexible copper earthing bonds as per the departmental specification and in accordance with the sample. The rate was mentioned as against the column. Regarding delivery it is stated "from ready stock at Calcutta," validity being thirty days. This was not immediately accepted. The Board took nearly six months to accept the sale as evidenced by Ex. A-5, purchase order dated 5-5-1967, wherein it is stated under column No. 9 that the supply should be commenced from the ready stock from the date of receipt of local purchase order before 30-6-1967. The plaintiff supplied the goods on 25-9-1967, nearly three months after the due date and on the same date, the sample of the material to be supplied was also approved by the Junior Engineer-in-charge of purchases. The Supervisor on behalf of the Board Examined as D. W. 2 working in the Central Stores received the material and entered the same in the stores receipt book. On 25-9-1967 itself; the plaintiff submitted the bill for payment and the money was not paid. Though Ex-A7 dated 9-11-1967, the plaintiff was informed that the order of purchase was cancelled and the security deposit was forfeited as the material was not supplied before 30-6-1967, as required under Clause 9 of the purchase order. The plaintiff explained the delay under Ex. A-7 and requested the Board to accept the same and condone the delay and to arrange for early payment. Under Ex. A-9 dated 12-1-1968 the plaintiff requested for immediate payment. Ex. A-10 is the legal notice dated 2-12-1968 issued by the plaintiff and in their reply, Ex. A-11 dated 19-2-1969, the Board reiterating its earlier stand asked the plaintiff to take back the material. According to Clause 9 of the Purchase Order, supply from ready stocks should be completed before 30-6-1967 from the date of the receipt of the local purchase order (L. P. O.) clause 10 dealing with penalty reads thus:

"In case of delay in delivery of materials, the purchaser may at his option impose a penalty calculated at the rate of 2 per cent per month of the contract value of such portion of materials as have not been delivered in the specified period."

13. Clause 11 contains four para and para No. 4 reads thus :-

"The amount paid towards security deposit will be forfeited if the contractor fails to fulfil the contract as per the terms of the purchase order."

Whether or not time is the essence of the contract is a matter that has to be ascertained as a matter of fact. If the intention of the parties was that time should be the essence of the contract, it shall have to be treated to be so. Whether or not the party is so intended is to be ascertained from the various circumstances. In support of the contention that time is the essence of the contract, especially if it is a commercial one, reliance was placed by the learned counsel for the appellants on the provisions of Section 55 of the Indian Contract Act as interpreted by the Supreme Court of India in the case of Mahabir Prashad Rungta Vs. Durga Datt, . Their Lordships of the Supreme Court held that in commercial transactions, time was ordinarily of the essence. Their Lordships referred to Section 55 of the Contract Act in that context. Section 55 of the Indian Contract Act says that:

"When a party to a contract promises to do a certain thing at or before a specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Therefore the question that has got to be decided is whether the parties to the contract in question intended that time should be the essence of the contract ?

14. In the purchase order, there is nothing to show that time was intended to be the essence of the contract, though 30th June, 1967, was mentioned as the date before which the supply of the goods should be affected. There is no evidence here in this case adduced on behalf of the Board worth mentioning in support of the contention that the parties intended that the time should be treated as the essence of this transaction though D. W. 1 says in his deposition that is so. There is nothing in writing to show that time was the essence of the contract.

15. It is not as if the suit transaction is an isolated one between the parties. The parties have been transacting business on previous occasions also. The conduct in the past indubitably establishes that in transaction like this, the Board never intended the time as constituting the essence of the contract. The Assistant Engineer, Central Stores of the Board, examined as D. W. 1 stated in his cross-examination on this aspect of the matter thus :

Ex. B. 8 is the intimation of payment and Ex. B. 9, is the duplicate delivery note of the corresponding item. The order for the goods mentioned in Exs. B. 8 and B. 9, was placed on 21-12-1966, and the goods were supplied, with a delay of one month and six days and the Board accepted the goods by imposing a penalty of Rs. 210-16. In respect of the goods mentioned in Exs. B. 10 and B. 11 the goods were supplied by the plaintiff to the Board by delay of eleven days, and it was accepted by imposing a penalty of Rs. 20-30. In respect of goods covered by Exs. B. 12 and B. 13, supplied by the plaintiff to the Board there was delay of one month and the goods were accepted by imposing a penalty of Rs. 143-50 Ps.

16. This witness testifies the circumstances obtaining prior to and at the time of

the suit transaction which would indisputably show that in a case of delayed delivery the Board never treated as if they are entitled to rescind the contract but by levying penalty, they used to accept the goods. That was the impression created in the mind of the plaintiff and that seemed to be the intention of the parties as well that time would not be treated as the essence of the contract.

17. If time was treated by the Board as constituting the essence of the contract, nothing prevented them from rejecting the goods when they were supplied. It is no doubt open to the Board to reject the goods on the ground that the sample was not approved but that was not the case put forward by the Board in justification of their conduct in cancelling the purchase order.

18. D. W. 2 was the supervisor who was examined on behalf of the Board. He received goods from the plaintiff and entered the same in the stores receipt book. He says that he received the goods on behalf of the Board. He received the material without putting any condition as to its verification and acceptance by his superiors. He is empowered to receive in the Central Stores on 25-9-1967, and it was entered in the stores receipt book and the Board as per their letter, Ex. A-7 dated 9-11-1967 nearly one and half months after the supply of material informed the plaintiff that the purchase order has been cancelled. At no time before then, the plaintiff was so informed. Had the Board decided to reject the goods on the ground of delay, they could have informed the plaintiff immediately after the expiration of the period fixed. They did not choose to do so. On the other hand, even according to them, they have chosen to keep the contract subsisting till 9-11-1967. The plaintiff was made to believe that the contract was subsisting between 30th June, 1967 and 9th November, 1967 and that the goods supplied would be accepted. For the first time, after two years, through Ex. A-11 dated 19-2-1969, in reply to plaintiff's legal notice, the Board asked the plaintiff to take back the goods. Within that period, no notice was issued even to the plaintiff asking him to take back the goods nor the goods were returned by the Board.

19. Even in the offer of the plaintiff it is stipulated that the supply would be from ready stock at Calcutta, the validity being thirty days and it is only subsequent to the expiration of that period that offer was accepted by the Board. This is yet another circumstance where the parties to the transaction can be said to have treated the time not as essence of the contract.

20. For the foregoing reasons agreeing with the Court below, I am of the opinion that the time was never intended to be treated as the essence of the contract by the parties. If that is so, the Board is not entitled to cancel the order and the cancellation cannot be treated to be valid in the eye of law. It is therefore a case where the Board accepted the delivery of the goods even after the period prescribed in the purchase order not treating the time as constituting the essence of the contract and, therefore, they are not competent to cancel the purchase order.

21. The next contention raised by the learned counsel appearing for the appellants was that the suit is barred on account of Section 12 and 82 of the Electricity (Supply) Act, 1948, and that the suit was barred against the Board u/s 21 of the Limitation Act.

22. The suit was originally instituted against the Chairman, Secretary, Superintending Engineer and Assistant Engineer, of the Andhra Pradesh Electricity Board, Hyderabad. All of them have filed only one written statement and they contended therein that the suit was not maintainable and the same is barred by Section 82 of the Electricity (Supply) Act, 1948. According to them, the suit ought to have been filed against the Andhra Pradesh State Electricity Board and not against the officers working in the Board. The Andhra Pradesh State Electricity Board was constituted and u/s 12 of the Electricity (Supply) Act, 1948, the Board shall be a corporate body by the name notified under Sub-section (1) of the Section 5, having perpetual succession and a common seal, with power to acquire and hold property both moveable and Immovable and shall by the said name sue and be sued. Therefore, it is manifest from the above provision of law that it is the Board but not the officers that shall have to be sued. u/s 82 of the said Act, no suit, prosecution or other legal proceeding shall lie against any member, officer or servant of the Board for anything which is in good faith done or intended to be done under the Act. Placing reliance on these provisions of the Act, the learned counsel for the appellants contends that the suit is barred as came to be instituted originally.

23. When an objection was taken by the defendants as to the maintainability of the suit under the Act, the plaintiff got the cause title of the plaint, amended so as to bring the suit against the Andhra Pradesh State Electricity Board. The amendment was made as per orders passed in I. A. No. 778/1972 dated 8th December 1971 and by that amendment the words "The Andhra Pradesh State Electricity Board represented by" were added to read that the Board is represented by the four officers originally sued. There is no other amendment in the body or in the relief para of the plaint. Cause of action is also not altered. The result of the amendment was that instead of suing the officers of the Board, the Board was sought to be sued. It is in that connection a contention was raised that the suit was barred by limitation as against the Board as the Board was made a party long after the accrual of the cause of action to the plaintiff. Reliance in that connection was made on Section 21 of the Limitation Act, 1963, which reads thus :

"21. Effect of substituting or Adding new plaintiff or defendant :

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that

the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date."

24. The question that arises for consideration is whether there is involved in the amendment of the plaint ordered any element of substitution or addition of a new plaintiff or defendant within the meaning of that expression as occurring in the aforesaid provision of law.

25. Sri Naik, learned counsel appearing for the respondent strenuously argued for the position that what is involved in the amendment is neither substitution nor addition of any party but only a correction of an error or a misdescription. The learned counsel drew my attention to an observation of Justice Umamaheswaram in the case of Pathikonda Gopala Rao Vs. Nagiri Pedda Kitamma, , to the effect that the Courts of law should bear in mind the sacred duty of doing justice between the parties in accordance with the provisions of the Code of Civil Procedure. They do not exist for the purpose of punishing the parties. Rules of procedure are not framed to defeat justice. These observations were made in the context of the interpretation of O. 6 R. 17 of Civil Procedure Code

26. In support of the contention that what is involved in the amendment of the plaint in this case is only a misdescription, the learned counsel relied upon a passage in the decision of the Calcutta High Court rendered in Municipal Commrs. Dacca v. Gangamani AIR 1940 Cal 153. In that case, a suit was instituted for a declaration that the assessment made by the Municipal Commissioner is ultra vires and illegal, which is through mistake instituted against the Chairman of the Municipal Commissioners instead of the Commissioners themselves. This is required by Section 15 of the Bengal Municipal Act, 1932. The main relief sought for in the plaint was against the corporation for not the Chairman. An amendment impleading the Commissioners themselves cannot be said to implead a new party within the meaning of the expression u/s 22 of the Limitation Act (Section 21 of the present Act). The Court held therefore that there is only a case of misdescription which is sought to be corrected under O. 1 R. 10 CPC and that the amendment therefore, relates back to the date of the suit as originally filed and time cannot be reckoned as from the date of the amendment.

27. Mura Mohideen Vs. V.O.A. Mohomed and Others, , is a case u/s 22 of the Limitation Act corresponding to Section 21 of the new Act read with O. 1 R. 10 CPC Chief Justice Rajamannar, said at p. 299 thus:-

"If however imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition. or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of intention of the party and if the Court is able to discover the person or persons intended to sue or to be sued a mere misdescription of such a party can always be corrected

provided the mistake was bona fide vide O. 1, R. 10, CPC Such an amendment does not involve the addition of a party so as to attract Section 22(1) Limitation Act." A Division Bench of the Patna High Court held in the case of Gangadhar and Another Vs. B.B.C.I. Railway and Others, , that it is well settled that the Court has complete power to make necessary correction in the plaint where there is some misdescription of the defendant in the cause title, the reason, being that the defendant has been substantially sued, though under a wrong name.

28. In Kurapati Venkata Mallayya and Another Vs. Thondepu Ramaswami and Co. and Another, , the Supreme Court had an occasion to deal with this aspect of the matter. In that case, a receiver filed a suit without mentioning the name of the firm for which he was appointed holding that was a case of misdescription and can be corrected at any time, the Supreme Court said at p. 823 thus :-

"The High Court has observed that even assuming that it would have been more appropriate for the Receiver to show in the cause title that it was the firm which was the real plaintiff and that the firm was suing through him it was merely a case of misdescription and that the plaint could be amended at any time for the purpose of showing the correct description of the plaintiff. We agree with the High Court that where there is a case of misdescription of parties it is open to the Court to allow an amendment of the plaint at any time and the question of limitation would not arise in such a case."

29. A decision of the Patna High Court in the case of Radhe Lal and Another Vs. East Indian Railway and Others, was relied upon for the purpose of showing that if upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the company is the real defendant, then the suit may proceed against the company.

30. What is manifest from the aforesaid authorities is that the provisions of the CPC are intended to defend but not to defeat the substantial justice. It is the substance that has got to be looked into but not the form in which the pleadings are drafted. The Court is always competent to correct mere errors of description under the provisions of the CPC particularly under O. 1, R. 10 CPC Mere correction of errors as regards description does not involve any addition or substitution of parties as to attract the inhibition of the provisions contained in Section 21 of the present Limitation Act. If it could be gathered from a reading of the pleadings and the antecedent circumstances that it is the Board that was intended to be sued, then the amendment of the cause title to the effect that "The Andhra Pradesh State Electricity Board represented by" does not substitute any addition or substitution of a new party. Therefore, the suit as against the Board must be taken to have been instituted from the date when the suit was originally instituted but not from the date when the amendment was ordered by the Court.

31. If that is the position and, I am of the opinion that is the correct position of law, there cannot be any substance in the contention put forward by the learned

counsel for the appellants that the suit was barred as against the Board in view of Section 21 of the Limitation Act. In view of my conclusion that in the amendment there does not involve any substitution or addition of a new party to the suit, the suit is to be taken to have been instituted against the Board from the time it was originally instituted and, as such the bar of Section 21 Limitation Act is not attracted to the facts of the case.

32. If, for the aforesaid reason, the Board represented by its officers is to be construed as being sought to be proceeded against by the plaintiff, then the objection u/s 12 and 82 of the Electricity (Supply) Act cannot have any validity because the suit was against the Board but not against the officers of the Board; nor a reading of the pleadings indicate any relief being claimed against the officers.

33. In view of this conclusion the decree shall have to be modified confining it to the Board represented by the defendants.

34. Alternatively Sri Naik contended that even otherwise the suit against the Board is in time. For this purpose he relied upon the letter Ex. B. 6 from the Board dated 19-2-1969 wherein they required the plaintiff to take back the goods as constituting acknowledgment. If that date is to be taken into account as constituting the date of acknowledgment, the suit instituted on 3-4-1969 is well within time. I find considerable force in that contention of the learned counsel.

35. No other contention is raised.

36. In view of my aforesaid finding that the suit was in effect and substance one instituted against the Board, the decree should be against the Board alone but not against the defendants jointly and severally. With the modification this appeal is dismissed with costs.

37. Appeal dismissed. Decree modified.