

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 77-84 OF 2004

RAMACHANDRA NARAYAN NAYAK ... APPELLANT

VS.

KARNATAKA NEERAVARI NIGAM LTD. & ORS. ... RESPONDENTS



JUDGMENT

V. Gopala Gowda, J.

The appellant has filed these appeals being aggrieved by the impugned common judgment and decree dated 12th June, 2003 passed in RFA nos.

593-600/2000 by the High Court of Karnataka urging various relevant facts and legal grounds for setting aside the same and restoring the common judgment and decrees dated 30th November, 1999 passed in O.S. no. 35/97 to 42/97 by the Civil Judge (Senior Division) Gadag.

2. The brief facts are stated hereunder for the purpose of the rival factual and legal contentions that are urged by the learned counsel on behalf of the parties. For the sake of convenience, the parties are referred to in this judgment as per the ranking assigned to them in the complaints before the trial court.

The plaintiff, the appellant herein, is a Class I contractor. He undertakes the contract of construction of irrigation canals and other major works on a large scale. The plaintiff has constructed an irrigation dam across the Malaprabha river near Soundatti in Belgaum District. The water from the said reservoir is to

be supplied to agricultural lands of the farmers in Dharwad and Belgaum Districts, through canals to be excavated and constructed for that purpose. For the construction of such canals in Ron taluka in Dharwad District, a Division is established at Ron headed by an Executive Engineer. A Chief Engineer was appointed to supervise work whose office was established at Belgaum.

3. The plaintiff submitted his tenders upon an invitation from the defendants, the respondents herein, for execution of the balance work of canals and his offer of bid was accepted. He has deposited the earnest money in the form of bank guarantee. On accepting the bid amount offered by the plaintiff, parties entered into a contract for execution of Alur combined branch and work of canal at K.M. no.1-6 and Malaprabha right bank canal works K.M. 97 and 102, as per the terms and conditions agreed between them and more particularly as stipulated in the tender notice.

4. Accordingly, the defendant no.4, Executive Engineer, Irrigation Department issued work orders to the plaintiff relating to various canals on 9.11.1988, 10.3.1989 and 16.3.1989 respectively. As per clause 2 of the agreement, the execution of work was to be completed within a period of 15 months from the date of handing over the site to the plaintiff excluding the monsoon season from 15th June to 15th September of the relevant years.

5. It is the case of the plaintiff that he was able to complete his part of the work such as canal excavation, embankment, morum lining/casing etc. within a short period deploying his staff and machinery. Upon progress of execution of work, the plaintiff wrote several letters dated 25.5.1990, 8.6.1990, 10.6.1990, 27.3.1991, 9.5.1991 and 14.10.1992 (Exs. P-45, P-32, P-46, P-30, P-42 and P-19) addressed to defendant no. 4 requesting him to supply cement, RCC templates and PCC slabs for

putting them to the bed of canal and for other uses.

6. It is the further case of the plaintiff that as per the meeting which was held between the plaintiff and defendant no.4, the proceedings which are marked as Ex. P-20, revealed that the cement and cement materials were in stock and were available with defendant no.4, but he had purposely delayed the supply of cement and cement materials and he also did not authorize the plaintiff to procure cement from the open market and made certain false accusations against him. The plaintiff placed reliance upon clause 30 of the tender agreement wherein it is stated that the decision of the Chief Engineer in relation to the dispute is final.

7. It is the case of the plaintiff that despite repeated requests and demands made by him vide his letters referred to supra, the defendant no.4

failed to supply cement and cement materials required by the plaintiff to complete the work, therefore he had no option but to terminate the contract with the defendants. The plaintiff vide his aforesaid letter dated 9.5.1991 to defendant no.4, marked as Ex. P-42, asked to finalise the bill regarding the execution of work by him and to terminate the contracts without imposing any penalty.

8. It is the further case of the plaintiff that on 12.10.1994, vide Ex.D-41, defendant no.3 passed an order rescinding the contract and levied penalty on the plaintiff, which order was communicated to the plaintiff by defendant no.4 vide letter dated 24.10.1994 marked as Ex.D-42. Before rescinding the contract, defendant no.3 neither issued notice nor heard the plaintiff, as required under clause 3(d) of the agreement, though the contract is rescinded by invoking clause 3(d) of the agreement by him.

9. The plaintiff, being aggrieved by the rescinding of the contract and failure on the part of the defendants to make payments for the work done and return of earnest money and security deposit amount, filed eight original suit nos. 35 to 42 of 1997 against the defendants before the Civil Judge (Senior Division) Gadag seeking for grant of declaratory relief that the order of rescinding the contract passed by defendant no. 3 in respect of works of canal is illegal and not binding on him. Further, the plaintiff sought decrees of permanent injunction restraining the defendants from either forfeiting or adjusting the earnest money and security deposit amount made by him and for payment of bill amount in respect of the work executed by him and also to restrain the defendants from recovering the alleged risk and cost amount from him from out of the amount due from the works executed by him in any other Division or Department (Exs. P-1 to P-6 produced

in the Original Suits) of Alur combined branch and work of canal at K.M. no. 97 and 102 and Malaprabha right bank canal. He had further prayed for settlement of final bill amount in relation to the execution of work and return of earnest money and security deposit amount along with 18% interest and also on the withheld amount along with damages, costs and other reliefs.

10. Defendant no. 4 filed written statement opposing the prayers made in the original suits and denied various allegations made in the complaints, except admitting the execution of the contract with the plaintiff for execution of the canal work to complete the balance work of construction of the canal in relation to the project in Dharwad district. The same is adopted by defendant nos. 1 to 3 accepting the execution of the contract with the plaintiff. It is further admitted by defendant no.4 that plaintiff has done some work and the defendant's Department was to

supply cement after the raw materials, i.e. metal, sand etc. required was collected for bed concrete and slab lining, but the excavated canal was not trimmed and dressed to the required section. Therefore, the defendant no. 4 was not bound to supply cement and cement materials, in fact the plaintiff was even requested to make his own arrangements for procuring cement from the open market as per para 7 of Schedule 'A' of the agreement.

11. It is further pleaded in the written statement that the plaintiff without following the terms and conditions of the contract, with an illegitimate motive, 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 the tender clauses and he requested to terminate the work without any penalty to be imposed against him as per the contract agreement. Defendant no.4 further pleaded that the plaintiff

was at fault and did not resume the work when he was requested to complete the work as per the agreement. As such, considering the facts and circumstances of the case, defendant no. 4 was directed to take action against the plaintiff as per the tender conditions of contract work and accordingly the contract was rescinded and he was informed of the action taken by the Chief Engineer by imposing maximum penalty upon him and forfeiture of earnest money and security deposit amount. Defendant no.4 denied the various allegations made by the plaintiff against him and prayed for dismissal of the suits both on merits as well as on the question of limitation, besides declaratory relief and other reliefs sought for by the plaintiff.

12. The trial court has framed nearly nine issues for its determination. The suits went for trial. Common evidence is recorded in all the original suits. The plaintiff examined himself and got

marked 73 documents as exhibits and defendants examined eight witnesses and got marked 136 documents in support of their case. After hearing the arguments, the learned trial judge decided issue nos. 1 to 5 in the affirmative, issue nos. 6 to 8 in negative and issue no. 9 in the affirmative and the suits of the plaintiffs were decreed in part by recording reasons in the common judgment.

13. The correctness of the common judgment of the trial court and decrees passed in the original suits of the plaintiff was challenged by the defendants before the High Court of Karnataka urging various legal contentions questioning the correctness of the findings and reasons recorded on the aforesaid contentious issues and requested the High Court to set aside the impugned common judgment and decrees as the same are erroneous and suffer from error in law. The High Court, after advertent to the relevant necessary facts,

formulated the points for its consideration and answered the same in favour of the defendants and against the plaintiff by recording its reasons holding that the finding of fact and reasons recorded by the trial court on the contentious issues are vitiated on account of erroneous reasoning for non-consideration of the material evidence on record in favour of the defendants and in the absence of evidence in favour of the plaintiff, the same are answered in affirmative and therefore it has reversed the common judgment and decrees by allowing the appeals. The correctness of the same is challenged in all these civil appeals by urging the following questions of law:

- 1) Whether the order dated 12.10.1994 passed by defendant no.3 rescinding the contract, communicated by defendant no.4 vide letter dated 24.10.1994, is valid and justified

in the facts and circumstances of the case?

- 2) Whether the High Court is justified in setting aside the judgment and decrees of the trial court without giving cogent reasons?
- 3) Whether the plaintiff is entitled to recover the cost of the work executed by him in respect of the disputed contract?
- 4) Whether the defendant no.3 is justified in imposing penalty, forfeiture of earnest money, security deposit and withholding bill amount and the same is in accordance with the terms and conditions of the contract?
- 5) Whether the High Court is justified in taking hyper technical view in the regular first appeals without justification?

14. It is contended by Mr. Kirti S. Javali, the learned counsel on behalf of the plaintiff

that the impugned judgment passed by the High Court is unwarranted and uncalled for as it has ignored the admissible evidence adduced on record by the plaintiff which is accepted by the learned trial judge on proper appreciation of pleadings and evidence and has accorded the reliefs as prayed for in the original suits by assigning valid and cogent reasons on the contentious issues framed by him. The High Court has ignored the evidence adduced by the plaintiff and the defendants, particularly, the DWs 1 to 6 and 8, whose evidence unimpeachably and conclusively proves the case of the unilateral breach of contract by the defendants besides that they have acted most irresponsibly as a result of which it was impossible for the plaintiff to complete the contract work. Further, it is urged that the High Court has completely ignored the admission made by the witnesses of the defendants, wherein the plaintiff also adduced positive evidence to show that the defendants had committed breach of

contract. Therefore, it is urged that the High Court has committed an error of jurisdiction and the impugned judgment is liable to be set aside.

15. It is further contended that the High Court has failed to consider the important and admitted fact that the defendants, after the earth work excavated by the plaintiff, were required to supply cement, RCC templates and PCC slabs for putting them to bed of canal and for other use. It is also admitted by the defendants that the cement was in stock and the plaintiff was not informed to procure the same from the open market after obtaining due permission and further it is also an admitted fact that the defendants never informed the plaintiff that there was no stock of the said materials much less supplying the same as and when required. Further, it is contended that it is evident from the facts pleaded and the evidence on record that the defendants are guilty of breach of contract without any fault of the

plaintiff and they forfeited the earnest money and security deposits. Therefore, the findings and reasons recorded on the contentious points by the High Court in the impugned judgment are contrary to the legal evidence on record. Hence, the said findings recorded on contentious points framed by the High Court are erroneous in law and the same are liable to be set aside.

16. Further, it is submitted that the High Court has failed to consider the findings and reasons recorded in paras 16,17,18 and 18A of the trial court judgment. However, it has accepted the excuses given by the defendants that the plaintiff should not have demanded cement before collecting sand and metal. In this regard, the High Court has ignored the pleadings and evidence placed on record with regard to collecting the sand and metal for execution of work.

17. It is further submitted that it was nothing but high handedness on the part of the defendants that they have not only caused undue harassment to the plaintiff but also caused great loss to him by committing breach of the terms and conditions of the contract. Further, the High Court has failed to consider the evidence of the defendants who have supported the claim of the plaintiff which is referred to in para 19 of the judgment of the trial court. Further, the High Court erred in re-appreciating the evidence elicited from the defendants' witnesses during their cross examination, wherein they have admitted that plaintiff has carried out all the earth work as per specifications. When he demanded cement and cement materials from defendant no.4 for execution of further work, the same were not supplied to him. Therefore, it is very clear that in spite of repeated demands made by the plaintiff, cement and cement materials were not supplied to him by defendant no. 4. Therefore,

the impugned common judgment of the High Court is contrary to the facts and legal evidence on record. Hence, the same is not sustainable in the eye of law and is liable to be set aside.

18. Further, it is contended by Mr. Kirit S. Javali, the learned counsel for the plaintiff that the High Court has failed to appreciate the evidence of defence witnesses who themselves have admitted in their evidence that as they did not supply cement and cement materials, the gradation test also could not be carried out. The plea that since sand and metal were not collected by the plaintiff and defendant no. 4 did not supply cement and cement materials by giving lame excuses and therefore the same could not have been accepted by the High Court to reverse the finding of fact recorded by the trial court on the contentious issues in favour of the plaintiff. The High Court has accepted the grounds pleaded by the defendants in their

appeals, that, the plaintiff did not construct any shed or make provision for storing the cement at the work site and this stand was taken up by them for the first time only at the time of adducing evidence and there is no pleading to this effect in their written statement. Further, the ground of appeals urged by them is that the evidence of DW 8 with regard to non supply of cement was that the plaintiff did not submit the construction programme to enable the defendants to supply the required quantity of cement and cement materials, this evidence is without there being any pleading in this regard, and further, he has stated that the defendants also did not supply cement as the plaintiff had not trimmed the canal and had not collected the sand and metal for conducting gradation test. Therefore, it is contended by the learned counsel on behalf of the plaintiff that the common judgment and order of the High Court is contrary to the facts and evidence on record.

19. Ms. Hetu Arora Sethi, the learned counsel appearing on behalf of the defendants in these appeals has sought to justify the findings and reasons recorded on the contentious points answered by the High Court contending that the High Court being the appellate authority, the appeals being in continuation of original proceedings, has reappraised the oral and documentary evidence and found fault with the findings of fact recorded by the trial court on the contentious issues framed by it and the same are erroneous and therefore must be set aside. It is further contended that the plaintiff has not fulfilled his contractual obligations as he has not executed the contract work and therefore, the Chief Engineer has rightly rescinded the contract and levied the penalty and forfeited earnest money and security deposit amount and withheld the final bill amount and therefore, the impugned judgment in these appeals at the instance of the plaintiff need not be interfered

with by this Court in exercise of its jurisdiction under Article 136 of the Constitution.

20. It was further contended on behalf of the plaintiff that the defendants had not even informed the plaintiff the reasons for not supplying the cement and cement materials, the High Court has failed to take into consideration the evidence of the defendants witnesses, with regard to the meeting held on 23.3.1992 in the Chambers of Chief Engineer, Belgaum, the proceedings of the meeting are marked as ex. P-20, the plaintiff, defendant no. 4 and other officers of the Department were present in the said meeting, and the work of construction of canal for 8 kms. was discussed and it was found that the defendant no. 4 had purposely delayed the supply of cement to the plaintiff on untenable grounds. Further, DW1, the Executive Engineer, admitted in his evidence that on the basis of proceedings drawn in the Chief Engineer's chambers that

departmental action was also proposed against defendant no. 4 and the subsequent action proposed against him would support the contention of the plaintiff that it is due to the fault of the Department, more particularly of the defendant no. 4, the contract work had to be stopped in the middle by the plaintiff. The Ex. P-20 puts blame on defendant no. 4 for stoppage of work by the plaintiff. Even in the letter dated 11.12.1992 issued by the Government of Karnataka, marked as Ex. P-23, it is observed that the concerned Executive Engineer has come in the way of contract by not supplying the cement in time to the plaintiff and the action of the Executive Engineer in terminating two contracts is not approved. The aforesaid important aspects of the matter has not been considered by the High Court in reversing the judgment of the trial court by passing the impugned judgment and it is contrary to the facts and evidence on record. Therefore, the same is liable to be set aside and the

judgment and decrees of the trial court are to be restored.

21. It was further contended that the High Court has failed to appreciate that the defendants were not supplying cement free of cost but for charges which were to be deducted from the final bill of the plaintiff. The plaintiff had requested defendant no.4 for the supply of cement and it was for him to decide as to how he could have stored the cement or made provision for the same. Further, the High Court should have noticed that non-completion of the work by the plaintiff is due to non supply of cement by defendant no. 4 and, he also did not supply even the templates and lugs required for putting bed concrete in the excavated canal. The High Court further should have noticed that the defendants have not adduced any evidence to show that there was no stock of cement which was required to be supplied in terms of the contract to the plaintiff. The High Court ought

to have considered the entire evidence on record particularly that the plaintiff is not at fault for non-completion of work as per the contract. Therefore, the impugned judgment and order is contrary to the facts and legal evidence on record. Hence, the same is liable to be set aside.

22. With reference to the aforesaid rival factual and legal contentions, the following points would arise for our consideration:-

1. Whether the findings and reasons of the High Court in reversing the findings recorded by the trial court on contentious issue nos. 1 to 3 and 6 and dismissing the suits of the plaintiff by answering the point nos.1 and 2 in the affirmative by passing the impugned judgment are correct?
2. Whether the findings and reasons recorded by the High Court on the contentious point

nos.1 and 2, in favour of the defendants in the impugned judgment are legal and valid?

3. Whether the High Court is justified in holding that the rescission of the contract of the plaintiff by reversing the finding on issue no. 4 and answering the point nos. 3 and 4 in the affirmative is valid and the action taken by the Department in imposing penalty and forfeiting of earnest money, security deposit and withholding bill amount of the plaintiff is justified?

4. What order is to be passed?

23. Answers to point nos. 1 and 2 : The first and second points are answered together, as they are interrelated, in favour of the plaintiff by assigning the following reasons:

We have carefully perused the pleadings and evidence of the parties on record and considered the rival factual and legal submissions made on their behalf and the findings recorded by the

trial court in its judgment on the contentious issue nos. 1 to 3 and 6 and point nos. 1 and 2 by the High Court to answer the aforesaid points. The trial court in its judgment while answering the contentious issues nos. 1 to 5 in the affirmative and issue nos. 6 to 8 in the negative in favour of the plaintiff, has elaborately referred to the pleadings and evidence on record, particularly the evidence elicited from the defendants' witnesses by the plaintiff's counsel in the cross examination, viz. from DW 1 the Executive Engineer, MRBC Ron, DW 2 the retired Executive Engineer, MRBC Division no.5 Sub division no.18 in Mallapur, DW 4 the Assistant Executive Engineer, MRBC, Division no.5, Sub-division no.18, Mallapur and DW 5 the Assistant Engineer, MRBC, Division no. 5, Sub-division no.18 Mallapur, and also referred to the documentary evidence, namely the letters correspondence made by the plaintiff with the Executive Engineer Defendant no.4 requesting him

to supply the cement and cement materials for the purpose of execution of the work as agreed upon in the contract. The learned trial judge has recorded the findings of fact on the contentious issue nos. 1 & 2 in the affirmative holding that the plaintiff has proved that defendant no.4 did not supply cement and cement articles for completion of the work though he had requested him on several occasions by his letters, which are marked as Exs. P-30, P-32, P-41, P-42, P-45 and P- 46 referred to supra and also referred to the admission made in the cross examination of the defendant witnesses namely DWs 1, 2, 4 and 5. The trial court has rightly further held that the plaintiff had proved the fact that due to non supply of cement and cement materials by the defendant no.4 as agreed upon in the contract, the progress of the work could not be carried out by him and therefore it was held that he was not at fault for non completion of the agreed work. The findings of fact recorded by the learned

trial judge on the aforesaid contentious issues are in the affirmative after referring to the pleadings and evidence of the plaintiff and defence witnesses and also considering the submissions made by the learned counsel on behalf of the plaintiff, that there is no condition in the tender agreement to collect the sand and metal before making a demand for the supply of cement and cement materials from defendant no.4. It was further held by the learned trial judge that according to the case of the defendants, collection of the sand and metals is required for conducting gradation test, and even to carry out such a gradation test cement is required and it is an undisputed fact that the defendant no.4 has neither supplied nor authorized the plaintiff to procure the cement and cement materials from the open market and on account of non supply of the same the plaintiff had to keep his men and machinery idle for months together, which has resulted in heavy losses for him and after

informing the defendant no.4, the plaintiff had moved his men and machinery from the work site. Further, the proceedings held in the meeting on 23.3.1992 in the Chamber of the Chief Engineer, Belgaum, which document is marked as exhibit P-20 has been referred to by the learned trial judge wherein it is observed that due to injudicious act of defendant no.4 in not supplying cement and cement materials to the plaintiff, the contract work had to be stopped by him and further departmental action was also proposed against him for his inaction in supplying the cement and cement materials to the plaintiff. Therefore, learned trial judge has rightly arrived at the conclusion on facts and evidence on record and recorded the findings of fact and held that the plaintiff has proved that the contract work could not be completed due to the fault of the Department itself and its officer i.e. the defendant no.4, and the plaintiff cannot be blamed. The learned trial judge has also

considered legal submission made on behalf of the defendants that the plaintiff did not seek permission from the defendant no.4 for procuring cement from the open market and the further contention urged on behalf of the defendants was that delay in taking possession of the work site shows that plaintiff had no real intention of completing the work within the time limit and the trial court has rightly rejected the same by recording valid reasons. The plaintiff had demanded supply of cement for the entire 8 k.ms. of work, which comes to about 22 to 23 thousand bags of cement but he had not made any provision for storing such cement and the same perishes faster than sand and metal. He had not even collected sand and metal required for conducting gradation test. The further contention that in spite of the request made by defendant no.4 to the plaintiff to resume the work and complete the same, he had not completed the work, though he knew fully well the consequences of abandoning

work in the middle without any reasonable cause would entail serious civil consequences and therefore, the fault lies with the plaintiff and not with the defendants. The above said factual submissions made by the learned counsel on behalf of the defendants were examined by the trial judge with reference to the pleadings and evidence on record and the same were rightly answered against the defendants. The learned trial judge in his judgment at paragraphs 16, 17, 18 and 18A adverted to the evidence elicited in the cross examination of DWs 1, 2, 3 and 4 and recorded the positive finding on the contentious issues nos. 1 and 2, in the affirmative. DW 1 has admitted in his cross examination that there was no condition in the tender agreement to collect sand and metal before demanding cement from the Department and further admitted that after completing the earth work, the plaintiff demanded cement by his letter dated 25.5.1990, which is marked as Ex. P- 45. He further admitted in his

cross examination that the plaintiff had written letter to the defendant no.4 stating that he would commence the bed concrete work next week, if 2731 bags of cement is supplied to him. Such quantity of cement is required for 1 k.m. work and further the evidence elicited in his cross examination shows that cement, template and the lugs were not supplied by defendant no.4 to the plaintiff and he could not complete the work. He has further admitted that defendant no.4 had to give authorization to the plaintiff to procure cement from the open market and since he did not inform the plaintiff regarding the grant of such authorization, he could not procure cement from the open market for want of such authorization. Since the cement, templates and the lugs were not supplied for all the kilometers of work by defendant no.4, the plaintiff could not complete the work. The plaintiff had also written a letter to defendant no.4 to conclude the contract for the reason that he could not finish the same

for non supply of cement, template and lugs. DW 1 further admitted in his cross examination that they were not required to supply cement free of charge to the plaintiff but the defendants would deduct the cost of cement in the bill amount payable to him. It was further admitted in his cross examination that defendant no.4 asked the plaintiff to resume the work, as stated in the evidence of DW 1, as the labour charges and material charges were already increased and therefore, the plaintiff did not agree for resuming the work for executing the same at old rates.

24. Further, the evidence elicited by the plaintiff's counsel from DW 2, the retired Executive Engineer, is extensively referred to by the learned trial judge in his judgment wherein he has stated that for bed concrete, trimming work fixing templates and lugs, cement is required. He further admitted in his evidence that for

execution of the above said works mixing of cement, sand and metal, gradation test was to be conducted to ascertain their proportion and if, the defendants do not supply the cement, gradation test cannot be conducted. He also further admitted that the defendants did not inform the plaintiff that they have sufficient stock of cement and he could collect sand and metal for execution of work. The Department did not supply cement and the plaintiff had informed the superior officers of the Department stating that the work is halted for non supply of cement and further stated in his evidence to the effect that if mud mixes with sand and metal, it cannot be used without washing and for such washing more expenses will have to be incurred by the plaintiff. Further, he had admitted in his cross examination that authorization was required for the plaintiff to procure cement from open market. DW-4 also has deposed to the same effect, which supports the case of the plaintiff.

25. DW-4, the Asstt. Executive Engineer in MRBC, Division 5, Sub-division no.18, DW-5 who was working as Asstt. Engineer in the same Division and DW-7 who was working as Jr. Engineer at the relevant point of time of work have also admitted in their cross examination that they did not ask the plaintiff to procure cement from the open market and in spite of repeated requests made by the plaintiff, the defendant no. 4 did not supply the cement. DW-8, the then Executive Engineer also admitted in his cross examination that though plaintiff had written several letters to defendant no.4 for supply of cement, the Department did not supply cement and he had admitted that due to non supply of cement, the plaintiff had to stop the work and due to stoppage of work the plaintiff's men and machineries had to suffer loss on that count.

26. After adverting to the evidence elicited in the cross examination of the aforesaid defendant witnesses the trial judge has analyzed and appreciated the same properly and came to the right conclusion and recorded the findings of fact at paragraph 18 of the trial court judgment on the contentious issue nos. 1 to 3 in the affirmative. Further, the defence taken by the defendants at the time of adducing the evidence without pleading in their written statement, regarding non supply of cement, is that the plaintiff had not submitted the construction programme to them to enable defendant no.4 to supply the required quantity of cement and the cement materials. The learned trial judge rightly made observation on the relevant issue in his judgment that defendant no.4 was not supposed to supply cement at free of cost to the plaintiff but charges for the same were to be deducted at the time of disbursement of amount in the final bill. Therefore, when the request was made by the plaintiff with defendant no.4 for

supply of cement, it was for him to see how to store cement safely and how to make best use of the same for the purpose of completing the contract work. The trial judge further recorded the finding of fact and held that the defendants neither supplied cement though it was in stock nor authorized the plaintiff to procure the cement from the open market. Defendant no.4 did not inform the plaintiff regarding refusal to supply the cement. It would have made no difference to the Department if it had supplied cement earlier or later. The DW 1 has admitted the same in his evidence on the basis of the proceedings recorded in the meeting held on 23.3.1992, which is marked as Ex. P-20. In the said proceedings blame was put on defendant no.4 for stoppage of work and the following facts were noticed and recorded:

" a) Instead of putting the blame on the contractor for not collecting sand, jelly etc., the contractor might have allowed to

procure the cement from the open market as per clauses of the agreement;

b) Cement was available with department when the contractor had placed his demand for cement;

c) Instead of issuing cement as demanded by the contractor the then EE prolonged the issue and had insisted to collect the sand, jelly etc before issue of cement."

Further, in the letter Ex. P-23 written by the Government of Karnataka to the Chief Engineer it is observed that the concerned Executive Engineer has come in the way of the plaintiff to execute the contract work for non supply of cement in time to him and the proposed action of terminating two contracts is not approved by it. Therefore, the learned trial judge after adverting to the oral evidence of the defendant witnesses referred to supra and the documentary evidence Ex. P-20 and Ex. P-23 and other

documentary evidence, has rightly arrived at the conclusion on facts and held that the plaintiff could not complete the work due to non supply of cement and cement materials by defendant no.4 and he also did not supply templates and lugs required for putting bed concrete in the excavated canal. The plaintiff had requested the defendants to conclude his contract and return the earnest money, security deposit and other amounts withheld by them. Reference was also made to the letter dated 13.1.1993, marked as Ex. P-21 of the defendant no.4, asking the plaintiff to continue the contract work and furnish his clear consent regarding the same. The plaintiff did not accept the same for the reason that his men and machinery were moved from the work site and the contract has come to an end. Therefore, learned trial judge has rightly answered the contentious issue nos. 1 and 2 in the affirmative. The same was erroneously set aside by the High Court by recording its findings

on fact without proper analysis and re-appreciation of evidence on record and wrongly applied the terms and conditions of the contract to the fact situation of the case in hand and accepted the case of the defendants and has set aside the findings in the relevant issues without noticing the fact that it is the defendants, who had committed breach of contract and therefore the plaintiff could not complete the agreed work under the contract.

27. The findings of fact recorded by the learned trial judge in his judgment have been reversed by the High Court, ignoring the pleadings and legal evidence on record and therefore we have to hold that the findings of the High Court are erroneous. We have very carefully examined that portion of the impugned judgment to answer the point nos. 1 and 2 framed by us in these appeals for our consideration. The learned Division Bench of the High Court has adverted to the relevant clause 11

at para 15 of its judgment regarding supply of materials to the plaintiff that may be required from time to time to be used by him for the purpose of execution of works as agreed in the contract and clause 11(A) (i), which provides that the contractor shall see that only the required quantities of materials are indented with the Junior Engineer of the Department and the same shall be supplied to him. The said condition of the agreement as provided in the above clause is not complied with by the plaintiff is the finding recorded by the High Court. As per the said clause, the plaintiff was required to be supplied with cement and cement materials by defendant no. 4, from time to time on presentation of indents signed by him or his authorized representative and counter signed by the Department officers, and in this regard, the High Court has referred to both oral and documentary evidence and held that the plaintiff had not presented any indent signed by him or his authorized representative to the

Department for supply of cement to the Junior Engineer, who in turn sent it to the Assistant Executive Engineer by recommending the same who in turn was required to send it to the Divisional office for supply of the same. The further finding is that the evidence adduced by the defendants in this regard is unchallenged by the plaintiff and undisputedly, neither indent nor proof for submitting the same to the defendants is placed before the Court by the plaintiff to show that he had presented any indent with the Department for supply of cement and cement materials and the High Court has referred to para 18 of the trial court judgment and also to Exs. P - 31, 37, 45, 59, 65 and 70 the same are marked as Exs. D- 28, 62, 76, 102, 116 and 132 respectively and reversed the findings recorded on the above contentious issues 1 to 3, 5 and 6 by the trial court by recording its reasons. The correctness of the said findings and reasons are examined by us to find out whether the same is tenable on facts and in law. Further,

the High Court has stated in the impugned judgment by reversing finding of fact recorded on the contentious issues referred to supra by the trial court by answering the contentious points formed by it and held that nowhere in the said letters it is mentioned that any indent had been prepared or presented by either the plaintiff or his authorized representative to the defendants in connection with request to supply cement and other materials to him. Therefore, it has held that there is non compliance of the condition nos. 2.05 and 2.06 of the agreement referred to above by the plaintiff and further it is not the case of the plaintiff that in the tender contract he was required to be supplied with cement and cement materials without any indent made as such. In this regard, we record our findings as under.

28. After the plaintiff took possession of the site of the works for execution of work, he wrote several letters as per exhibits referred to supra

with a request to the defendants for supply of cement and cement materials and the said letters are very important for the reason that the plaintiff has been persistently demanding defendant no.4 for supply of cement and cement materials as agreed to be supplied to him for execution of work. The aforesaid findings of the High Court adverted to in the preceding paragraph are erroneous in law for the reason that the High Court has placed reliance on the evidence of DW-8 regarding non submission of indents by the plaintiff as per the terms of the contract and general conditions of the tender, which evidence is wholly inadmissible in law, as the same was allowed to be placed on record by the trial court without pleading in their written statement. Apart from the said reason, the defendants in their cross-examination have categorically admitted that the cement and cement materials were not supplied to the plaintiff for execution of work and in fact in the various letters written by the plaintiff

marked as exhibits referred to supra he has specifically demanded for supply of cement and cement materials, the same were accepted by the defendants but they did not insist the plaintiff to submit indents and construction programme and therefore the said letters must be construed as such. Ignoring the substantive evidence on record, the High Court has reversed the findings of fact on the contentious issues referred to supra, which are wholly unsustainable in law.

29. In view of the aforesaid specific conditions and clauses in the agreement, the request of the plaintiff with the Department to supply cement in entirety within a week, even in the absence of indents the demand of the plaintiff for supply of cement and other materials as per his requirement from time to time to use the same in the execution of contract work was very much there by writing number of letters which are exhibited and the same was not met by the defendants by pleading and

adducing evidence. The fact remains that defendants have neither supplied the cement and cement materials to the plaintiff as requested by the plaintiff through his series of letters marked as exhibits referred to supra nor have they replied to him asking him to submit the indents. In view of these admitted facts, the High Court should not have placed reliance upon the inadmissible evidence of DW 8, to set aside the findings of fact recorded by the trial court on the aforesaid contentious issues. Further, para 22 of the impugned judgment refers to the Department asking the plaintiff to furnish the construction programme as contemplated in general condition no.1.10 of the tender document. This is clear from the letters dated 26.6.1990, 28.6.1990 and 30.6.1990 placing reliance upon evidence of DW-8 Gangareddy, by the High Court to come to its conclusion to reverse the findings of the trial court recorded on contentious issue nos. 1 to 3, 5 & 6, as he has stated in his evidence that as per

tender agreement, the plaintiff-contractor should have submitted construction programme for the contract period of 15 months to the defendants, but he has not submitted it to them and therefore it has found fault with the finding of the trial court in holding that the defendant no.4 has not supplied cement and cement materials to the plaintiff for execution of work and set aside the same. It is further erroneously observed by the High Court in the impugned judgment that the evidence of DW-8 remained unchallenged by the plaintiff, as it has accepted the inadmissible evidence regarding non submission of construction programme by the plaintiff, the said evidence of DW-8 is without pleading of the defendants and therefore it should not have relied upon the same and reversed the findings of the trial court on the contentious issues. In view of the foregoing reasons, the High Court's conclusion and its finding in holding that the plaintiff had failed to comply with the said general conditions of the

tender and he committed breach of contract is wholly untenable in law. Further, its reference and reliance to clause 44(b) of the agreement and non supply of the cement and its materials, that the Government shall not be, in any way, liable on account of any delay in supply of such material also cannot be accepted by this Court in view of the observations made by the Chief Engineer in the proceedings drawn in the meeting held on 23.3.1992 which document is marked as Ex. P-20. After placing strong reliance upon the said clause for non submission of letter of indent by the plaintiff, though demand has been made as per the letters referred to supra by the plaintiff, and letters of the defendants referred to supra, and that payment of bill amount is being made to the plaintiff and therefore the question of concluding contract by defendant no.3 does not arise. The defendant no.4 had requested him to bear with the Department. By the time the letters were written to the plaintiff by defendant no. 4, the plaintiff

had already shifted his men and machinery from the site and accordingly informed the Department about the same. The High Court has erroneously held that the plaintiff could not have relied solely on the evidence of DW-8 regarding non furnishing of construction programme for supply of cement and cement materials to him and he had abandoned the tender work in the middle, and recorded its finding by reversing the finding of the trial court. The said finding of the High Court that the Executive Engineer has stated in his evidence that plaintiff did not take permission from defendant no.4 to procure cement and cement material as per his evidence is contrary to the terms of the contract. So also the evidence of DWs 3 and 4 in this regard could not have been placed reliance upon by the High Court to set aside the finding of the trial court. For the reasons stated supra and evidence of DWs 2, 3, 4 and 5, reliance was placed upon the evidence of DW-8 by the High Court, as he stated in his evidence that the plaintiff did

not do canal dressing, trimming work and concrete work, which is wholly erroneous as the same is contrary to the terms and conditions of the contract and substantive evidence on record in favour of the plaintiff.

30. Further, the trial court has referred to the evidence of DWs 3, 4, 5, 7 and 8 and held that the plaintiff had done canal work and canal bund, murrom lining embankment work, however for the gradation test required to be done as stated by DW-8, the same could not be done without cement, according to the evidence of DWs 2, 3 and 4, as cement was necessary for plaintiff to do the bed concrete and trimming work. The finding of the High Court was that only a certain quantity of cement was required by the plaintiff but he had requested for supply of entire quantity of cement from the Department and not the required quantity for execution of the said works, which were to be attended at that stage of request made by him is

once again erroneous in law and cannot be allowed to sustain in law. Further, it has erroneously observed that the plaintiff had not constructed any godown for storing the cement at the work site and he had not stored sufficient sand and metal, in this regard, the trial court has placed reliance upon the evidence of DWs.2, 3, 4, 7 and 8 and recorded the finding holding that non supply of cement and cement materials to the plaintiff is contrary to the terms and conditions of the agreement. The High Court has found fault with the above findings of the trial Court on the contentious issue nos. 1 and 2 and held that the trial court has arrived at erroneous finding, therefore, it has answered the point Nos. 1 and 2 framed by it against the plaintiff and set aside the findings recorded by the trial court on contentious issue nos. 1 and 2 in its judgment. Consequently, the first appeals of the defendants were allowed.

31. It is needless to observe that the conclusion and findings arrived at by the High Court on the basis of re-appreciation of evidence is contrary to the pleadings and evidence on record, the trial judge being the fact finding authority has duly considered the entire evidence after proper analysis and it has recorded the finding of fact on the contentious issue nos. 1,2,3,5 and 6 in favour of the plaintiff.

32. Answer to point no.3 - The High Court, on the issue of rescission of the contract with the plaintiff by defendant no.3, vide order dated 12.10.1994, which order was communicated by defendant no.4 to the plaintiff, has relied on letters sent by the defendants to the plaintiff, wherein he was requested to resume and complete the work and all the items of tender as agreed upon by him. The High Court has erroneously recorded the finding of fact stating that no infirmity can be found in the action taken by the

Department in rescinding the agreement and levying of penalty and forfeiture of earnest money, security deposit and withholding of final bill amount, as the plaintiff did not resume work nor had he shown his willingness to resume or complete the work as per the terms and conditions of the agreement, nor did he request for any fresh terms and conditions to complete the same, and so the Department was left with no option but to rescind the tender agreement. We find the above findings of the High Court in reversing the finding of the trial court on issue nos. 4, 5 and 7 are wholly untenable both on facts and in law and we have to hold that the rescinding of the contract by defendant no.3 is illegal, and penalty imposed upon the plaintiff and forfeiture of earnest money, security deposit and withholding of bill amount after rescinding the contract is not legal and valid as the plaintiff himself has requested the defendants to conclude the contract without any penalty or the risk and cost amount.

Defendant no. 3 passed the order of rescinding the contract, without issuing any show cause notice or holding an enquiry, as required under clause 3(d) of the contract and therefore the learned trial judge has rightly recorded the findings on the aforesaid contentious issues in favour of the plaintiff and rightly held that the rescinding of the contract was not justified. The unilateral rescission of the contract of the plaintiff by defendant No. 3 is arbitrary and unreasonable. The action of defendant no.3 in rescinding the contract has resulted in serious civil consequences of imposition of penalty and forfeiture of the earnest money deposit amount, security deposit and withholding the bill amount in relation to the execution of the work by the plaintiff. Therefore, defendant no. 3 before rescinding the contract, by invoking his power under clause 3(d) of the agreement, should have complied with the conditions mentioned in the said clause as the same is mandatory. The rescinding of

the contract is also bad in law for one more reason that the State Government has accorded permission to defendant no.3- the Chief Engineer, Irrigation (North), Belgaum to rescind the contract as per terms and conditions of the agreement vide letter dated 29.8.1994, which document is marked as Ex. D-40. The Chief Engineer directed the Superintending Engineer, M.R.B.C. Circle, Dharwad to levy penalty and rescinded the contract vide letter dated 12.10.1994, which document is marked as Ex. D-41, the relevant portions of this letter is extracted below :

"(ii) to rescind the contract and to take up the balance work at the risk and cost of the contract as per clause-3 of Agreement.

In addition to the above, the expenditure incurred towards the work charged establishment if any, beyond the tender period till the date of rescinding the agreement may be recovered, duly observing all the formalities of the agreement. The Superintending Engineer is requested to call for tenders for the balance works."

We have to infer from the last unnumbered paragraph of the said letter, that the contract of

the plaintiff is rescinded. Thus, we have to hold that defendant no.3 rescinded the contract, which order is communicated by defendant no.4 vide letter 24.10.1994 which document is marked as Ex. D-42. The reliance placed by defendant no.3 and the Superintending Engineer upon the approval of the Government in its letter Ex.D-40 for rescinding of the contract with the plaintiff is fallacious, as the Government has very clearly stated in its letter referred to supra, that the contract of the plaintiff has to be rescinded and penalty be imposed as per the conditions of the agreement. Therefore, the finding recorded by the High Court on this contentious point in the impugned judgment is liable to be set aside. Accordingly, we set aside the same by answering the point no.3 in favour of the plaintiff.

33. For the foregoing reasons, we are of the view that the findings and reasons recorded by the High Court on the contentious points framed by it

are totally erroneous both on facts and in law and therefore the same are required to be interfered with by this Court and hence the appeals must succeed. In view of the findings and reasons recorded by this Court on point nos. 1, 2 and 3 in favour of the plaintiff, point no.4 is accordingly answered in favour of the plaintiff. Hence, we set aside the impugned judgment and decrees dated 12th June, 2003 passed by the High Court of Karnataka in RFA nos. 593-600/2000 and we restore the common judgment and decrees of the trial court in the original suits, except modification with regard to rate of interest from 18% to 9%.

34. The defendants are directed to repay the earnest money and security deposit amount and also finalize the bill of the plaintiff for the work executed by the plaintiff and pay the same with interest @ 9% per annum within six weeks from the date of receipt of the copy of this judgment.

Accordingly, the appeals are allowed, with no order as to costs.

.....J.
[CHANDRAMAULI KR. PRASAD]

.....J.
[V. GOPALA GOWDA]

New Delhi,
August 27, 2013.



JUDGMENT