

(2002) 06 AP CK 0031

Andhra Pradesh High Court

Case No: Appeal No. 388 of 1989 and Cross Objection

Tamilnadu Card Boards and
Paper Mills Ltd.

APPELLANT

Vs

Sirpur Paper Mills Ltd. and
Another

RESPONDENT

Date of Decision: June 13, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, 96

Citation: AIR 2003 AP 438 : (2003) 1 BC 255

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: Channabasappa Desai, for the Appellant; Madhukar Ganu and Vilas V. Afzul Purkar, for the Respondent

Judgement

P.S. Narayana, J.

The unsuccessful first defendant on O.S. No. 30/85 on the file of the Subordinate Judge Asifabad is the appellant and the first respondent in the appeal is the plaintiff and the second respondent in the appeal is the second defendant in the suit, who was set ex parte in the Trial Court. The first respondent-plaintiff filed a suit for recovery of Rs. 1,39,834.80 ps. towards the cost of Sirrock Rolls supplied by the first respondent-plaintiff company to the appellant-first defendant and the second respondent-second defendant in the suit.

2. The first respondent-plaintiff had pleaded in the plaint as follows:

Plaintiff is a Public Limited Company, having its registered office in Hyderabad and factory at Sirpur Kaghaznagar. It is represented by the general power of attorney holder Mr. M.K. Bhaiya. The first defendant is also a Public Limited Company with registered office at Madras. It is represented by its Director Mr. V. Seshan. The second defendant is an Engineering Works at Erode in Tamilnadu State, represented

by its working partner Sri K. Jaipala. On 16.10.1982 at Sirpur Kaghaznagar, the first defendant represented by its Director Sri V. Seshan placed an order on the plaintiff for supply of two Sirrock Rolls and delivered cheque No. 3011575, dated 16.10.1982, for Rs. 80,000/- as advance drawn on the State Bank of India, Erode. It was signed by the second defendant. In that letter dt. 16.10.1982 the first defendant requested the plaintiff to raise the bill in the name of second defendant stating that second defendant is its machinery supplier. Cost of each Sirrock Roll was Rs. 1,26,500/-. The advance of Rs 80,000/- at the rate of Rs. 40,000/- for one Sirrock Roll. The balance payable including all the taxes comes to Rs. 1,03,009.80 ps. The contract was concluded between the plaintiff and the first defendant for supply of two Sirrock Rolls. The cheques for Rs. 80,000/- issued by second defendant in favour of plaintiff on State Bank of India, Erode was dishonoured when it was presented for encashment. The plaintiff by its letter, dated 4.11.1982, requested the first defendant to send a demand draft for the said amount. But, in the meanwhile, the plaintiff received demand draft No. 225607/192, dated 3.11.1982, for Rs. 80,000/- through letter dated 8.11.1982, in the place of the cheque originally issued. The first defendant regretted for the inconvenience caused by the return of the cheque. The second defendant submitted drawing for the said two Sirrock Rolls through their letter dated 5.11.1982. The first defendant by its letter, dated 21.12.1982 requested the plaintiff to expedite the despatch of two Sirrock Rolls to Erode. The plaintiff firm despatched one Sirrock Rolls from Sirpur Kaghaznagar to Erode under consignment note No. 14139, dated 12.2.1983, through Transport Corporation of India, and a bill dated 15.3.1983 was raised for payment of Rs. 1,03,099.80 ps. after adjusting Rs. 40,000/- out of the advance sum paid. Those documents were sent through Bank for payment and the consignment was sent directly to the second defendant. The second defendant took delivery of the consignment by producing the lorry receipt on 2.3.1983, but the bill was not honoured by the second defendant and the sum of Rs. 1,03,099.80ps. still remained unpaid. The second Sirrock Roll was despatched under consignment note No. 14371. dated 5.3.1983, from Sirpur Kaghaznagar to Erode through Transport Corporation of India. A bill was issued on 9.3.1983 claiming Rs. 1,05,731/- after adjusting the balance of Rs. 40,000/- received as advance. These documents were sent through Bank and the said sum was realised. The plaintiff addressed letter, dated 1.2.1984, to the defendants reminding the payment of Rs. 1,03,099.80 ps., due under the first Sirrock Roll and called upon the defendants to pay the said sum. The total amount due including interest at 15 per cent per annum is Rs. 1,39,834.80 ps. Interest is claimed as per the conditions stipulated. Plaintiff issued notice on 28.8.1984 to both the defendants. It again issued a notice on 25.10.1984 to the first defendant. First defendant denied the liability to pay the said sum. The first defendant cannot deny its liability because the order was placed by it and the two Sirrock Rolls were supplied at the instance of the first defendant A final notice was issued on 12.4.1985 to the first defendant for which reply on 8.5.85 was received. The first defendant tried making the second defendant liable. But because the second defendant received the Sirrock Rolls, it is also liable along with the first

defendant to pay the cost of Sirrock Rolls with interest jointly and severally. Hence this suit, for decree against both defendants jointly and severally for a sum of Rs. 1,39,834.80 ps., with future interest at 15 per cent per annum till date of realisation.

3. The appellant herein first defendant in the suit had filed a written statement with the following averments:

The first defendant had changed its name as T.T. Card Boards and Paper Mills Ltd. The first defendant which was expanding its unit was in need of new machinery. For the supply of the same, the first defendant placed a composite order with the second defendant. The second defendant alone is responsible for supply of the machinery to the first defendant. The first defendant was well acquainted with the plaintiff was manufacturing Sirrock Rolls which were part of the machinery to be supplied by the second defendant to the first defendant. The second defendant requested the first defendant to use their good offices with the plaintiff and negotiate for the supply of two Sirrock Rolls and place the order on behalf of the second defendant with the plaintiff. Accordingly, Mr. V. Sheshan, the Director of the first defendant, placed an order with the plaintiff on behalf of the second defendant on 16.10.1982. This order clearly stipulates that the bills for these Sirrock Rolls should be raised on the second defendant by the plaintiff and the goods should be delivered to the second defendant. Along with this order an advance of Rs. 80,000/- was paid by the second defendant to the plaintiff through cheque No. 301575, drawn on State Bank of India, Erode. Thus, it is evident that the contract dated 16.10.1982 was between the plaintiff and the second defendant and that the first defendant merely negotiated the terms on behalf of the second defendant and signed the letter only to confirm the terms of the contract between plaintiff and the second defendant. Therefore, the allegation of the plaintiff that the first defendant placed the order for the supply of two Sirrock Rolls and delivered the cheque drawn by second defendant and that the contract is between the first defendant and the plaintiff are not correct. It is also incorrect to say that the first defendant requested the plaintiff to raise the bills in the name of second defendant. Because the plaintiff and the first defendant knew that the contract was for and on behalf of the second defendant, the plaintiff agreed and accordingly raised the bills and despatched the machinery to the second defendant and the payment was made by the second defendant. Therefore, there is no concluded contract between the plaintiff and the first defendant for supply of two Sirrock Rolls. The letter written by the plaintiff about the dishonour of the cheque issued by the second defendant, was received by first defendant but even before the first defendant could intimate the second defendant about it, the second defendant sent a demand draft for Rs. 80,000/- to the plaintiff. Because the work was being delayed, the first defendant only requested the plaintiff to despatch the Sirrock rolls to second defendant only requested the plaintiff to despatch the Sirrock Rolls to second defendant at Erode. The plaintiff despatched the first Sirrock Roll to the second defendant and raised the bill for Rs. 1,03,099.80 ps., in the name of second defendant. The plaintiff sent the

documents to the second defendant. The second defendant took delivery of "the consignment on production of the lorry receipt. Thus plaintiff dealt with the second defendant only with full knowledge, that second defendant is the contracting party. Therefore, plaintiff can look for payment only to the second defendant and not to the first defendant. These particulars will clearly show that plaintiff had really entered into contract only with the second defendant. The first defendant is not aware of that had transformed between the plaintiff and the second defendant. Plaintiff wrote the letter on 1.2.84 to the second defendant only demanding payment of Rs. 1,03,099.80 ps. First defendant did not receive any such letter. Therefore the contracting party is only the second defendant and because of it the plaintiff demanded the amount from the second defendant. The second defendant raised the relative bills on the first defendant for the two Sirrock Rolls supplied and the first defendant paid the entire value of the two Sirrock Rolls, which are part of the machinery supplied, by second defendant to first defendant. Therefore, first defendant is not liable, to pay the balance of the value of the Sirrock Rolls supplied to the second defendant. Having raised the bills in the name of second defendant and having accepted payment of the value of one Sirrock Roll in full, from the second defendant, the plaintiff is estopped for claiming the suit amount from the first defendant. The first defendant did not receive any notice dated 28.8.1984 from the plaintiff. It received only the notice dated 25.10.1984 for which reply was sent on 7.3.1985. The very fact the plaintiff is claiming jointly and generally a decree against the second defendant also, disclose that second defendant alone is liable. Interest claimed is excessive and the suit claim is barred by limitation. There is no cause of action to file the suit against the first defendant. This Court has no jurisdiction to entertain and try this suit. Therefore, the suit may be dismissed with costs of the first defendant.

4. As already stated supra, the second respondent in the appeal the second defendant in the suit was set ex parte and on the strength of the pleadings, the following issues were settled by the Trial Court:

1. Whether the contract for supply of Sirrock Rolls is between plaintiff and both the defendants?
2. Whether the first defendant is liable to pay the suit claim?
3. Whether the suit claim is barred by limitation?
4. Whether the interest claim by plaintiff is excessive?
5. Whether this Court has no jurisdiction to entertain this suit?
6. To what relief?

In the Trial Court, on behalf of the plaintiff, P. W. 1 and P. W. 2 were examined and on behalf of the first defendant, the present appellant in the appeal was examined as D.W. 1. Further, Exs. A. 1 to A.22 were marked. On appreciation of both oral and

documentary evidence, the suit was decreed with costs for Rs. 1,49,834.80 ps., as against both the defendants jointly and severally, with subsequent interest at 12% per annum on Rs. 1,03,099.80 ps. from the date of suit till date of decree and at 6% per annum on Rs. 1,03,099.80 ps. from the date of decree till the date of realisation and aggrieved by the same, the first defendant preferred the present appeal and the plaintiff had filed cross-objections under Order 41, Rule 22 of the CPC praying for awarding of interest at 15% per annum or at least at 12% per annum for the period subsequent to the decree and till realisation and for costs in the Cross Appeal.

5. Mr. Channabasappa Desai, the learned Counsel representing the appellant-first defendant had contended that Ex. A.3 was signed by the first defendant-appellant and the contents show that negotiations took place in front of Mr. Bhantia, who was not examined and the witnesses who were examined are the persons having no personal knowledge. The learned Counsel further contended that the bill should be raised in the name of the second defendant only. The learned Counsel also had drawn my attention to paragraph No. 4 of the plaint and also Exs. A.6 and A.7. The learned Counsel also had drawn my attention to the evidence of P. W.2 and had commented that the understanding was that the money should be collected from the second defendant only and the learned Counsel also had pointed out that even the legal notices were issued to the second defendant only and this aspect clearly goes to show that the understanding was clear that the second defendant alone would be made liable and the first defendant-appellant has nothing to do with the same. The learned Counsel had drawn my attention to Exs. A.8, A.10, A.11, A.18 and also A.19. He learned Counsel also had pointed about Exs. A.5, A.6 and also A.7 and had drawn my attention to several portions of the evidence of P. Ws. 1 and 2 and also D. W. 1 in this regard. The learned Counsel also had placed reliance on *Naseem Moorulaiah v. Abdul Salem* 2002(1) DT 738 at page 741] and had contended that in view of the fact that Mr. Bhantia was not examined, adverse inference had to be drawn.

6. Mr. Vilas Afzul Purkar, the learned Counsel representing the first respondent-plaintiff had drawn my attention to Exs. A.1, A.2, A.3 and also A. 14 and had contended that all these documents clearly goes to show that the appellant-first defendant also is liable and the correspondence also shows that both of them had placed the orders. The learned Counsel also had further contended that the non-examination of Mr. Bhantia is of no consequence since a person who is conversant with the facts of the case can be examined and Raja Reddy, P. W. 1, a person conversant, in fact, had been examined and hence, there is no question of drawing any adverse inference in this regard. The learned Counsel further submitted that, no doubt, notice had been addressed to the second defendant, but it was marked to the first defendant as well and that cannot be a ground and even otherwise, the contents in the toto should be taken into consideration while appreciating the aim to object of issuing a notice. The learned Counsel also had

drawn my attention to the oral evidence of P.Ws. 1 and 2 and also D.W.I and further the learned Counsel had contended that it is a commercial transaction and the Trial Court had erred in granting interest only at 6% p.a. from the date of decree till the date of realisation and hence prayed for modification of the decree awarding interest at 15% p.a. or at least at 12% p.a., for the period subsequent to the decree till realisation and for costs.

7. Heard both the learned Counsels and also perused the material and the evidence of P.W. 1, P.W.2 and D.W. 1 in this regard.

8. The points, which arise for consideration in this appeal, are as follows:

(a) Whether the contract for supply of Sirrock Rolls is between the first respondent-plaintiff and the appellant-first defendant and the second respondent-second defendant in the suit?

(b) Whether the suit is within time?

(c) Whether the first respondent-plaintiff is entitled to the interest as prayed for in the cross-objections?

(d) To what relief?

9. Point (a) : The first respondent-plaintiff is a Public Limited Company and the appellant-first defendant is also a Public Limited Company and the second respondent-second defendant is an Engineering Works at Erode and the suit is instituted as against both the defendants and as already stated supra, the second defendant has not contested the matter. The case of the first respondent-plaintiff is that on 16.10.1982 Mr. V. Sheshan of the first defendant placed an order with the plaintiff for supply of two Sirrock Rolls and also gave a cheque for Rs. 80,000/- as an advance drawn on State Bank of India, Erode Branch, and the said cheque was signed by the second defendant. The first defendant has specifically instructed the plaintiff to despatch the two Sirrock Rolls to the second defendant at Erode and also raise bills for the value of those two Sirrock Rolls on the second defendant and according to the said stipulation in the said order, dated 16.10.1982, the plaintiff despatched the Sirrock Rolls and raised the bills on the second defendant and for the first Sirrock Roll, the lorry receipt was sent to the second defendant directly while the bill was sent through bank for payment and the second defendant had taken delivery of the first Sirrock Roll from the Transport Company by producing the said receipt. But, he did not pay the amount mentioned in the bill sent through the Bank and the documents for the second Sirrock Roll had been sent through the Bank and the second defendant paid the full amount of the bill and took delivery of the Sirrock Roll from the Transport Company. But, however, unfortunately the cheque for Rs. 80,000/- issued along with the order of supply of Sirrock Roll was not honoured by the Bank at Erode and this fact was brought to the notice of the first defendant through letter and then a demand draft for the said amount was received

from the second defendant. It is also the further case of the plaintiff that though legal notices had been issued, inasmuch as the amount was not paid, the plaintiff was left with no other option except to institute the suit. No doubt, specific stand was taken by the first defendant that it is not concerned with the liability and the second defendant alone is liable and unnecessarily, the first defendant also was impleaded as a party. As can be seen from Ex. A. 1, a letter dated 16.9.1982, and the said letter addressed by Mr. V. Sheshan reads as follows :

"Dear Shri Bhantiaji,

I take pleasure in writing to you after a long time and I hope, this finds you in good health and cheer.

We require one "Stonite Roll" for our paper machine conforming to the following specification :

I shall be thankful, if you can kindly send me your offer indicating therein the delivery time and other terms. You are also requested to kindly send me a complete set of drawing of the stonite roll to enable us to make necessary supporter.

I am trying to contact you over telex in the meantime and in the event of your not receiving any telex before receipt of this letter, kindly send me your offer immediately on receipt of this letter.

With regards.

Yours sincerely,

Sd/-

(V.Sheshan)"

Ex. A.2 is dated 18.9.1982. Ex. A.3, dated 16.10.1982, is by the first defendant relating to supply of two Sirrock Rolls and it was, no doubt, specified that "you may kindly raise the bill in the name of M/s Mechano Engineering Works, No. 84, Perundurai Road, Erode, TIN (Pin. Code No. 638009) who are our machinery suppliers." Thus, Exs. A. 1 to A.3, no doubt, show that the first defendant had negotiated with the plaintiff for supply of Sirrock Rolls and placed an order under Ex. A.3. DW. 1 -Sheshan in his evidence had stated that the firm was then trying to expand the Unit for manufacturing of Card Board to manufacture of paper also and that had required new machinery, which included the instalment of two Sirrock Rolls in the said machinery and that the first defendant placed the composite order with the second defendant for supply of entire new machinery required by the first defendant for its expansion of the unit and he had personal contracts with Mr. Bhantia, Vice-President of the plaintiff Company and in view of the same and at the instance of the second defendant, he came to Sirpur Kaghaznagar along with Mr. Jaipalan of the second defendant and introduced him to the officials of the plaintiff Company and negotiated and also placed order on behalf of the second defendant

for supply of two Sirrock Rolls and, thus, this evidence clearly reveals that the first defendant had required the machinery for expansion of the Unit and placed an order with the second defendant for the said machinery and because of his personal acquaintance with the Vice-President of the plaintiff Company, he came to Sirpur Kaghaznagar and had negotiated the price of other particulars of the Sirrock Rolls. As can be seen from Exs. A. 1 to A. 3, nowhere it had been specified that the negotiations of the first defendant was only on behalf of the second defendant and the second defendant had nothing to do with the bargain. The fact that the cheque was dishonoured was also brought to the notice of the first defendant by the plaintiff and the first defendant wrote Ex. A. 14 wherein it was specified that the first defendant was regretting for the dishonor of the cheque and if this fact was known to the said defendant earlier, it would have send a demand draft in this regard. Thus, Exs. A. 1 to A.3 and A. 14 definitely go to show that the contract was in between the first and the second defendants as well. Apart from this. Exs. A. 1 to A.3 and also Ex. A. 14, the evidence of P.Ws. 1 and 2 and also D.W. 1 in a way comes to the aid of the case of the plaintiff. No doubt. The learned Counsel for the appellant-first defendant had strenuously contended that the legal notices were addressed only to the second defendant and this shows that impleading the first defendant was an afterthought. But, it is pertinent to note that a copy had been marked to the first defendant as well. Ex. A.5 dated 21.12.1982, reads as follows:

"This has reference to your letter No. SPM/MDS/23729 dated 15th instant addressed to M/s. Mechano Engineering Works. Erode, informing non-receipt of drawings sent by you vide your letter dated 10th November, 1982. We understand from Mr. Jayapal of Mechano Engg. Works, Erode, who is here today that they have forwarded the drawings to you personally through their Engineer in the first week of November, 1982 itself and that the drawings were handed over to your Mr. Raja Reddy. Kindly therefore check up with Mr. Raja Reddy and ensure that the delivery me promised by you is maintained for despatch of the Sirrock Rolls".

We also confirm having sent the following telegram reading

KIND ATTN. MR. METHA. MATERIAL MANAGER MECHANOENGG. WORKS ENGINEER PERSONALLY HANDED OVER THE DRAWINGS IN THE FIRST WEEK OF NOVEMBER ITSELF TO MR. RAJA REDDY. HOWEVER MECHANO ENGINEER MEETING YOU TODAY STOP PLEASE ARRANGE TO DESPATCH THE ROLLS ORDERED IMMEDIATELY TO REACH OUR FACTORY BEFORE THE MONTH END.

Kindly look into the matter and inform us by wire the exact date when you will be dispatching the rolls to our factory.

Thanking you.

Yours faithfully,

For the Tamilnadu Cardboard and Paper Mills Ltd.

Ex. A.6, dated 18.12.1982, reads as follows:

"We have placed orders for the purchase of 2 numbers of stonite rolls after a personal visit of Mr. V. Sheshan, Director, Tamilnadu Cardboard and Mr. K. Jayapalan, Mechano Engineering Works, Erode.

Our Engineer has inspected some rolls at your works. Our Engineer wanted a journal diameter of 140 mm Die and a length of 330 mm. Mr. Raja Reddy, Chief Engineer. Workshop wanted a drawing for journal modifications of the above description.

After reaching Madras, we have deputed our Engineer, Mr. Kandasamy with a drawing for the journal modification to Sirpur to hand over the drawing personally to avoid delay.

We surprise to note that you have sent a drawing on 10.10.82 for approval even after handing over our drawing personally by our Engineer. Unfortunately, we have not received neither your drawing nor your letter. If we have received your drawing, we would have despatched the drawing immediately as we are in need of the rolls urgently. We have received your letter after our telegram dated 1.5.12.1982. Anyhow, we request you to send both the rolls by the end of this month. Our Engineer has already started to Sirpur to impress upon you the necessity for early delivery. Kindly help us to complete our project in time by delivering your rolls at the earliest.

Thanking you.

Yours faithfully,

For Mechano Engineering Works".

Much stress had been placed on the words used "we have placed orders for the purchase of two numbers of stonite rolls after a personal visit of Mr, V. Sheshan, Director, Tamilnadu Card Board and Mr. K. Jayapalan, Mechano Engineering Works, Erode." On the strength of this correspondence, a serious attempt was made to contend that the first defendant has nothing to do with the said bargain or contract and there is no privity of contract at all at any point of time between the first defendant and the plaintiff and since the first defendant is a sound party, as an afterthought the plaintiff had thought of obtaining a decree as against the first defendant also. Reliance was also placed on Exs. A. 18 and A. 19, the bills issued by the plaintiff to the second defendant. But, even on a careful reading of all these documents, it is clear that an order was placed by the first defendant itself and these are all subsequent events. Even Exs A. 18 and A. 19 also amply establish that the order of the supply of Sirrock Rolls had been made by the first defendant and thus when there is ample oral and documentary evidence to fasten the liability as against the first defendant also, the first defendant cannot escape the liability stating that it is the second defendant who is alone liable. It is further essential to note that the

evidence of P.W. 1 is clear and categorical and P.W. 1 also a person well conversant with the facts of the case and in view of the evidence of P.Ws. 1 and 2 and also the evidence of D. W. 1 and Exs. A. 1 to A.22 it is clear that not only the second defendant, the first defendant-appellant also is liable to pay the amount. In the said circumstances, it cannot be said that the non-examination of Mr. Bhantia is in any way fatal and it cannot also be said that because he was not examined, an adverse inference has to be drawn in the facts and circumstances of the case, inasmuch as on behalf of a Company, a person conversant with the facts of the case can well be examined. Hence, even from the documentary evidence available not only Exs. A.1 to A.3, from A.6 and A.7 also coupled with Exs. A. 18 and A. 19, it is clear that both the defendants i.e., the appellant herein and the second respondent in the appeal are jointly and severally liable to pay the amount.

10. Point (b) : Though it was pleaded in the written statement of the first defendant-appellant that the suit is barred by limitation, the learned Counsel had not advanced any arguments in this regard. However, the suit was filed on 22.8.1985 and the suit claim is in relation to a bill, dated 15.2.1983, and inasmuch as the suit was filed within three years from the date of the said bill, it cannot be said that the suit is barred by limitation.

11. Point (c) : There is no dispute between the parties that the transaction is a commercial transaction. The learned Counsel for the first respondent-plaintiff-cross appellant had contended that inasmuch as the transaction is a commercial transaction, the granting of interest of 6% p.a., from the date of decree till the date of realisation is not justified and hence, the decree has to be modified by awarding interest at 15% p.a. or at least at 12% p.a., for the period subsequent to the decree and till realisation and for costs of cross appeal. However, in the facts and circumstances of the case, the first respondent-plaintiff is entitled to 12% interest for the period subsequent to the decree till realisation.

12. Point (d) : In the light of the findings recorded above on point Nos. (a) to (c) the appeal is devoid of merits and, accordingly, the appeal is dismissed. But, however, in the facts and circumstances of the case, without costs and the cross appeal-objections also are partly allowed as indicated above without costs.