

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.285/2002**

% **2nd September, 2011**
M/S. PRIME HORTIAGRO PROJECTS LTD. Appellant
Through: Mr. A.P. Mukundan, Advocate

VERSUS

M/S. COMPETENT CONVEYOR SYSTEMS PVT. LTD. Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC), is to the impugned judgment and decree dated 11.2.2002 of the trial Court whereby the suit of the respondent for recovery of Rs.3,26,800/- was decreed against the appellant/defendant alongwith pendente lite and future interest @ 12% per annum.

2. The facts of the case are that the respondent/plaintiff claimed to have entered into a contract with the appellant/defendant as per the

purchase order placed by the appellant/defendant on 25.9.1997. The respondent/plaintiff contended that it had to supply machinery/conveyor systems to the appellant/defendant for the total value of Rs.16 lacs and that it did in fact supply this machinery/conveyor systems vide invoice Nos.242 to 245 dated 12.11.1997 and 15.11.1997 totaling to Rs.16 lacs. The respondent/plaintiff further averred that the appellant/defendant made two payments of Rs.7,60,000/- and Rs.6,50,000/- but did not make the balance payment of Rs.1,90,000/-. It was further alleged that the appellant/defendant was issued various letters which had no effect. The respondent/plaintiff further averred that though the appellant/defendant issued the necessary sales tax forms for the complete amount of the contract value of Rs.16 lacs, however, it did not pay the balance amount and therefore the subject suit came to be filed.

3. The main defence of the appellant/defendant in the trial Court was that the respondent/plaintiff in addition to supply of machinery/conveyor systems was also liable to do the commissioning of the machinery/conveyor systems and since the respondent/plaintiff failed to do the job of commissioning, no payment was due to the respondent/plaintiff. The appellant/defendant also argued that as per the terms of the contract, though balance payment was to be made only on successful commissioning, however, the respondent/plaintiff committed

interpolation in the terms and conditions of the contract whereby the word “delivery” was substituted for the word “commissioning”. It was then the stand of the appellant/defendant that because the respondent/plaintiff failed to do the job of commissioning, the appellant/defendant had to do the job of commissioning and for which it incurred expenditure and therefore no amount was payable to the respondent/plaintiff.

4. The relevant issue in this regard was issue No.iii framed by the trial Court and which issue reads as under:-

“iii. Whether the plaintiff is entitled to recovery any amount from the deft.? If so, how much? OPP”

5. The trial Court has while dealing with issue No.3 from internal pages 9 to 15 of the impugned judgment held that the respondent/plaintiff was not liable for the job of commissioning, and therefore the appellant/defendant was liable to pay the suit amount. Some of the conclusions of the trial Court in the impugned judgment, and with which I agree, are as under:-

(i) The admitted work order placed upon the respondent/plaintiff by the appellant/defendant dated 25.9.1997 alongwith its terms and conditions exhibited as Ex.PW1/3 and Ex.PW1/4 showed that the contract value of Rs.16 lakhs was arrived at by totaling of the price/value of eight

machineries as mentioned in the first page of Ex.PW1/3 and therefore there was no question of any commissioning being done by the respondent/plaintiff as the price was only towards supply of the machinery.

(ii) Even in the proforma invoice dated 8.11.1997 Ex.PW1/D5 which was sent with the covering letter dated 13.11.1997, Ex.PW1/D4 by the respondent/plaintiff to the appellant/defendant again only contained the value of the contract as Rs.16 lakhs with respect to eight items of the machinery which were to be supplied.

(iii) If the scope of work of the respondent/plaintiff included the job of commissioning, then, the respondent/plaintiff was entitled to additionally 7-1/2% for installation charges or supervision charges of Rs.1500/- per day plus free lodging, boarding etc. in terms of the clause (IX) of the clause of prices as found in the original offer of the respondent/plaintiff dated 9.7.1997 Ex.PW1/D2 i.e. price of installation/supervision charges/commissioning was in fact in addition to the price of the machinery supplied and these aspects were conspicuous by their absence in the supply orders dated 25.9.1997 Ex.PW1/3 and PW1/4 and therefore the commissioning was not the liability of the respondent/plaintiff.

(iv) The appellant/defendant had issued necessary sales tax forms (ST-1) for the complete amount of the contract of Rs.16 lakhs and which would not have been done if the respondent/plaintiff had not completed the work.

6. Some of the relevant observations of the trial Court, in this regard, read as under:-

“Even if it is assumed, that the defendant placed its purchase order upon the techno-commercial offer dated 9.7.97 Ex.PW1/D2, in my considered view for various reasons it cannot be said that the plaintiff undertook to install and commission the conveyor systems at the site of M/s. North Eastern Regional Agricultural Marketing Corporation Ltd. at Guwahati. A bear perusal of techno-commercial offer Ex.PW1/D2 by itself provides that besides the prices of the conveyor systems, the plaintiff also provided for charging installation @ 7-1/2% or supervision charges of Rs.1,500/- per day plus free lodging, boarding, travelling and local conveyance at site. Purchase order Ex.PW1/3 of the defendant is, however, totally silent on this core. The purchase order of the defendant by itself does not make any mention of any installation charges or supervision charges but for only the price of the conveyor systems. There is not even an iota of any mention anywhere in the purchase order as regards any installation or supervision charges that could be payable to the plaintiff besides the prices of the conveyor systems. What was exactly offered by the plaintiff against which the defendant placed his purchase order Ex.PW1/3, the defendant by itself has not preferred to produce before the Court, in as much as, as said earlier, the purchase order of the defendant is against the offer letter No.SPY/PHPL?239/97 dated 22.9.97 and not the techno-commercial offer Ex.PW1/D2. Not only that, the bills raised by the plaintiff upon the defendant which undisputedly are Ex.PW1/5 to Ex.PW1/8 relate to only as regards the prices of the conveyor systems in total amounting to Rs.16,00,000/- against the

sales Tax-1 forms. The prices of the conveyor systems as per the bills Ex.PW1/5 to Ex.PW1/8 have not been disputed in any manner, whatsoever. Admittedly, the defendant issued the ST forms to the plaintiff and the unchallenged and unrebutted testimony of PW1 that the ST forms issued by the defendant to them were for the full value of Rs.16,00,000/- for which they had supplied the goods, further establishes the fact that the plaintiff supplied the goods, that is the conveyor systems to the defendant for the total value of Rs.16,00,000/- against the bills Exs. PW1/5 to Ex.PW1/6. The value of the price of the goods so sold at Delhi by no means can be said to be connected with any obligation on the part of the plaintiff to install and commission the conveyor systems at the site at Assam. Even the DW1 who is the Director of the defendant company, during his cross-examination has admitted it to be correct that the plaintiff in his quotation/order Ex.PW1/D2 had quoted separately for installation and affixation charges of the conveyor system, but they did not accept it. That also simply implies that the defendant on its part did not accept the offer of the plaintiff to install and commission the conveyor systems and the purchase orders were placed by the plaintiff only for the supply of the conveyor systems sans their installation and commissioning. As regards the alleged interpolations made in the terms and conditions forming part of the purchase order, the mere testimony of DW1 that it had been done by the plaintiff by putting the word 'delivery' against the word 'commissioning' applying the whitener, I do not find to be creditworthy or reliable, for the reasons foregoing, as also for the reason that the purchase order was not either signed by DW1 or said to have been signed on his instructions in his presence. The person who signed the purchase order and who only could depose about such a state or the circumstances in which the word 'delivery' after applying the whitener came to be put in the purchase order, for the reasons unexplained has not been produced before the court by the Defendant. Letters which the defendant alleges to have written to the plaintiff for the non-commissioning of the conveyor systems by the plaintiff, I find, the defendant on its part has failed to prove having written and sent by it to the plaintiff. DW1 as for the mode of sending such letters during

his examination-in-chief has deposed that they used to make the payment by ordinary mail along with covering letter. Who used to dispatch such letters and if any record was being maintained for such despatches, while the testimony of DW1 is silent, no evidence has come to be produced, though the defendant by itself is also a private limited company. The oral testimony of DW1 as such for the defendant company having sent any letters either enclosing any cheques towards payment or otherwise for the non-installation or non-commissioning of the conveyor systems by the plaintiff, I do not find to be either trustworthy and reliable. I am, therefore, of the considered view that the defendant on his part has utterly failed to prove that the plaintiff was under any obligation to install and commission the conveyor system supplied against the invoices Ex.PW1/5 to Ex.PW1/8." (underlining added)

7. Learned counsel for the appellant argued that even if we refer to the letter of the respondent/plaintiff dated 13.11.1997 Ex.PW1/D4 alongwith its invoice Ex.PW1/D5 the same showed that the balance amount was payable after commissioning of Rs.2,40,000/-. It is therefore argued that this shows that the respondent/plaintiff was liable to do the commissioning. In my opinion, this argument is misconceived because timing of a payment is an aspect which is different from the scope of the work. The scope of work of the respondent/plaintiff was only the supply of machinery numbering in eight totaling to Rs.16 lakhs and which becomes clear from the reading of the purchase orders dated 25.9.1997 Ex.PW1/3 and PW1/4 and the proforma invoice dated 8.11.1997 Ex.PW1/D5 and therefore mentioning that balance of Rs.2,40,000/- will be

paid after commissioning is with respect to timing of payment of the balance and it has nothing to do with the scope of work such as to include the commissioning having to be done by the respondent/plaintiff. I may note that the appellant/defendant also tried to build up the case upon certain letters which were exhibited as Ex.DW1/P1 to DW1/P5 but the trial Court has noted that none of these documents have been proved to have been sent to or received by the respondent/plaintiff and hence cannot be relied upon. Also, in my opinion, therefore the argument of the counsel for the appellant that the expression “delivery” has been interpolated by substituting it with the word “commissioning” would not have any effect because even if the word “commissioning” is found to be written in Ex.PW1/3 dated 25.9.1997 instead of the word “delivery” as is found, yet the same will only indicate the timing of the balance payment and not the scope of the work. The scope of work continues to be only of supply of eight machinery/conveyor systems totaling to Rs.16 lakhs and which was the total value of the contract. There was no other additional charges payable for any other additional work towards commissioning and therefore commissioning was not within the scope of the contract.

8. Learned counsel for the appellant also argued that alongwith the appeal an application under Order 41 Rule 27 CPC was filed to bring on record the letter dated 22.9.1997 sent by the respondent/plaintiff to

the appellant/defendant and which letter does not mention about any installation charges and the same only mentions supervision charges. I really fail to understand as to how this letter in any manner will assist the appellant/defendant because even this letter shows that the prices are with respect to scope of work of supply only of the machinery/conveyor systems and the scope of supply as per the letter dated 22.9.1997 does not show that the respondent/plaintiff had in addition to the supply of machinery/conveyor systems was also liable to do the commissioning of the machinery. No clause has been pointed out to me in this letter dated 22.9.1997 of the scope of supply to include the commissioning and what has been only pointed out is that the balance payment of 15% plus supervision charges would be paid after successful commissioning. I have already dealt with this aspect above that the timing of the balance payment has nothing to do with the scope of work. In any case, this letter dated 22.9.1997 falls into insignificance in view of the purchase order dated 25.9.1997 Ex.PW1/3 and PW1/4 issued by the appellant/defendant itself and which is later in point of time and which purchase order does not include any supervision/installation charges and it also does not include within the scope of the work any liability of the respondent for commissioning and the scope of work is of the value of Rs.16 lakhs arrived at by totaling the eight number of machineries to be

supplied. The application therefore even if considered will have no effect to the result of the present appeal.

9. This Court is entitled to interfere with the impugned judgment of the trial Court if the judgment of the trial Court is illegal or perverse. If the trial Court takes one possible and plausible view, this Court ought not to interfere in an appeal unless injustice is shown to be caused. In any case, I am of the view that the trial Court has taken a correct view because even as per the purchase orders Ex.PW1/3 and Ex.PW1/4 placed upon the respondent/plaintiff by the appellant/defendant the total contract was of Rs.16 lakhs and which figure of Rs.16 lakhs is arrived at by totaling each individual cost of the machinery/conveyor systems totaling to eight as found in Ex.PW1/3 and there is no requirement of the respondent/plaintiff to undertake commissioning.

10. In view of the above, I do not find any merit in the appeal. The appeal is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

SEPTEMBER 02, 2011
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VALMIKI J. MEHTA, J.