

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

% *Date of Judgment: 04.05.2011*

+ **R.S.A.No. 142/2007**

RAMESH LAL**Appellant**

Through: Mr. B.P. Singh, Advocate.

Versus

MUNICIPAL CORPORATION OF DELHI**Respondent**

Through: Ms. Biji Rajesh along with
Mr. Gaurang Kanth, Advocates.

AND

R.S.A.No. 144/2007

RAMESH LAL**Appellant**

Through: Mr. B.P. Singh, Advocate.

Versus

MUNICIPAL CORPORATION OF DELHI**Respondent**

Through: Ms. Biji Rajesh along with
Mr. Gaurang Kanth, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, I. (Oral)

1. This appeal has impugned the judgment and decree dated 07.02.2007 which had reversed the finding of the trial judge dated 27.04.2004. Vide judgment and decree dated 27.04.2004, the suit filed by the plaintiff Sh. Ramesh Lal seeking recovery of amounts against the defendant/Municipal Corporation of Delhi (MCD) had been decreed in his favour. The impugned judgment had reversed the finding of the trial judge. The suit filed by the plaintiff stood dismissed.

2. Vide the impugned judgment dated 07.02.2007; both the suits i.e. suit no. 37/2004 and suit no. 39/2004, filed by the plaintiff had been decided. Both the suits had, in fact, been consolidated in the trial court itself and had been disposed of by the impugned judgment.

3. Plaintiff was registered as a contractor with the defendant; he was engaged in the business of government contract work and supply of building material. He had conducted works for the MCD which were found to be satisfactory. The final bill was prepared by the department and had been passed for payment. The plaintiff had signified his acceptance and signed the measurement book as well. These facts are undisputed.

4. The gross value of the work done by the plaintiff in suit no. 37/2004 was to the tune of ₹2,05,044/-; final bill amounted to ₹1,24,750/- of which the amount of ₹43,133/- was paid to the plaintiff; security amount had also been released. Balance recoverable was ₹81,617/-.

5. In suit no. 39/2004, the gross value of the work done by the plaintiff amounted to be ₹3,75,997/-; final bill which had been passed was of ₹2,38,102/-. ₹32,886/- was the security amount. Amount recoverable was ₹2,70,988/-.

6. Legal notice dated 11.07.2002 had been issued to the defendant whereafter the present suits were filed.

7. Suit was accordingly filed for a sum of ₹ 81,617/- along with interest at 18% per annum (i.e. a sum of ₹14,201 w.e.f. 12.06.2001 till 16.09.2002) for the total amount of ₹ 95,818/-. This was in suit no. 37/2004.

8. Plaintiff had filed the second suit for recovery of ₹2,70,988/- along with the interest at the rate of 18% per annum (w.e.f. 12.06.2001 till 16.09.2002 i.e. the interest amount of ₹20,001/-) i.e. the total amount of ₹2,92,633/-.

9. It is not in dispute that during the pendency of the two suits, the principal sums of ₹81,617(in suit no. 37/2004) and ₹2,70,988/- (in suit no. 39/2004) have since been paid. The interest amount i.e. ₹14,201/- in first suit and ₹20,001/- in the second suit were the subject matter of dispute before the courts below.

10. The suit had initially been filed under Order 37 of the Code of Civil Procedure (hereinafter referred to as 'Code'). The trial judge had noted that the summons in the prescribed format had been issued. Pursuant to the summons for judgment, the defendant, however, did not file his application for leave to defend but instead chose to file an application under Section 8 of the Arbitration and Conciliation Act, 1996 read with Order 7 Rule 11 of the Code. The contention was that the parties were governed by an Arbitration Agreement which did not stipulate any interest. Court was, however, of the view that interest is to be awarded to the plaintiff and the suit of the plaintiff was accordingly decreed.

11. In appeal, this finding was set aside. The impugned judgment was of the view that interest is not payable to the plaintiff. Court was of the view that the parties were governed by the Arbitration Agreement and Clause 25 of the same was adverted to. The judgment was accordingly set aside.

12. This is a second appeal. It has been admitted and on 2305.2007, the following substantial question of law had been formulated:-

“ Whether the demand raised by the appellant regarding the payment of interest is a disputed matter, if so to what its effect and whether he is entitled to interest or not?”

13. On behalf of the appellant it has been urged that the judgment suffers from a perversity as there were no disputes or difference left between the parties; admittedly, the final bill had been passed for payment; in fact, payment of the principal amount in terms of the final bill had been released. Part payment had been released before the filing of the suit and the balance amount had been paid during the pendency of the suit. This by itself shows that there was no dispute or difference left between the parties. The question of invoking the arbitration clause did not arise.

14. Arguments have been rebutted. It is pointed out that the impugned judgment suffers from no perversity; the Arbitration Agreement did not contain any interest clause; interest could not

have been awarded.

15. Record has been perused. The suit had initially been filed as a suit under Order 37 of the Code. The suit amount was inclusive of the figures i.e. the amount of Rs. 14,201/- in the first suit and the sum of Rs. 20,001/- in the second suit. Order 37 is a complete Code in itself. The procedure contained therein has to be strictly followed. Once the summons for judgment is served upon the defendant, the procedural requirement is that the defendant has to enter his appearance and thereafter file an application for leave to defend. In the application for leave to defend all defenses which are permissible under law are permitted. That is the procedure under Order 37 of the Code. The plaintiff could not have straightaway filed an application under Order 7 Rule 11 of the Code or invoked Section 8 of the Arbitration and Conciliation Act, 1996. The averments made in the application under Order 7 Rule 11 could well have been made by him in his application for leave to defend.

16. That apart, the contention of the learned counsel for the appellant has force. Once the final bill had been passed by the department; there was no dispute or difference left between the parties. The question of invoking the arbitration clause did not

arise.

17. The quotient of interest which is now disputed by the department was not a dispute arising out of the Arbitration Agreement which is a necessary pre-condition to invoke the arbitration clause. Even otherwise, the arbitration agreement by which parties were government clearly in clause 9 stipulated that the payment of the final bill once it is passed shall as far as possible be made within the period specified therein i.e. if the tendered value of the work is up to Rs. 5 lacs, a period of three months is prescribed and if the tendered work exceeds Rs 5 lacs, a six months period was prescribed. Admittedly, in this case even after his stipulated period, complete payment was not released. Legal notice dated 11.07.2002 which was also after the stipulated three months period was also not heeded to. The plaintiff was compelled to resort to litigation. Clause 10 (B) of the Arbitration Agreement deals with interest and recovery; in this clause, the mobilization advance paid to the contractor, would carry interest at the rate of Rs. 18% per annum to be calculated from the date of payment upto the date of recovery. This clause is admittedly in favour of the department; nevertheless it does throw light on the intent of the parties to the agreement; plaintiff had relied upon this clause to claim interest at 18 % per annum for the intervening

RSA Nos. 142/2007 & 144/2007

period as in spite of the fact that even after stipulated period of three months was over, his complete payment had not been made to him. This clause had been relied upon by the trial judge. The impugned judgment not granting interest to the plaintiff which was part of the suit amount which was a suit under Order 37 of the Code is an illegality. Plaintiff had not invoked the Arbitration Agreement; he had simplicitor filed a suit for recovery. Question of the invocation of the Arbitration Agreement did not arise when admittedly there was no dispute or difference left between the parties. Payment of final bill was admittedly paid after a delay; interest was the entitlement of the plaintiff. The award of interest at the rate of 18 % per annum as aforementioned has been deciphered from the clause of the agreement itself i.e. Clause 10 (b) read with Clause 9. Impugned judgment not granting interest to the plaintiff is a perversity. Plaintiff was rightfully entitled to it.

18. Reliance by the learned counsel for the respondent upon the judgment reported in (2007) 3 SCC 686 Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and Ors. as also upon the judgment reported in (2003) 6 SCC 503 Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums is misplaced. These judgments are inapplicable. In Agri Gold Exims Ltd. (supra), it was held that

the term 'dispute' must be given its general meaning. In this
RSA Nos. 142/2007 & 144/2007

case, the respondents had made payment without prejudice to their rights and contentions; thus there was a dispute between the parties. In this case, the final bill had been passed; there was no dispute left. This ratio is inapplicable. The second judgment of Hindustan Petroleum Corpn. Ltd. (supra) states the undisputed proposition that where an arbitration clause exists, the court had the mandatory duty to refer the disputes arising between the contracting parties to the Arbitrator. In this case, there was no dispute which was referable for arbitration. After passing of the final bill which was an admitted document, there remained no dispute between the parties.

19. Judgment of 18 (1980) DLT 122 Haryana Breweries Ltd. Vs. Aluminium Manufacturing Co. Ltd. & Anr. is also distinct. This judgment has detailed the procedure which has to be followed in a summary suit under Order 37 of the Code. After the summons for judgment had been served upon the defendant, an application for leave to defend has to be filed by him. This was a case where the leave to defend has been refused only on the ground that it had been filed before summons for judgment had been served upon the defendant; this was held to be a curable defect and not a ground for the dismissal of the application for leave to defend.

20. Substantial question of law is answered in favour of the
RSA Nos. 142/2007 & 144/2007

appellant and against the respondent. Appeal is allowed. Both the appeals are disposed of.

INDERMEET KAUR, J.

4th May, 2011

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