

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 8th November, 2011

+ RFA(OS) 54/2011

M/S.NICCO CORPORATION LTD. Appellant

Through : Mr.Pinnaki Addy, Advocate and
Mr.Shekhar Gupta, Advocate.

versus

M/S.S.N. NANDY & CO. Respondent

Through: Mr.S.D.Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE S.P.GARG

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

PRADEEP NANDRAJOG, J.(Oral)

1. Vide impugned judgment dated 23.2.2011, plaintiff's suit for recovery of ₹92,20,562/- against the defendant has been decreed in sum of ₹2,72,078.94 with proportionate cost, pendente-lite and future interest @12% per annum.

2. As per the averments in the plaint, the plaintiff 'M/s.S.N.Nandy & Co.' had offered to execute works on turnkey basis as per the requirement of the defendant/appellant and that the various items of work to be executed were listed as per Ex.PW-1/51 at a total price of ₹2,87,30,333/- and that

during execution of the works, vide Ex.DW-1/P1 extra items were agreed to be executed at the rate specified therein.

3. Alleging that for the extra work done the plaintiff was entitled to ₹92,20,562/-, the suit was filed.

4. The appellant/defendant denied any extra work.

5. Thus, the main issue between the parties was whether the plaintiff had executed extra work not covered by the original letter of intent dated 15.10.1992, Ex.PW-1/6 and as detailed in Ex.PW-1/51.

6. In para 7 of the impugned decision, the learned Single Judge has noted, Ex.PW-1/9 and Ex.PW-1/17 i.e. letters dated 2.3.1993 and 7.1.1994 as per which the plaintiff had referred to meetings held on different dates and had asserted therein that at said meetings the extra works listed in the letters were agreed to be executed and that the defendant had never refuted said letters.

7. We agree with the conclusion arrived at by the learned Single Judge that not replying to the said letters amounted to an admission, that as alleged in the two letters, at the meetings held on the dates disclosed in the letters extra work was agreed to be executed.

8. The reliance by the defendant upon the receipt, Ex.PW-1/D1 that full and final payment was acknowledged as being received by the plaintiff has rightly been refuted by the learned Single Judge inasmuch as the receipt, Ex.PW-1/D1 clearly records that ₹9,36,900/- received towards full and final payment pertained to the original contract value of ₹2,87,30,000/-.

9. We also agree with the view taken by the learned Single Judge that ₹5,00,000/-, which were claimed by the plaintiff as being paid when extra work was agreed to be executed, being never adjusted against the running bills pertaining to the main works, would evidence that there was an agreement between the parties that the plaintiff would execute extra work.

10. The defendant has admitted having received plaintiff's letter Ex.PW-1/D1 which is dated 15.3.1993 and in which breakup of the rate for the extra work has been indicated. The defendant never refuted the said letter.

11. Faced with the aforesaid, save and except to argue that the defendant never wrote any letter to the plaintiff requiring extra work to be executed, learned counsel for the appellant/defendant has nothing more to argue.

12. The argument has to be noted and rejected for the reason contractual obligations and variations to an existing contract can well be oral. In the teeth of Ex.PW-1/D1, Ex.PW-1/6, Ex.PW-1/9, Ex.PW-1/17, Ex.PW-1/51 and Ex.DW-1/P1 it is apparent that at the meetings held on the dates disclosed in the said letters it was agreed that extra works would be executed. Defendant not having controverted the contents of the said letter is proof of the correctness and truthfulness thereof. Further, ₹5,00,000/- paid by the defendant to the plaintiff which were never adjusted in the running bills pertaining to the main work is also proof that extra work was agreed to be executed.

13. We note that from para 24 to para 37, the learned Single Judge has worked out the revised scope of work, which has been tabulated in paragraph 24 of the impugned decision to bring out the excess and/or less work executed. The learned Single Judge has so worked out with reference to Ex.DW-1/P1 i.e. the document as per which revised scope of work was listed. With respect to Pump House-1 and Pump House-2 the learned Single Judge has noted less work executed and thus, as per contractual rates has held that the defendant would be entitled to a corresponding price reduction, vis-à-vis the original contract price as per Ex.PW-1/51 in sum of ₹1,29,843/- and ₹1,85,937/- respectively. With respect to the alleged third extra item of work i.e. DAF building, the learned Single Judge has held that as per original contract work evidenced from Ex.PW-1/51 a DAF unit had to be erected and which would include the building and thus has negated said claim. Similar is the position with respect to the claim for MCC building for the reason original contract envisaged MCC transformer room to be constructed which obviously meant a building to house the unit. Claim towards Influent Slump has been held not payable as it was found not to be an extra work. Similarly, no extra work pertaining to Apron around RCC Tank being held established, claim towards said amount has been negated. With respect to the next item of claim i.e. office-cum-lab the learned Single Judge has noted that as per Ex.PW-1/51 quantity to be executed was 300 sq.mts. and as per Ex.DW-1/P1 330.77 sq.mts. extra work was executed and for which sum held payable to the plaintiff has been determined at ₹1,10,000/-.

Similarly, pertaining to the Treatment Effluent Sump excess work of 60 cubic meters having been executed has been determined and price payable, as per contract, has been determined at ₹3,00,000/-. Similarly, excess work having been found to be executed pertaining to Sludge Lagoon/Drawing Bed a sum of ₹1,05,000/- has been held payable to the plaintiff. On the similar process of reasoning, by contrasting the works listed in Ex.PW-1/51 and the revised works as per Ex.DW-1/P1, holding extra work executed for Pump House at Common Catch Pit ₹1,85,000/- has been held payable to the plaintiff and in respect of Cooling Tower Basin over Common Catch Pit ₹1,20,000/- has been held payable to the plaintiff. ₹29,347/- has been held payable towards extra quantity of the boundary wall and for reconstruction of the boundary wall, for which letters dated 27.11.1994 and 30.11.1994 i.e. Ex.PW-1/23 and Ex.PW-1/25 respectively were considered, ₹1,53,217.50 has been held to be payable.

14. To put it pithily the works as per Ex.PW-1/51 i.e. the original works agreed to be executed and the revised works as per Ex.DW-1/P1 have been worked out by the learned Single Judge.

15. Learned counsel for the appellant concedes that the original works agreed to be executed were as per Ex.PW-1/51 and does not dispute that Ex.DW-1/P1 was received by the plaintiff. As noted hereinabove contemporaneous letters written by the plaintiff to the defendant in which it was asserted that at meetings held revised works were required to be executed and the same were detailed in Ex.DW-1/P1 were

never refuted and thus the learned Single Judge has drawn a correct inference.

16. Challenge by learned counsel for the appellant to the findings of the learned Single Judge with reference to Section 70 of the Indian Contract Act are simply noted by us without any further discussion inasmuch as the said discussion by the learned Single Judge, as per para 17 of the decision is on the assumption that the extra works executed were never agreed to be executed by the defendant, but since as a matter of fact the works were executed and accepted by the defendant, the learned Single Judge has, in the alternative discussed the impact of Section 70 of the Indian Contract Act with respect to the plaintiff having admittedly executed additional works which were accepted by the defendant.

17. Since there is enough evidence to show that the extra works were executed by the plaintiff upon an oral agreement between the parties, we need not bother ourselves on the alternative reasoning which is on an assumption.

18. The appeal has to fail as regards the principal sum adjudicated by the learned Single Judge, but we have to speak a word on the cost and interest awarded in favour of the respondent.

19. From a perusal of the impugned decision it is apparent that an inflated claim in sum of ₹92,20,562/- has been found to be payable only in sum of ₹1,86,784.50 and pre-suit interest is ₹86,294.44 and thus the decree is in sum of ₹2,72,078.94. The plaintiff has succeeded only to the extent of about 2% of the claim. Had the plaintiff been honest with the

defendant, in all probability the defendant would have sorted out the matter across the table. So inflated and grossly exaggerated was the claim that the plaintiff left no scope for the defendant to sit and negotiate.

20. Thus, we are of the opinion that the plaintiff should not be entitled to any pre-suit interest or any pendente-lite and future interest as also proportionate costs.

21. We have a legal reason for denying interest. The sum was unascertained till the learned Single Judge did so. The claim was highly exaggerated and the sum was not ascertainable.

22. Thus, the appeal is partially allowed. Impugned judgment and decree dated 23.2.2011 is modified and the suit filed by the plaintiff/respondent is decreed in sum of ₹1,86,784.50 without any pre-suit or pendente-lite interest. Future interest at the rate of 12% per annum from date of decree passed by the learned Single Judge on said sum is awarded to the plaintiff and against the defendant. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(S.P. GARG)
JUDGE

NOVEMBER 08, 2011
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