

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 05.12.2011
Judgment Pronounced on: 20.12.2011

+ CS(OS) 921/2005 & IA 5040/2005

RAMA CONSTRUCTION COMPANY Plaintiff
Through: Mr. A.K.Trivedi, Adv.

versus

MUNICIPAL CORPORATION OF DELHI Defendant
Through: Ms. Mini Pushkarna, Adv.

**CORAM:-
HON'BLE MR JUSTICE V.K. JAIN**

V.K. JAIN, J

1. This is a suit for declaration, perpetual injunction and mandatory injunction. The plaintiff was awarded work for construction of live stock marketing for sheep, goat and buffalo at Gazipur Dairy Farm, vide work order dated 18th March, 2003, which the plaintiff claims to have received on 31st March, 2003. The work was to be completed within fifteen months and the time allowed for carrying out the work was to be reckoned from the tenth day of the work order. Admittedly, the work was not completed within the period of fifteen months stipulated in the order irrespective of whether the period is reckoned from the tenth day of the

issue of the order, i.e. 18th March, 2003 or it is reckoned from tenth day of the date on which the plaintiff claims to have received the work order.

Clause 2 of the agreement between the parties provided that if the Contractor failed to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the Contract or extended date of completion, he shall pay, as agreed compensation, at the rate of 1% per day or such smaller amount as the Superintending Engineer may decide, on the tendered value of the work, for every completed day, the work remained incomplete or the progress remained below that specified in clause 5 of the Contract. It provides that the total amount of compensation for the delay would not exceed 10% of the tendered value of the work. The decision of the Superintending Engineer in this regard has been made final and binding. Clause 5.1 of the Contract, to the extent it is relevant provided that the Contractor shall submit a time and progress chart and get it approved from the department. It further provided that the Contractor shall, in all cases in which the time allowed for any work exceeds one month complete 1/8th of the whole of work

before 1/4th of the whole time allowed in the contract has elapsed, 3/8th of the work before one-half of such time has elapsed and 3/4th of the work before 3/4th of such time has elapsed. A show-cause notice dated 11th March, 2004 was, therefore, issued by the defendant to the plaintiff. The defendant vide notice dated 11th March, 2004, intimated the plaintiff that since the progress of the work was not proportionate to the time that had elapsed, he had rendered himself liable to pay compensation. He was, therefore, asked to show-cause why the compensation be not levied. The plaintiff replied to the show-cause notice, but the reply was not found satisfactory. The defendant, vide communication dated 4th March, 2005, informed the plaintiff that the Competent Authority under clause 2 of the agreement had determined that he was liable to pay Rs.19,04,703/- as compensation. The aforesaid action of the defendant has been challenged by the plaintiff primarily on the grounds that (i) the compensation was levied after the contract had already lapsed and (ii) the delay in completion of the work was not attributable to him. This is also the case of the plaintiff that it was the defendant which had failed to provide lay-out plan and get the connect the

electricity connection and further had also failed to remove the hindrance created by legal people at the site where the work was to be executed. The defendant has also taken action under clause 3 of the agreement and published a fresh tender for work to be executed at the risk and cost of the plaintiff. The plaintiff has now sought a declaration that the order levying compensation and taking action for re-tender at the risk and cost of the plaintiff, is null and void. The plaintiff has also sought an injunction restraining the defendant from taking action for recovering the amount of compensation and debarring or blacklisting him from the department. The plaintiff has also sought mandatory injunction directing the defendant not to circulate any letter with respect to recovery of aforesaid amount to any other divisioned branch.

2. In its written statement, the defendant has alleged that the plaintiff had stopped the work right from the very beginning on flimsy grounds and to hide his own shortcomings. He completed only 16% of the work during the stipulated period of 15 months to complete the work, though there was no hindrance in the execution of the work. It is also alleged that six other agencies worked round the

clock on the adjacent land completed the work of temporary live stock market, construction of link road etc. without any public resistance from June, 2003 to March, 2004. It is claimed that the plaintiff raised bogus dispute on one pretext or the other which not only caused delay but also caused losses to the public exchequer. He accepted various provisional extensions but did not complete the work. The following table, according to the defendant, would clear the picture:-

S.No./Item No. of the schedule Item		Quantity as per Schedule		Quantity executed by the contractor	
		Qty.	% of Total work	Qty.	% of Total work
1/15	Brick work 1:6 in foundation	547.24	3.34	629.66 M3	3.84
2/16	Brick work 1:6 in super structure	546.71	3.74	334.07	2.28
3/132	Random Rubble masonry	306.31 M3	1.78	329.83 M3	1.92
4/136	Washed stone grit plaster	452.10 SQ.M.	0.64	3243.53	4.63
5/13	Reinforcement	140800 Kg.	14.24	35861.53	3.63
6/36	Steelwork in grating	70000Kg	8.60	24691.12	3.03
7/119	Supply and stacking of good earth	7506 M3	1.67	341.91M3	0.07
8/129	Ready mix concrete	1879.61M3	16.91	334.00 M3	3.00

It is alleged that items at serial No.1 to 4 were of interest to the plaintiff and covered upto 9.5% of total cost but the plaintiff went on to execute these item upto 12.67% of the total cost of the contract. On the other hand, he was not interested in items at serial No.5 to 8 which constituted upto 41.42% of the total cost of the contract. The plaintiff, however, executed these items only upto the extent of 9.73%. The following table, according to the defendant, indicates the delay in progress of the work at the site:-

S.No.	Running Account Bill (gross amount upto date)	Date of Bill	Time elapsed	% of the total work required to be done (as per contract)	% work done (actually at site)	Cumulative Hindrance
1	1 st R.A. Bill – 4,17,525/-	30.6.03	3 month	20%	2.19%	19 days
2	Upto 2 nd R.A.Bill 2,89,830/-	23.10.03	7 month	46%	3.71%	27 days

It is also alleged that in fact this project was a loss-making contract for the plaintiff on account of abnormally low rates quoted by him and that is why he did not execute the work in terms of his agreement with the defendant. It is also alleged that the contract had not expired at the time

compensation was levied, since MCD had granted two extensions upto 27th April, 2005 and the plaintiff also continued to work at the site till 14th January, 2005.

The following table, according to the defendant indicates the progress of work during the entire period of execution of work:-

S.No.	Running Actt. Bill No.	M.B.No./Page	Date of billing	Gross Amount of accepted bill	% of work done	Hindrance	% of work to be done
1.	1 st Running Account Bill	415/88	30.06.03	4,17,525/-	2.19%	19 days	20%
2.	2 nd Running Account Bill	1817/6	23.10.03	2,89,830/-	3.71%	27 days	46%
3.	3 rd Running Account Bill 1817/73	1817/73	31.7.04	23,31,698/-	15.95 %	27 days	100%
4.	4 th Running Account Bill	1817/87	27.8.04	14,50,504/-	23.57 %	27days	100%

The defendant has justified the levy of compensation on the ground that the plaintiff had failed to complete the work even in the extended period of contract. Regarding delay in dispatch of the work order, it is alleged that the plaintiff despite being aware of the awarded work to him and site having been shown to him did not collect the turn over and despite it, it has been handed over to him on

21st March, 2003.

It is also alleged that the approach to the site was not available only for eight days starting from 11th August, 2003 as was duly recorded in the hindrance register but the plaintiff did not complete the work despite site being available free from all encumbrances and any hindrance. Approach to the site, according to the plaintiff was provided by creating another entry by filling up the drain passing in front of the site. It is also alleged that after two provisional extensions upto 24th April, 2005, the plaintiff was also given another extension upto 27th June, 2005. It is alleged that there was a total hindrance of 57 days which was duly recorded in the hindrance register maintained at the site, and the hindrance was not for 299 days from 11th August, 2003 to 4th June, 2004, as is claimed by the plaintiff.

3. The following issues were framed on the pleadings of the parties:-

1. Whether MCD was right in levying compensation of Rs.19,04,703/- under Clause 2 of the contract vide order dated 4th March, 2005? OPD.

2. Whether MCD was right in rescinding the contract under clause 3 of the Agreement by order dated 10th May, 2005?

3. Whether MCD was right in issuing Tender dated 13th May, 2005 at the risk and cost of the plaintiff firm? OPD.
4. Whether MCD was right in issuing show-cause notice dated 19th May, 2005? OPD.
5. Whether the hindrances existing at site were such as to lead to non-execution of the contract? OPP.
6. Whether the plaintiff is entitled to decree of declaration and injunction? OPP.
7. Relief.”

Issues No.1 to 5:

These issues are inter-connected and can be conveniently decided together.

4. In **M/s J.G.Engineers Pvt. Ltd. v. Union of India & Anr.** AIR 2011 SC 2477, Supreme Court considering a clause identical to clause 2 of the agreement between the parties to this suit, inter alia held as under:

14. Thus what is made final and conclusive by clauses (2) and (3) of the agreement is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to

quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decisions as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

Supreme Court in this regard also referred to the following view taken by it in **Bharat Sanchar Nigam Limited v. Motorola India Limited** (2009) 2 SCC 337:

x x x The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.

5. It would thus be seen that in the present case, it is for this Court to decide whether delay in execution of the work within the time stipulated in the agreement is

attributable to the plaintiff or to the defendant. If the Court finds that the delay is attributable solely to the defendant, the decision of the Superintending Engineer levying compensation on the plaintiff is liable to be held without jurisdiction. On the other hand, if the Court finds that the delay is attributable to the plaintiff, the decision of the Superintending Engineer in respect of the quantum of compensation to be levied on the plaintiff would be final and binding on the parties and it would not be open to the Court to review the decision of the Superintending Engineer with respect to quantum of compensation and take a view contrary to the view taken by the Superintending Engineer. Similarly, if the Court finds that the Contractor failed to maintain progress of the work in terms of clause 5 of the agreement and the defendant was not responsible for the failure of the plaintiff to maintain the required progress, it would not be open to the Court to interfere with the amount of compensation levied by the Superintending Engineer, his decision with respect to quantification of the compensation being final and binding on the parties.

6. The plaintiff has filed his own affidavit by way of evidence and has examined one more witness Shri Harmir

Singh from Police Station Kalyanpuri. The defendant has examined one witness Mr. Alok Tiwari. In his affidavit by way of evidence Mr. Alok Tiwari who was earlier working as Assistant Engineer in Division 27 of MCD has stated that there was hindrance at the site from 18th March, 2003 to 4th April, 2003 as was noted in the hindrance register. According to him, thereafter there was no obstruction on the site upto 9th October, 2004 due to any public resistance. He has alleged that the plaintiff had completed only 16% of the work during the stipulated period of 15 months to complete the work, despite there being no hindrance in execution of the work. The plaintiff, according to him, was from the very beginning trying to avoid execution of the items which were loss making items for him. He wanted a replacement of stone masonry, brick masonry on boundary wall, Dholpur Stone finish on boundary wall with blue grit stone finish and ready mix concrete by designs mix concrete, in execution of the work. The defendant, though not bound to do so, accorded replacement of the first two items since the plaintiff promised to expedite the work and complete it within the stipulated period. He was also allowed to execute small concrete work using design mix at

the site but permission to replace whole of ready mix concrete by design mix concrete was denied since ready mix concrete is rated highest grit concrete by everyone. According to him, the plaintiff executed excess work in respect of the items which are profitable to him but failed to execute very little work in respect of the items which were not profitable to him. He has claimed that the items which were not profitable to the plaintiff constituted 41.42% of the total cost of the contract but the plaintiff executed them upto the extent of 9.73%. On the other hand, the items which were profitable to him and constituted 9.5% total cost of the work were executed upto 12.6% of the total cost of the work. He has also claimed that the plaintiff was provided police protection by approaching the police whenever he made complaint though first such complaint was made only on 9th September, 2004. He has alleged that the progress of the work executed by the plaintiff never commensurate with the time that had elapsed. The plaintiff was required to execute 20% of the work in first three months and 46% of the work in first seven months. As against this, he executed only 2.19% of the work during first three months and 31% during first seven months

though the cumulative hindrance during this period was 90 days and 27 days respectively. He has alleged that approach to the site was not available only for eight days and another entry was provided to the plaintiff by filling up the drain passing in front of the site and the plaintiff, therefore, did not have any valid reason for slow progress of the work. He has also alleged that the plaintiff himself signed the cement register till 30th January, 2005 and the cement was issued to him till 14th January, 2005, till he demolished the cement godown and site office and removed all the cement from the site, without knowledge of the department.

7. The plaintiff, in his affidavit by way of evidence has stated that the work order posted on 29th March, 2003 was received by him by 31st March, 2003 and immediately thereafter he had written a letter to the defendant requesting that the date of start of work may be taken as 10th April, 2003 since the work order was received by him only on 31st March, 2003. Referring to the correspondence between the parties, he has stated that he had been writing to the defendant to complete the work required to be done on its part. According to him, he had also requested for

replacement of coursed rubble stone masonry with brick work since mining of stone was banned by Supreme Court. He also stated that the defendant also failed to make payment to him despite repeated requests from him. He has alleged that the work was stopped by the residents from the first day of September, 2004 and when the situation did not come under control despite efforts made by him as well as by officers of the defendant, the matter was reported to the police, which was requested to remove the hindrances at the site. He has stated that the Executive Engineer has passed an order on behalf of the Commissioner imposing/levy Rs. 19,04,703/- as compensation on him, which was against the norms of clause 2 of the agreement as well as the principles of natural justice. He has also alleged that the defendant knowingly did not record the hindrances which were beyond his control. He has claimed that the defendant was not competent to rescind the contract under clause 3 of the agreement since the contract had already come to an end on 9th July, 2004 whereas the contract was repudiated vide letter dated 9th December, 2004.

8. Admittedly, the time stipulated in the Contract for

completion of the work awarded to the plaintiff was 15 months. The case of the plaintiff is that since the work order was received by him only on 30th March, 2003, the time for commencement of the work should be taken as 10th April, 2003. Computed from 10th April, 2003, the work ought to have been completed by 9th July, 2004, which admittedly has not been done. The case of the plaintiff is that the work could not be completed by him on account of hindrances at the site. The case of the defendant, as noted earlier, is that the initial hindrance on the site was only from 18th March, 2003 to 4th April, 2003. There is no credible evidence of any hindrance on the site between 10th April, 2003 and 9th July, 2004. It has come in the testimony of DW-1 that for 8 days, an approach to the site was not available and, therefore, another entry was provided by them to the plaintiff by filling up the drain passing in front of the site. Thus, the site was approachable 10th April, 2003 onwards and the plaintiff, therefore, had no justification not to complete the work by 9th July, 2004.

It has come in evidence that the plaintiff wanted replacement of stone masonry, brick masonry on boundary wall, Dholpur Stone finish on boundary wall with blue grit

stone finish and ready mix concrete by designs mix concrete, in execution of the work. It is an admitted case that though it was not bound to do so, the defendant approved replacement of the two items. The plaintiff was also allowed to execute small concrete work using design mix at the site. It is true that permission to replace whole of the ready mix concrete by design mix concrete was refused to the plaintiff but, since ready mix concrete definitely is far superior than a design mix and as stated by DW1, it is considered as the highest grit concrete, the defendant was well within its right in refusing to permit replacement of whole of the ready mix concrete by design mix concrete. Refusal of the defendant to permit replacement of the whole of the RMC by DMC therefore did not justify delay in completion of the work. There is no evidence of any agitation by local people at its site, between 10th April, 2003 and 9th July, 2004. The agitation started only in September, 2004 whereas the time to complete the construction had expired much earlier. The plaintiff himself has stated in the Court that the work was stopped by residents from first day of September, 2004. This is not his claim that the local residents had also stopped the work at any time between

10th April, 2003 and 9th July, 2004. A perusal of the complaint made by DW-1 Shri Alok Tiwari to the Police (Ex.P-20) would show that the hindrance at this site started only about ten days before this letter was written by him, which would mean that it started on or before 30th August, 2004. There is no evidence of any agitation at this site prior to 30th August, 2004. Therefore, the agitation by local people did not justify failure of the plaintiff to complete the work within the time stipulated in the Contract. A perusal of the letter dated 24th November, 2004 (Ex.P-29) and letter dated 9th December, 2004 (Ex.P-30) would show that the plaintiff was insisting on payment of price difference in terms of clause 10cc of the Contract, in order to complete the balance work. The alleged hindrance, therefore, was not the true reason for the failure of the plaintiff to complete the work within the stipulated period. In fact the letters dated 18th August, 2003 (Ex.P-8), 27th October, 2003 (Ex.P-9), 14th November, 2003 (Ex.P-10), 10th December, 2003 (Ex.P-11) and 6th September, 2004 (Ex.P-19) written by the plaintiff to the defendant indicate that the reason given by the plaintiff for delay in completion of the work was non-payment of bills and not any such hindrance which could have been

prevented the execution of the work at this site. In fact, no hindrance at all was claimed by the plaintiff in these letters.

Vide letter dated 2nd April, 2003, Ex.P-3, the plaintiff had requested the defendant to make available (i) lay-out plan of the project; (ii) location of hand pump/tube well; (iii) letter to DVB for temporary electricity connection; (iv) all architectural as well as structural designs. Vide letter dated 3rd April, 2003(wrongly dated as 4th March, 2003) which is Ex.P-4 and is an admitted document, the defendant informed the plaintiff that (i) lay-out plan can be had from the office of the AE/JE concerned; (ii) location of hand pump should be marked by him himself in the lay-out, plan considering the building infrastructure; (iii) for electricity connection, he should apply in a prescribed form and his application should be forwarded to the concerned Electric Engineer and (iv) all the architectural as well as structural designs can be had from the office of Executive Engineer(or concerned Assistant Engineer). Thus, the defendant immediately responded to the requirement of the plaintiff and this response was sent seven days before 10th April, 2003 which I am taking as the date for commencement of work. In fact the defendant vide a

separate letter dated 3rd April, 2003(Ex.P-4/A) which again is an admitted document, requested the plaintiff to start the work immediately since it was of great importance being necessary, to implement an order passed by the Supreme Court. A perusal of the documents would show that the defendant had continuously been requesting the plaintiff to speed up the work and complete it in time. The letters whereby the plaintiff was requested to speed up the work are dated 23rd July, 2003 (Ex.PW-1/6), 20th February, 2004(Ex.P-12), dated 25th February, 2004(Ex.PW-12/A), dated 11th March, 2004(Ex.P-14), dated 27th September, 2004(Ex.P-25 & Ex.P-76), dated 14th January, 2005(Ex.P-31), and dated 20th January, 2005(Ex.P-34).

I, therefore, have no hesitation in holding that the plaintiff was squarely responsible for not completing the work within the stipulated period of 15 months computed from 10th April, 2003, and, thereby he rendered himself liable to levy of compensation under clause 2 of the Contract between the parties.

9. The work completed by the plaintiff in the first 15 months was to the extent of only 16%, which was wholly unjustified and amounted to breach of the contract on the

part of the plaintiff. As noted earlier, in terms of clause 5 of the Contract, the plaintiff was required to execute $1/8^{\text{th}}$ of the work before $1/4^{\text{th}}$ of the time allowed for completing the work, $3/8^{\text{th}}$ of the work before half of the time stipulated for completing the work and $3/4^{\text{th}}$ of the work before expiry of $3/4^{\text{th}}$ of the stipulated time. As against this, the plaintiff executed 2.19% of the work during first three months and 31% during first 7 months. In fact, this is not at all in dispute as the plaintiff did not maintain progress of the work in terms of his agreement with the defendant.

10. During the course of arguments, it was contended by the learned counsel for the plaintiff that the defendant was not competent either to levy compensation or to rescind the Contract, after the Contract had already expired by efflux of time. The case of the defendant, on the other hand, is that the compensation can be levied even after the time for execution of the work expired and in any case the time was extended by the defendant first upto 27th December, 2004 vide letter dated 28th June, 2004, then upto 27th April, 2005. Vide letter dated 24th December, 2004 and thereafter after 27th June, 2005, vide letter dated 19th April, 2005. The plaintiff has denied receipt of the letters dated 28th June,

2004, 24th December, 2004 from the defendant, though receipt of the letter 19th April, 2005(Ex.D-11) has been admitted by the plaintiff. A copy of this letter has also been filed by the plaintiff as Ex.P-44. The plaintiff himself has filed a copy of the letter dated 25th April, 2005 Ex.P-45 sent to him by the defendant. Even in this letter, there is reference to extension of time upto 27th June, 2005.

Ex.PW-1/D is the cement register which was maintained at the site. A perusal of the document would show that cement was regularly issued to the plaintiff even after 27th June, 2004. The plaintiff took cement on numerous dates, the last delivery having been taken by him on 14th January, 2005. In fact the last seven deliveries of cement were taken in January, 2005, whereas cement was taken 17 times in December, 2004 and 18 times in November, 2004. It had also been taken on a number of dates in October, September, July and June, 2004. Had the defendant not extended time beyond 27th June 2004 and the plaintiff not accepted extension of work from time to time, there would have been no occasion for him to take delivery of cement from the site, after the initial date stipulated for completion of the work had expired. Had the

plaintiff not received the letter dated 28th June, 2004 extending the time for completion of the work upto 27th December, 2004, he would not have taken delivery of cement after June 2004. Similarly had he not received the letter dated 24th December, 2004 extending the time upto 27th April, 2005, he would not have taken delivery of cement after December, 2004. In his deposition, the plaintiff has claimed that he stopped the work on the site on 31st August, 2004 but, delivery of cement taken by him from time to time, even after 31st August, 2004 clearly shows that his statement in this regard is not correct. It would be pertinent to note here that the plaintiff has admitted that the cement which is stored at the godown at the site was under joint custody of the parties and whenever it was taken out from the godown, entry used to be made in cement register before taking cement out of the godown. He has also admitted the cement register (Ex.PW-1/DA) filed by the defendant and has expressly admitted his signatures at mark 'A' to mark 'G'. Mark 'G' shows the issue of cement in December, 2004 and January, 2005, mark 'F' shows delivery of cement to the plaintiff between September, 2004 and December, 2004 and mark 'E' shows delivery of cement

to him between August, 2004 and September, 2004. The conduct of the plaintiff in taking delivery of cement beyond 27th December, 2004, clearly indicates that the parties had treated the contract as subsisting even beyond 27th December, 2004, and that is why the plaintiff got the cement issued to him from the godown, and presumably to carry out further work. The site register Ex.PW-1/DB has also been admitted by the plaintiff. It bears signature of the site Engineer of the plaintiff on 17th January, 2005 wherein it is recorded that after demolishing the cement godown and site office, the plaintiff had removed all the cement from the site, without permission of the department. These documents totally be lie the case set up by the plaintiff and clearly show extension of time by the defendant.

11. Referring to various extensions of time granted to the plaintiff for completing the work and the terms of the contract providing for levy of compensation on account of delay in execution of the work, it was contended by The learned counsel for the plaintiff that since time was not the essence of the contract, the defendant was not justified in rescinding the contract and awarding the work for execution by another agency at the risk and cost of the plaintiff. In

support of his contention, the learned counsel for the plaintiff has relied upon the decision of Supreme Court in **Hind Construction Contractors vs. State of Maharashtra** *AIR 1979 Supreme Court 720*. In the above-referred case, the period for completion of the work was fixed as 12 months from the date of commencement of the work. The plaintiff/appellant did not complete the work within the stipulated time, whereupon the contract was rescinded by the respondent and the security deposited by the appellant was forfeited. The case of the appellant before Supreme Court was that time was not the essence of the contract, the completion of the work was delayed on account of reasons beyond his control and though extension of time was permissible under the contract, it was wrongfully refused by the respondent, though his request for extension of time made before expiry of the time stipulated for completion of the work was pending with the respondent. The contention was that the respondent/defendant ought to have granted some reasonable time to the plaintiff/appellant for completing the work undertaken by him and making the time essence of the contract and only if the work was not completed by him within that time, the contract could have

been rescinded on the ground that the plaintiff/appellant had committed breach of the contract. Dealing with the contention Supreme Court, *inter alia*, observed as under:

“X X X It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

X X X If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of the waiver, ceased to be applicable then the only course open to the respondent was to fix some time making it the essence and if within the time so fixed the appellant-plaintiff had failed to complete the work, the respondent-defendant could have rescinded the contract.

X X X Long before the expiry of the period of 12 months the appellant-

plaintiff had by his letter dated June 6, 1956 (Ex. 68) requested for extension of period of completion up to the end of December, 1956; this request was repeated by another letter dated June 23, 1956 (Ex. 69). May be the reasons or grounds on which the request was made may not have appealed to the Superintending Engineer but some reasonable time making it the essence ought to have been granted. In this behalf it may be stated that the S.D.O. by his letter (Ex. 69) had recommended extension up to December 1956 as sought while by his letter dated June 23, 1956.”

In the facts and circumstances of the case before this Court, this judgment would be of no help to the plaintiff. This is not the case of the plaintiff that he had asked for extension of time to complete the work, but the defendant had unjustifiably refused the same. It is rather the case of the defendant that they had extended the time for completion of the contract; firstly up to 27th June, 2004, then up to 27th December, 2004 and lastly up to 27th June, 2005. The plaintiff himself wrote letters to the defendant stating therein that he was not interested in executing the balance work. During his deposition in the Court, the plaintiff claimed that he had stopped work at the site in August, 2004. In his letter dated 09th December, 2004

(Ex.P-30), the plaintiff alleged that he had never applied for extension of time and in fact he was rescinding/repudiating the contract w.e.f. 09th December, 2004. In his legal notice dated 10th February, 2005, the plaintiff again referred to his letter dated 09th December, 2004. In the legal notice dated 21st March, 2004 (Ex.P-37), the plaintiff again alleged that he had vide letter dated 09th December, 2004, rescinded the contract. This was again reiterated in his reply dated 04th April, 2005 (Ex.P-42), representation dated 12th April, 2005 (Ex.P-43) and notice dated 25th May, 2005 (Ex.P-51). Since the plaintiff abandoned the work, did not apply for extension of time and even did not offer to complete the work within the time, which was extended by the defendant from time to time, the defendant, in my view, was justified in rescinding the contract and awarding the work to another agency to be executed at the risk and cost of the plaintiff.

In any case, even if I presume, despite my finding to the contrary, that rescission of the contract was wrong in law on account of time being not essence of the contract that would have no bearing on the compensation levied upon the plaintiff under clause 2 of the Contract.

12. It was contended by the learned counsel for the plaintiff that though under Clause 2 of the contract, the compensation can be levied only by Superintending Engineer, the levy of compensation to the plaintiff was conveyed by the Executive Engineer and neither the Superintending Engineer has been produced in the witness box nor has any documentary evidence been produced by the defendant to prove that the compensation was levied by Superintending Engineer.

A perusal of Ex.P-36, which is the letter dated 04th March, 2005, conveying levy of compensation to the plaintiff, shows that the compensation was levied by the Competent Authority. Though the letter does not indicate, who the Competent Authority was, since the compensation under Clause 2 of the Contract could be levied only by the Superintending Engineer, the reference to the Competent Authority in the letter dated 04th March, 2005, obviously, would be only to the Superintending Engineer. Hence, it cannot be said that the compensation was not levied by the Superintending Engineer. In my view, since the letter dated 04th March, 2005 clearly conveyed that compensation was levied by Competent Authority, it was not necessary for the

defendant to produce the Superintending Engineer in the witness-box to prove that the compensation was levied by him.

13. Relying upon the decision of this Court in **Delhi Development Authority vs. Construction & Design Services, UP Jal Nigam**, 165 (2009) *Delhi Law Times* 208, it was contended by the learned counsel for the plaintiff that since the communication dated 04th March, 2005 did not disclose any reason as to why maximum compensation was levied on the plaintiff, the order levying compensation is liable to be declared null and void. I, however, find no merit in this contention. As noted earlier, Supreme Court, in **M/s J.G.Engineers Pvt. Ltd.** (supra), and **Bharat Sanchar Nigam Limited** (supra) has clearly held that decision of the Superintending Engineer with respect to quantification of the compensation is final and what has to be seen for adjudication is only as to whether the contractor was responsible for the delay or not. A purpose of requiring a decision making authority to disclose the reasons for his decision is that in the event of his decision being challenged, the reviewing authority or the Court, as the case may be, may scrutinize the reasons given by him, to decide

whether the decision is based on cogent and germane reasons or was influenced by extraneous considerations. Since the decision of the Superintending Engineer with respect to quantum of damage is final and binding on the parties and, therefore, cannot be questioned in any proceedings, including a civil suit, absence of reasons for levying the maximum penalty cannot be a ground for declaring the levy of compensation null and void.

14. It was also contended by the learned counsel for the plaintiff that since the defendant has failed to prove the actual damages, it is not entitled to recovery of any compensation from the plaintiff. Again, he has relied upon the decision of this Court in **Construction & Design Services, UP Jal Nigam** (supra), where this Court was of the view that the plaintiff before the Court having not treated the time as essence of the contract, cannot fall back on a presumptive condition to impose the maximum compensation leviable; enforcement of such action would be giving effect to a penalty clause. As regards reasonable compensation, this Court observed that the plaintiff had not shown even the basis for levying compensation which it did in that case, despite its being aware of the extent to which

the contract was performed as well as the exact extent of loss in monetary terms, either by way of payment to another contractor or the amount spent for completing the work.

15. In **BSNL vs. Reliance Communication Ltd.** (2011) 1 SCC 394 and **ONGC vs. Saw Pipes Ltd** AIR 2003 SC 2629. In **Saw Pipes Ltd** (supra), the respondent offered to supply casing pipes to the appellant, who accepted the offer and issued a detailed order containing terms and conditions of which the goods were to be supplied on or before 14th November, 1996. The contract provided for payment of liquidity damages to the appellant. After referring to Sections 73 and 74 of the Contract Act, Supreme Court, inter alia, observed as under:

“Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken

the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is--whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be

purchased for manufacturing yarn,
consideration would be different
(emphasis supplied)

....Take for illustration construction of a

road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable.”

In para 69 of the judgment, the Court, *inter alia*, concluded as under:

“(1) Terms of the contract are required to

be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

In **BSNL** (supra), the contract between the parties provided for payment of liquidity damages to the appellant. On the question as to whether a sum named in the contract

is a pre-estimate of reasonable compensation for the loss or by way of penalty, Supreme Court referred to the following extract from Law of Contract (10th Edn.):

“a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract”.

As regards the liquidity damages, the Court observed as under:

“Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls

during the relevant period have to be seen.”

In case of **Saw Pipes Ltd** (supra) the contract pertained to supply of pipes required for deployment of rigs which were to be used for production of gas and the plan for redeployment and a revised plan had to be made for deployment of rigs on account of various constraints including shortage of casing pipes which were to be supplied by Saw Pipes Ltd. and shortage of casing pipes being only one of the several reasons leading to delay in deployment of rigs, the actual damages on account of delay in supply of casing pipes could not have been ascertained by the Court. In case of **BSNL vs. Reliance Communication Ltd.** (supra), there was an interconnection agreement between the parties which provided for payment of liquidated damages and considering that the telecom services in India are operating under regulatory regime where all service providers are to be afforded level playing field. The Court was of the view that the compensation claimed by BSNL was pre-estimate of damages and was not penal in nature.

In **Shiva Jute Baling Ltd vs. Hindley and Company Ltd**, *AIR 1959 SC 1357*, the appellant company entered into a contract with the respondent company for supply of 500 bales of jute. The contract proved that in the event of default of tender or delivery, the seller shall pay to the buyer as and for liquidated damages, Rs 10 per ton plus the excess (if any) of the market value over the contract price, the market value being that of jute contracted for on the day following the date of default. On the appellant taking the stand that the contract had stood cancelled, the respondent claimed default on the part of the appellant and the matter was referred for arbitration. Upholding the compensation awarded by the Arbitrator in terms of the contract between the parties, Supreme Court, *inter alia*, observed as under:-

“The argument under this head is that the liquidated damages provided under clause (12) of the contract include not only the difference between the contract price and the market price on the date of default but also a further sum of 10s. per ton. Reference in this connection is made to Sections 73 and 74 of the Indian Contract Act, and it is said that the extra amount of 10s. per ton included in the sum of liquidated damages is against the provision of these section and therefore the award being against the law of India

is bad on the face of it and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. What clause (12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely, (i) the difference between the contract price and the market price on the date default and (ii) an addition of 10s. per ton above that. There is nothing in s. 73 or s. 74 of the contract Act, which makes the award of such liquidated damages illegal. Assuming that the case is covered by s. 74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the

arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in clause (12) it should have appeared before the arbitrators and represented its case. It cannot now be heard to say that simply because clause (12) provided for a further sum of 10s. per ton over and above the difference between the contract price and the market price on the date of the default, this was per se unreasonable and was therefore bad accordingly to the law of India as laid down in Sections 73 and 74 of the Contract Act. Both these sections provide for reasonable compensation and s. 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. In this case the arbitrators have awarded the maximum amount so named and nothing more. Their award in the circumstances cannot be said to be bad on the face of it, nor can it be said to be against the law of India as contained in these sections of the Contract Act.”

16. The propositions of law which emerge from the statutory provisions contained in Section 73 & 74 of the Indian Contract Act when examined in the light of a cumulative reading of aforesaid decisions of Supreme Court can be summarized as under:

- a) If a party to the contract commits breach of the contract, the party who suffers loss/damage on account of such breach is entitled to receive such

compensation from the party in breach of the contract which naturally arose in usual course of business, on account of such breach or which the parties to the contract knew, at the time of making the contract, to be likely to result on account of its breach. However, the party suffering on account of the breach is entitled to recover only such loss or damage which arose directly and is not entitled to damages which can be said to be remote.

- b) In case the agreement between the parties provides for payment of liquidated damages, the party suffering on account of breach of the contract even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss or damage was caused on account of breach of the contract. In such a case, the amount of reasonable damages cannot exceed the amount of liquidated damages stipulated in the contract.

Any other interpretation would render the words “whether or not actual damage or loss is proved to have been caused thereby” appearing in Section 74 of the Indian Contract Act absolutely redundant and

therefore the Court needs to eschew such an interpretation.

- c) If the amount stipulated in the contract, for payment by party in breach of the contract, to the party suffering on account of breach of the contract is shown to be by way of penalty, the party suffering on account of the breach is entitled only to a reasonable compensation and not the amount stipulated in the contract. If it is shown by the party in breach of the contract that no loss or damage was suffered by the other party on account of breach of the contract, the party in breach of the contract is not liable to pay any amount as compensation to the other party.
- d) If the nature of the contract between the parties is such that it is not reasonably possible to assess the damages suffered on account of breach of the contract, the amount stipulated in the contract, for payment by the party in breach should normally be accepted as a fair and reasonable pre-estimate of damages likely to be suffered on account of breach of the contract and should be awarded.

17. In FAO(OS) No. 06/2008 & FAO(OS) No.07/2008 **Oil & Natural Gas Corporation Ltd. v. Mitra Guha Builder (India) Company** decided on 16th February, 2009 damages were levied in exercise of power conferred on the Superintending Engineer under an identical clause. The Arbitrator however, concluded that the clause permitting levy of penalty was impermissible in law and it was not a clause levying liquidated damages being a pre-estimate of damages. The view taken by the Arbitrator was upheld by the learned Single Judge noticing that the petitioner cannot deny liability to make payment by adjusting admitted amount against the damages/penalty when a substantive part of delay (367 days) was attributable to the petitioner and there was a smaller part of delay (273 days), which was attributable to the respondent. The Division Bench of this Court held that the view taken by the Arbitrator was not correct since mere absence of a recital in the clause of the agreement to the effect that the parties agree that the liquidated damages are genuine pre-estimate, would not lead to the conclusion that the parties had provided for levy of penalty and not liquidated damages. The Court was of the view that the reasoning adopted by the Supreme Court

in ONGC v. SAW Pipes (supra) was applicable and the learned Single Judge had disregarded the same.

In **Pure Pharma Limited v. Union of India**, 2008(3) Arb. L.R. 57 (Delhi), the agreement between the parties contained an identical clause. One of the grounds taken by the petitioner in that case was that the clause pertaining to liquidated damages could not be invoked unless and until the exact extent of loss was proved. It was also contended that the aforesaid clause did not reflect the genuine pre-estimate of damages but was in the nature of a penalty and therefore it was incumbent upon the respondent to prove the loss incurred by it on account of the alleged breach. The petitioner before the Court relied upon the decision of Supreme Court in ONGC v. SAW Pipes (supra) as well as the decision in Haryana Telecom Ltd. v. Union of India 2006 (2) Arb.L.R. 293. After considering the decisions relied upon by the learned Counsel for the petitioner, this Court noted that the Arbitrator had interpreted the aforesaid clause to be a genuine pre-estimate of the loss which was likely to occur on account of delayed supplies and also held that the compensation provided in the said clause was not unreasonable since no

evidence had been led by the claimant to establish that the stipulated condition was by way of penalty. It was also observed that the claimant was not able to demonstrate either before the Arbitrator or before the Court that on account of delay in the supply of goods no legal injury was or would be suffered by the respondent or no loss was likely to occur on account of the delayed supplies. The petition challenging the award was therefore dismissed.

18. A Division Bench of this Court having held in **Mitra Guha Builder (India) Company** (supra) that such a levy was by way of liquidated damages and similar view having been taken in **Pure Pharma Limited** (supra), I am unable to accept the contention that the levy of compensation under Clause 2 of the Contract was not by way of liquidated damages envisaged in Section 74 of the Act. In **Sudhir Genset Limited vs. Indian Oil Corporation Ltd.** 177 (2011) DLT 438, this Court, dealing with a clause which provided for payment by the vendor to the defendant by way of liquidated damages, an amount equal to ½ per cent of arterial, delayed by the vendor for each week or part thereof subject to a maximum of 10% of the price, rejected the contention that in order to claim damages, the

respondent was required to prove the actual loss suffered by it. In taking this view, this Court, particularly relied upon the decision of Supreme Court in the **ONGC** (supra). The Court was of the view that when the parties had agreed to fix liability in terms of Clause 13 for payment of damages as per the formula contained in that clause, it was not a case of penalty but what was recovered is the amount of damages pre-fixed by the parties with regard to loss suffered by the respondent on account of delay in supplying the equipment. In such circumstances, it was not necessary for the respondent to prove actual damages.

19. The learned counsel for the plaintiff has also submitted copies of the decisions in **Vishwanath Sood vs. Union of India**, *AIR 1989 SC 952*, **B.W.L. Ltd. vs. MTNL and Others 2000** *Arb. W.L.J. 450*, **J.S. Chaudhary vs. Vice-Chairman, DDA and Anr.** *183 (2011) Delhi Law Times 723*.

I have perused these judgments and none of them is of any help to the plaintiff. In the case of **Vishwanath Sood** (supra), Supreme Court held that levy of compensation was conditioned on some default or negligence on the part of the contractor and the relevant

clause in the Court provides for discretion to the Superintending Engineer to reduce the rate of penalty from one per cent. It was observed that nay moderation which may be done by the Superintending Engineer would depend on the circumstances, the nature, the period of default and the degree of negligence or default that could be attributed to the contractor. It was also observed that the decision of Superintending Engineer was in the nature of a considered decision which he has arrived at after considering the various mitigating circumstances that may be pleaded by the contractor and the question regarding amount of compensation has to be decided only by the Superintending Engineer and no one else.

However, in the case before this Court, it has been proved that it was the plaintiff who was responsible for delay in execution of the work and in fact he abundant the work despite various extensions of time granted by the defendant. A show-cause notice dated 11th March, 2004 (Ex.P-13) was admittedly issued to the plaintiff and was also replied by him vide letter dated 19th March, 2004 (Ex.P-16). However, since he has failed to complete the work, compensation was levied on him and conveyed vide letter

dated 04th March, 2005. The presumption is that while levying the compensation, the Superintending Engineer had considered all the facts and circumstances of the case, including the reply submitted by the plaintiff to the show-cause notice. As noted earlier, since the decision of the Superintending Engineer with respect to quantification of the compensation is final and binding on the parties, it was not necessary for the Superintending Engineer to pass a speaking order dealing with each and every plea taken by the plaintiff in his reply to the show cause notice.

In **B.W.L. Ltd.** (supra), this Court held that before levying the liquidated damages, it was necessary to prove that there was delay by the supplier in performance of its obligations the agreement did not clothe the respondent with the power to arrive at a unilateral finding in this regard and that even independent of Section 74 of the Contract Act, it was necessary that adjudication takes place on the question who was responsible and liable for the delay. This judgment does not help the plaintiff since this Court has gone into this aspect and has come to the conclusion that the plaintiff was squarely responsible for the delay in execution of the work. This Court was also of the view that

the respondent could not take a decision with respect to levy of compensation in violation of the rule of *audi alteram partem*. Again, this judgment does not help the plaintiff since a show-cause notice was duly given to the plaintiff before levying the compensation.

In **J.S. Chaudhary** (supra), the plaintiff had file a suit claiming certain amounts from DDA. I do not find any such proposition of law in this judgment which can be applied to the case before this Court.

The learned counsel for the plaintiff has also relied upon clauses 28.1 to 28.8.3 and clause 32.1 of CPWD Works Manual, but I find nothing in the above-referred provisions of the Manual, which would be of any help to the plaintiff.

20. In the case before this Court, there is nothing on record to indicate that the compensation contemplated by the parties under clause 2 of the Contract was in any way unreasonable. No evidence has been led by the plaintiff to establish that levy of compensation envisaged in clause 2 of the Contract was by way of penalty or that the compensation contemplated therein was unreasonable. No evidence has been led by the plaintiff to prove that there

was no legal injury to the defendant on account of his failure to complete the contract. The challenge to levy of compensation, therefore, must fail. The issues are decided against the plaintiff and in favour of the defendant.

Issues No.6 & 7

21. In view of my findings on issues No.1 to 5, the plaintiff is not entitled to the declaration or injunction sought by him.

ORDER

In view of my findings on issues, the suit is dismissed with costs.

Decree sheet be drawn accordingly.

(V.K. JAIN)
JUDGE

DECEMBER 20, 2011
‘sn’/vn/bg