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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : August 13, 2012
Judgment Pronounced on: August 24, 2012

+ RFA(OS) 16/2012

RAMA CONSTRUCTION COMPANY Appellant
Represented by:Mr.A.K.Trivedi, Advocate and
Mr.Avinash K.Trivedi, Advocate.

versus

MUNICIPAL CORPORATION OF DELHI Respondent
Represented by:Ms.Mini Pushkarna, Advocate and
Ms.Prerna Verma, Advocate.

FAO(OS) 336/2012

RAMA CONSTRUCTION COMPANY Appellant
Represented by:Mr.A.K.Trivedi, Advocate and
Mr.Avinash K.Trivedi, Advocate.

versus

MUNICIPAL CORPORATION OF DELHI Respondent
Represented by:Ms.Mini Pushkarna, Advocate and
Ms.Prerna Verma, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Challenge in RFA(OS) No.16/2012 is to the judgment and decree dated December 20, 2011 dismissing suit filed by the appellant in which the appellant had challenged compensation in sum of ₹19,04,703/- levied upon it and contract being cancelled by the respondent

followed by the respondent proceeding to complete the balance work at the risk and cost of the appellant by inviting fresh tenders for the balance works.

2. The challenge in FAO(OS) No.336/2012 is to the order dated May 31, 2012 dismissing objections filed by the appellant to an award dated January 17, 2012 as per which appellant's claim No.1, 2, 3 and 6 have been allowed in sum of ₹1,41,000/-, ₹5,24,214/-, ₹1,14,888/- and ₹1,45,428/- respectively and counter claim filed by the respondent has been allowed in sum of ₹44,20,271/- i.e. net award is in favour of the respondent.

3. Suffice would it be to state that the claims of the appellant allowed as per the award pertained to amount due for work done and the counter claim filed by the respondent was the extra amount paid by the respondent for execution of the works at the risk and cost of the appellant, who admittedly did not complete the works tendered for and awarded to the appellant.

4. Learned counsel for the parties were not in disagreement that if the judgment and decree dated December 20, 2011 was upheld, it would mean that the decision by the learned Single Judge that the appellant defaulted in executing the contracted works and as a result the respondent was justified in terminating the contract and awarding the balance work at the risk and cost of the appellant was correct, and in that view of the matter the impugned award which has been upheld by the learned Single Judge would have to be sustained and as a consequence FAO(OS) No.336/2012 has to be dismissed.

5. As per Work Order dated March 18, 2003, Ex.PW-1/1, the work of constructing livestock market at Ghazipur Dairy Farm was awarded to the appellant and as claimed by it, since the Work Order was received on March 31, 2003, vide letter dated April 03, 2003, Ex.PW-1/4, it intimated the respondent that date of commencement of the works have to be treated as April 10, 2003 and accordingly date of completion would be July 09, 2004 and not June 27, 2004; a change of date of completion which is of no relevance.

6. Alleging defaults against the appellant a show-cause notice dated March 11, 2004, Ex.PW-1/15, was issued to the appellant to show cause as to why penalty under clause-2 of the agreement be not levied to which the appellant replied vide Ex.PW-1/16 on March 19, 2004. Penalty was levied upon the appellant in sum of ₹19,04,703/- as per letter dated March 04, 2005, Ex.PW-1/36.

7. Stipulated period as per the contract for completion of the works being 15 months, and even as per the appellant the date of completion being July 09, 2004, the undisputed position is that when the respondent terminated the contract vide letter dated May 10, 2005, Ex.PW-1/48 just about 16% of the work had been completed.

8. The rival pleadings of the parties would reveal that the appellant was placing the blame on the shoulders of the respondent inasmuch as it was the case of the appellant that there were hindrances at the site and local people were obstructing the execution of the work and thus

the delay was attributable to the respondents, whose duty it was to ensure an unhindered site made available for execution of the works. On this issue, as per the respondents, the initial hindrance at the site was for hardly a week and that during execution of the works, obstructions caused by people in the neighbourhood took place somewhere around September – October 2004, when the contract stipulated date was already over, and that too for a very short duration. It was the case of the respondents that the appellant was just not interested in executing the works probably for the reason, to bag the tender, the appellant had quoted low rates and it was a loss making venture for the appellant. Though of not much relevance, the parties were also at variance whether the respondent had extended the time for completion of the works vide letters dated June 28, 2004, Ex.D-3 and December 24, 2004, Ex.D-2; and vide the letter up to April 27, 2004 before the contract was terminated vide letter dated May 10, 2005, Ex.PW-1/4. Lastly, the parties were at variance on the subject whether the show-cause notice dated March 11, 2004, Ex.PW-1/15 and the penalty levied, communication whereof was conveyed vide letter dated March 04, 2005, Ex.PW-1/36 was by the Competent Authority i.e. the Superintending Engineer concerned.

9. The learned Single Judge has returned findings of fact against the appellant on all the counts.

10. With respect to the penalty levied vide Ex.PW-1/36, the learned Single Judge has noted, and in our opinion correctly, that the letter in question simply conveys the

decision that penalty in sum of ₹19,04,703/- has been levied in exercise of power vested in the Superintending Engineer under clause-2 of the contract. The letter has been sent under the signatures of the Executive Engineer (Project), but the decision on the file has been taken by the Superintending Engineer concerned.

11. It is apparent that the appellant is confusing between a decision being taken and it being formally communicated.

12. On the subject of time being extended for completion of the works, suffice would it be to state that the plea of the appellant that it never received the letters dated June 28, 2004, Ex.D-3 and December 24, 2004, Ex.D-2 is a palpably false defence, and has been rightly rejected by the learned Single Judge, for the reason before issues were settled, and called upon to admit/deny the documents filed and relied upon by the parties, the appellant admitted receipt of Ex.D-2 and Ex.D-3. The appellant had denied the contents thereof.

13. Now, the receipt of the documents being admitted, we wonder as to what could the appellant mean by denying the contents of the two letters. The contents were an extension of time by the respondent for the works to be executed. It is apparent that the appellant was litigating mindlessly.

14. That apart, the learned Single Judge has given good reasons to hold that time for completion of the work was admittedly extended, by referring to the cement register Ex.PW-1/D maintained at site which reveals that

cement was issued by the respondent and received by the appellant even beyond July 09, 2004 and the last 7 deliveries were taken in the month of January 2005, the 7th of which was on January 14, 2005. The learned Single Judge has rightly concluded that if the respondent had not extended the time and the appellant had not accepted the extension thereof, there would have been no cement issued by the respondent and received by the appellant after July 09, 2004.

15. As regards hindrance at site, suffice would it be to state that the testimony of the witness of the respondent that the initial hindrance at site was only up to April 04, 2003 was not even challenged when the witness was cross-examined and thus we concur with the view taken by the learned Single Judge that the evidence establishes initial hindrance of site only up to April 04, 2003, and this does not matter at all for the reason the date of commencement of the works is April 10, 2003. On the subject of agitation by people in the neighbourhood which caused an obstruction at the site, Ex.P-20 a complaint dated September 09, 2004 made to the police, would reveal that the agitation started on or around August 30, 2004 and lasted for about 10 days; and in respect of which, suffice would it be to state that the contract stipulated date was July 09, 2004. Of course, vide Ex.D-2 and Ex.D-3, the time was extended and lastly up to April 27, 2005. Letters dated July 23, 2003, Ex.PW-1/6, February 20, 2004, Ex.P-12, February 25, 2004, Ex.PW-12/A, March 11, 2004, Ex.P-14, September 27, 2004, Ex.P-25, January 14, 2005, Ex.P-31 and January 20, 2005, Ex.P-34

would reveal that the respondent was consistently requesting the appellant to speed up execution of the work. Thus, there is sufficient evidence to support the finding returned by the learned Single Judge that the appellant was a laggard.

16. As regards the works executed at the site, the learned Single Judge has tabulated firstly:

S.No./Item No. of the schedule Item		Quantity as per Schedule		Quantity executed by the contractor	
		Qty.	% of Total work	Qty. in cu.m.	% of Total work
1/15	Brick work 1:6 in foundation	547.24	3.34	629.66	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	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	70000 kg.	8.60	24691.12	3.03
7/119	Supply and stacking of good earth	7506 M3	1.67	341.91	0.07

8/129	Ready mix concrete	1879.61 M3	16.91	334.00	3.00
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to bring home the point that less than 20% of the work was executed notwithstanding two extensions being granted to the appellant. The chart was not at all disputed before us, and suffice would it be to state that the quantity of works executed as reflected therein, being admitted quantities of work executed, would not only justify the action of the respondent to rescind the contract and proceed to execute the balance at the risk and cost of the appellant, but even levy penalty for delay in execution of the works.

17. The learned Single Judge has also prepared a chart as under:-

S. No.	Running Account Bill (gross amount up to 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

to bring home the point that right from the inception, the appellant was just not interested in executing the works.

18. With reference to the measurement books, the learned Single Judge has tabulated:

Sl. No.	Running Acctt. Bill No.	M.B.No./ Page	Date of billing	Gross amount of accepted bill	% of work done	Hindrance	% of work be done
1.	1 st Running Acctt. Bill	415/88	30.06.03	4,17,525/-	2.19%	19 days	20%
2.	2 nd Running Acctt. Bill	1817/61	23.10.03	2,89,830/-	3.71%	27 days	46%
3.	3 rd Running Acctt. 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%	27 days	100%

to reinforce the point of the appellant being in perpetual default in adhering to the progress of work, and

this tabulation not challenged in appeal, compels us to accord our concurrence to the conclusions arrived at by the learned Single Judge.

19. Thus, the impugned judgment and decree dated December 20, 2011 is upheld, and as regards the award dated January 17, 2012, which has upheld the counter-claim of the respondent in sum of ₹44,20,271/- i.e. the extra amount spent by the respondent to complete the balance works, we note that the learned Arbitrator has discussed the evidence, which we note is the same which was discussed by the learned Single Judge in the suit, and has correctly returned the finding that the respondent was fully justified in terminating the contract and proceeding to execute the balance works at the risk and cost of the appellant.

20. RFA(OS) No.16/2012 and FAO(OS) No.336/2012 are dismissed with costs in favour of the respondent and against the appellant in sum of ₹20,000/- (Rupees Twenty Thousand) each in the two appeals.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

AUGUST 24, 2012
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