

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

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Date of decision: 23rd August, 2013

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RFA 259/2011

UNION OF INDIA & ANR

..... Appellants

Through: Mr. Jaswinder Singh, Adv.

Versus

**FOREGEWELL ENGINEERING
CORPORATION**

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This first appeal impugns the judgment and decree dated 03.01.2011 of the Court of Additional District Judge (Central)-17, Delhi of dismissal of Suit No.284/2009 filed by the appellant / plaintiff for recovery of Rs.12,00,889/- from the respondent / defendant along with *pendente lite* and future interest.

2. Notice of the appeal was issued and the Trial Court record requisitioned. The notice sent to the respondent / defendant was returned with the endorsement of the respondent / defendant having left the address given in the memorandum of appeal. When the subsequent

attempts for service of the respondent / defendant also failed, ultimately vide order dated 29.05.2013, the respondent / defendant was permitted to be served by publication. Publication as ordered has been effected. None appears for the respondent / defendant.

3. A perusal of the impugned judgment shows that the respondent / defendant was *ex parte* in the suit also.

4. The counsel for the appellant / plaintiff has been heard.

5. The appellant / plaintiff had instituted the suit from which this appeal arises, pleading:

- (i) that pursuant to the bids / tenders invited by the appellant / plaintiff for Flood Lighting along the Indo-Pak border in PH:III in 120 kms. stretch of Barmer District of Rajasthan by supply and installation of 24 nos. of manually operated 110 KVA DG Sets, the bid of the respondent / defendant being the lowest was accepted and the respondent / defendant awarded the contract for the said work;

- (ii) that the estimated cost of the said work put to tender was Rs.1,04,22,668/- and the respondent / defendant had bid for Rs.1,20,88,888/-;
- (iii) that the respondent / defendant failed to comply with the terms and conditions of the contract and failed to supply the entire ordered quantity inspite of repeated requests, reminders and opportunities resulting in rescission of the agreement and notice being given to the respondent/defendant of execution of the balance work at the risk and cost of the respondent / defendant;
- (iv) that the respondent / defendant sought appointment of the Arbitrator and an Arbitrator was appointed; during the pendency of arbitration also respondent / defendant was given opportunity to carry out the balance work but the respondent / defendant still failed to do so and the work was accordingly got carried out through a third party;
- (v) that as per Clause 2 of the Agreement, SE (E), BFLC, CPWD, Jaisalmer decided and determined that the

respondent / defendant was liable to pay Rs.12,00,889/- by way of compensation, being 10% of the tendered costs towards the liquidated damages besides the other claims of the appellant / plaintiff;

- (vi) that the appellant / plaintiff made the said claim before the Arbitrator also but the Arbitrator in award dated 15.02.2006 held the said claim of the appellant / plaintiff for Rs.12,00,889/- to be an 'excepted matter' and accordingly gave liberty to the appellant / plaintiff to take other remedies for recovery of the said amount;

Accordingly, the suit for recovery of the said amount was filed:

6. The respondent / defendant as aforesaid was proceeded against *ex parte* before the Trial court also and the appellant / plaintiff led its *ex parte* evidence by filing an affidavit by way of examination-in-chief of its Executive Engineer (E), BFLD-II, CPWD, Jaisalmer and closed its evidence.

7. The learned Additional District Judge has vide the impugned judgment and decree dismissed the suit of the appellant / plaintiff on two

grounds. Firstly, that the appellant / plaintiff had failed to place any material in support of its claim and secondly on the ground of the claim in suit being barred by time.

8. On the aspect of limitation, it was held that though the appellant / plaintiff was vide award dated 15.02.2006 granted liberty to avail alternative remedy for its claim for Rs.12,00,889/- but the suit had been filed after three years therefrom on 02.06.2009 and was thus barred by limitation as prescribed in Articles 27 and 113 of the Limitation Act, 1963.

9. The counsel for the appellant / plaintiff has argued that the learned Additional District Judge failed to consider that the Article applicable to the claim of the appellant / plaintiff being the Central Government was Article 112 of the Limitation Act which provides for a period of 30 years from the date when the period of limitation would begin to run against a like suit by a private person. It is contended that if the said Article had been applied, the suit could not have been barred by limitation. Reliance in this regard is placed on *Maharaja Shree Umaid Mills Ltd. Vs. Union of India* 1981 E.L.T. 772 (Raj.)(DB) and on *Controller of Aerodrome,*

Nagpur Airport, Nagpur Vs. Homi D. Jahangir 1987 LawSuit (Bom)

11.

10. The stipulated date of completion of the works awarded to the respondent / defendant was 08.03.1996 and there can be no doubt that the claim of the appellant was within the said period of 30 years prescribed in Article 112 of the Limitation Act. The finding of the learned Additional District Judge of the suit claim being barred by time is thus clearly erroneous and is set aside.

11. Though the learned Additional District Judge save for observing that the appellant / plaintiff has not placed any material in support of its claim has not given any other reasons but a perusal of the plaint and the affidavit by way of examination-in-chief shows the nature of the said claim to be for liquidated damages in accordance with the contract between the parties and which contract authorized the SE (E), BFLC, CPWD, Jaisalmer of the appellant / plaintiff to determine the liquidated damages in accordance with the formula provided therein. Though undoubtedly neither in the plaint nor in the affidavit by way of examination-in-chief the said aspect has been highlighted and no

documents whatsoever have been purported to be proved or tendered into evidence but the fact of the matter remains that the photocopies of the documents in this regard i.e. the notice inviting tenders, the bids submitted by the respondent / defendant, the contract awarding the work to the respondent / defendant and the decision of the SE (E), BFLC, CPWD, Jaisalmer levying penalty under Clause 2 of the Agreement at Rs.12,00,889/- on the respondent / defendant were on the Court file.

12. I have in *Aktiebolaget Volvo Vs. R. Venkatachalam* 160 (2009) DLT 100 held that the CPC and the Evidence act refer only to 'document' and which would include photocopy and the question of producing the original would arise only upon the photocopy being disputed. Similarly, I have in *Indian Performing Rights Society Ltd. Vs. Gauhati Town Club* MANU/DE/0582/2013 held that where the defendant is *ex parte* and the material before the Court is sufficient to allow the claim of the appellant / plaintiff, the time of the Court should not be wasted in directing *ex parte* evidence to be recorded and which mostly is nothing but a repetition of the contents of the plaint.

13. Following the aforesaid dictas, I am of the view that notwithstanding the failure of the appellant / plaintiff to have proved its case for recovery of Rs.12,00,889/- in the traditional manner, on the basis of material on record the appellant / plaintiff is entitled to decree of Rs.12,00,889/- as claimed.

14. Notice in this regard may also be taken of the fact that Supreme Court in *ONGC Vs. Saw Pipes Ltd.* (2003) 5 SCC 705 has held that in public works, the loss/damage from non performance and delay cannot be assessed and a reasonable estimate made by the parties of the damage which would be suffered by non-execution of the works is to be accepted without any proof of loss or damage having been caused inasmuch as it is the public in general which suffers. Considering the nature of the work in the present case relatable to the security of the country, the importance thereof and the resultant damage from delay in affecting the same can well be fathomed.

15. I also deem it proper to award interest on the said amount to the appellant / plaintiff from the date of institution of the suit at the rate of

9% per annum being the average rate paid by the nationalized banks during the said years on fixed deposits with them.

16. The appeal is accordingly allowed and the judgment and decree of the Trial Court is set aside. The suit of the appellant / plaintiff is decreed for recovery of Rs.12,00,889/- with interest at 9% per annum from the date of institution of the suit till the date of recovery. However, the respondent / defendant having not contested the suit, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 23, 2013

‘gsr’