

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

Reserved on : 19.02.2013

Decided on: 05.03.2013

+ **RFA (OS) 4/2005**

M/S. BINDAL AGRO CHEM. LTD. Appellant
Through : Sh. Anurag Sharma, Advocate.

versus

M/S. V.M.J. ENTERPRISES Respondent
Through : Sh. T.N. Tripathi, Advocate.

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Appellant (defendant in the suit) was sued by the plaintiff, who claimed a decree for Rs. 32,27,102.56/- as the unpaid price of the construction and erection services rendered by the latter.
2. The Appellant had issued a Work Order, dated 03.12.1992 to the plaintiff; on 07.05.1993 additional work was awarded on the same terms. The plaintiff was to supply manpower and use his own tools and tackles for executing the work, which was fabrication of pipes (after cutting metal plates and welding them), earthwork channels, laying and fitting the pipes and completing finishing work for reinforcement (civil work). The plaintiff, in its suit, alleged that it completed the works, and raised bills for Rs.56,75,340.05/-. The plaintiff admitted in its affidavit, dated 02.05.2003

that it received payment of the bills to the tune of Rs.24,83,014/-. The amount of Rs.31,92,326.05/- was allegedly outstanding. For the additional works awarded, the plaintiff claimed a sum of Rs.34,776.51/-. It was also alleged in the suit that the plaintiff's workmen were prevented from entering the Appellant's site from 05.11.1993 and all its equipment could not be retrieved. No particulars of such equipment were, however, disclosed in the plaint nor was their value mentioned; during the hearing of the suit, the plaintiff restricted its claim for recovery of the suit amount.

3. The Appellant, in its written statement (in the suit) admitted having awarded the work and additional work, by letter dated 07.05.1993; it, however, pleaded that its consultant had verified the plaintiff's bills in sum of Rs.54.68 lakhs; 5% of the said sum amounting to Rs.2.73 lakhs was retained in terms of the retention clause (clause 25A). Of the balance amount of Rs.51.95 lakhs, a sum of Rs.49.94 lakhs was paid. Since some chargeable and consumable items other than electrodes were supplied by it to the plaintiff and payments made to other contractors on behalf of the plaintiff, no amount was payable; on the contrary it argued that Rs.5.65 lakhs excess amount was paid. It urged that there was a penalty clause in the agreement and that the plaintiff did not complete the works within the stipulated period.

4. Parties went to trial; the Court framed a large number of issues. These were later recast; the learned Single Judge recorded that the following issues had to be decided:

(a) To what amount is the plaintiff entitled to from the defendant?

(b) Whether the defendant was entitled to adjust the amounts indicated in the statement of account filed by the defendant; and

(c) If plaintiff is entitled to any amount, whether plaintiff is entitled to interest and if so at what rate?

5. It was noticed that the plaintiff pleaded in the plaint that it received only a sum of Rs.24,83,014/- and relied on various documents (Ex.P-6 to P-29 vouchers sent by the defendant to the plaintiff for signatures when payments were tendered). The total of the sum received was shown in Annexure 'L' to the replication of the plaintiff. That document recorded that:-

“Total payments (including mobilization advance) made by the defendant to the plaintiff: Rs.33,83,014.”

6. The learned Single Judge noticed in the impugned judgment that the plaintiff's pleadings were contrary to the evidence on record. It is also an admitted fact that the plaintiff did not adduce any evidence in the form of accounts maintained by it, and amounts paid to it; nor did it produce any bank statements or ledger extracts to evidence the actual payments received by it. In these circumstances, the impugned judgment proceeded upon an analysis of the rival pleadings and the accounts urged by the Appellant. Thereafter, the Court held as follows:

“29. It is accordingly held that the defendant has failed to prove that it has paid Rs.49,94,215/- to the plaintiff. However, since counsel for the plaintiff admitted that in view of averments made in the replication filed by the plaintiff and Annexure 'L' (Colly.) annexed thereto, plaintiff has admitted receipt in sum of Rs.33,83,014/-. This includes the mobilization advance.

30. On the issue of deduction? Defendant was not to effect any deductions for supply items as per contract. As per

contract, supply items were listed. It was for the defendant to prove that it supplied items other than the ones required to be supplied free of cost.

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40. Defendant has relied upon Clause 25A of the contract to justify retention of Rs.2.73 lacs. Clause 25(A) and (B) have been noted in para 20 above. This amount had to be paid back in two installments. Neither party has led evidence on issue of contract being completed or not. I accordingly hold that even this amount would be payable in view of the fact that plaintiff has stated and deposed that he was prevented from entering upon site after 5.11.1993.

41. Reframed issues 'a' and 'b' as per para 7 above are accordingly answered by holding that plaintiff would be entitled to a sum of Rs.54,68,631/- as per bills admitted as payable by the defendant. Plaintiff has admitted receipt of payment in sum of Rs.33,83,014/-. Defendant would be entitled to adjustment of Rs.16,313/-. I accordingly hold that plaintiff would be entitled to a sum of Rs.20,69,304/- from the defendant. Suit is decreed in the sum of Rs.20,69,304/- in favour of the plaintiff and against the defendant."

7. It is argued by counsel for the appellant that in proceeding to saddle it with liability the impugned judgment is in error of law. The plaintiff was under a liability to prove, through credible evidence, that it was entitled to the claims made in the suit. It hopelessly failed to discharge the burden of proving its case. In the circumstances, the Court could not have merely relied on the pleadings and placed the burden of proving that amounts were paid on the defendant. The question of the onus shifting would arise only after the plaintiff made good, through credible evidence and materials, its

allegations of non-payment. The Appellant's counsel also submitted that far from producing any accounts, or ledger, or even bank statements, the plaintiff's pleadings and evidence were at variance; even the affidavit sworn to on its behalf made conflicting claims. Therefore, the learned Single Judge should not have decreed the suit at all.

8. In para 15 of the impugned judgment, the Single Judge relied upon the appellant's statement of account produced during the hearing. After considering and analyzing it, the impugned judgment recorded as follows:

"18. To simplify for purpose of understanding, the statement relied upon by the defendant would be as under:

i) Amount certified for payment : Rs.54,68,631.00
ii) Less 5% retention as per work order: Rs. 2,73,432.00

A. Amount Payable : Rs.51,95,199.00

Payments :

i) Mobilization advance : Rs. 2,00,000.00
ii) Payment confirmed by party : Rs.24,83,024.00
iii) Further payment made : Rs.23,11,191.00

B. Total payment made (i+ii+iii) : Rs.49,94,215.00

Further Deductions

*i) Cost of material supplied i.e. steel, cement, diesel etc.
: Rs. 26,972.00*

ii) Consumable items other than electrodes:Rs.4,26,199.00

*iii) Payment made to other parties on behalf of VMJ :
Rs. 87,885.00*

<i>iv) Equipment hire charges:</i>	<i>Rs. 2,24,689.00</i>
<i>C. Total Deductions (i+ii+iii+iv):</i>	<i>Rs. 7,65,689.00</i>
<i>D. Amount to be adjusted (B+C) :</i>	<i>Rs.57,59,904.00</i>
<i>E. Excess paid (D-A)</i>	<i>: Rs. 5,64,705.00”</i>

9. It was further held that several items were to be provided by the plaintiff to the Appellant, free of cost. They included i) Electrodes; ii) Plates for fabricating pipes; iii) Prefabricated pipes of NB 14” and above; iv) Pipes and fittings up to 13” NB; v) Flanges; vi) Bolts, nuts, gaskets, half couplings, flat and columns; vii) Valves; viii) Cement and reinforcement steel for civil works. Further it was noticed that in terms of the Work Order (clause 25), 95% of the payment under each bill was payable after adjusting mobilization advance, i.e. upto 5% of the bill amount. 5% was payable at 2 stages, i.e. i) 2 ½% within 90 days of completion of work; and ii) 2 ½% on furnishing bank guarantee towards performance guarantee.

10. At this stage, it would be useful to notice that in the plaintiff’s affidavit, dated 02-05-2003 – the relevant part of which is extracted below, it was stated that:

“8.....But the defendant failed to provide the necessary erection materials for the underground piping job like many pipes, fittings, flanges etc. as per the terms of the agreement at proper time. The deponent vide letter dated 18.12.1992 annexed as Annexure C, brought the matter to the notice of the defendant for taking necessary steps. For such negligence of the defendant, the plaintiff had suffered idle labour charges and other consequential losses. Vide letter dated 19.5.1993, annexed as Annexure D the deponent informed the defendant that out of the total

contract price of Rs.70.91 lakhs Running on account Bill, Rs.43 lakhs was raised and submitted to the office of the defendant. The aforesaid bill for Rs.43 lakhs was duly settled by the defendant after deducting a sum of Rs.5.19 lakhs towards costs of materials/consumable supplied by the defendant to the deponent whereas as per the contract, the defendant is to bear the cost of such material as per the terms of the work order stated hereinabove. Thus, the defendant has to refund to deponent the deducted sum of Rs.5.49 lakhs towards the cost of material which has been illegally recovered from the deponent.

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10. That in the course of the work, under the contract, the Plaintiff has raised as many as 11 Running on Amount Bills, totaling to an amount of Rs.56,75,340.05 paise out of which total sum of Rs.24,83,014.00 was paid on diverse dates as part payment of the Running on Account Bills. Such part payments against the Running on Account Bills were made by the defendant only after accepting and passing the bills to the extent of nearly Rs.51 lakhs by PDIL and BACL (Consultant and Owners).

11. That at no material time, did the defendant raise any objection with respect to any one of the Running on Account Bills. Thus the defendant is liable to pay outstanding dues against those running on account bills amounting to Rs.31,92,326.05.”

11. As is clear from the above extract, the plaintiff made different assertions about the payments made. The first figure mentioned by it (regarding payment made to it, by the appellant) was Rs.24,83,014/-. The plaintiff, in its affidavit, stated that the Bill for Rs. 43 lakhs was settled by deducting “Rs. 5.19 lakhs towards costs of materials/consumable supplied by the defendant to the deponent whereas as per the contract, the defendant

is to bear the cost of such material as per the terms of the work order stated hereinabove.” A plain reading of this statement meant that the Appellant had paid Rs. 37,81,000/- to the plaintiff. Yet, the impugned judgment recorded – erroneously, that the amount paid was Rs.33,83,014/-. It is clear, therefore, that the plaintiff was itself unclear as to the precise liability of the Appellant; it had to lead evidence in the form of amounts received by it, and shown by it in its books. No such evidence was forthcoming. The Court would then have been justified in declining the claim. The fact, however, is that the Court went by the defendant’s pleadings, and proceeded to determine its liability.

12. The Appellant’s argument about the error in the impugned decree in casting liability without basis appears attractive. Yet, this Court cannot set aside the judgment only on that basis. The fact remains that the defendant – appellant in its pleading admitted that out of the total amount of over Rs. 51 lakhs admitted liability payable to the plaintiff, Rs. 2,73,432/- was deducted from the running bills, to adjust the initial retention price of 5% value of the total contract. This amount was clearly payable. Of the other amounts, Rs. 7,65,689/- was payable, as it denoted the amounts deducted towards the consumables and other articles and services that were to be provided free of cost by the Appellant itself. The third amount was Rs. 5,19,000/- which the plaintiff claimed was deducted, while settling its bill for Rs. 43 lakhs. This is in all probability the sum of Rs. 5,64,705/- claimed as “excess payment” to the plaintiff by the defendant. There is no justification for deduction of such amount. Thus, the amount – which the Appellant was liable to pay, in terms of its written statement, and the materials relied on by it- was a total sum of Rs. 15,58,121/-. This Court is, therefore, of the opinion that the impugned

judgment and decree requires to be modified to the extent that instead of Rs.20,69,304/-, the Appellant/defendant is liable to pay to the plaintiff the sum of Rs. 15,58,121/-.

13. The appeal has to be allowed in part; consequently, the impugned judgment and decree is modified. The Appellant shall pay to the plaintiff, the sum of Rs. 15,58,121/-. The other terms of the decree, in respect of interest and costs, are left undisturbed. The appeal is allowed to the above extent, with no order as to the costs.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

MARCH 5, 2013