

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 26, 2020

+ CS(COMM) 517/2016, CC. (COMM) 80/2017, I.As. 7400/2002 & 7620/2008

DELHI DEVELOPMENT AUTHORITY Plaintiff

Through: Mr. Arun Birbal and Mr. Sanjay Singh, Advs.

versus

SPEEDWELL PROPERTIES LTD. Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

IA. 7400/2002 (for delay)

This is an application filed by the plaintiff seeking condonation of delay in re-filing the Suit. For the reasons stated in the application, the delay is condoned. Application stands disposed of.

CS (COMM) 517/2016

1. This is a Suit for Recovery filed by the plaintiff / Delhi Development Authority ('DDA', for short) for Rs.3,23,76,838/-. The prayers made in the Suit are as under:

"It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

(a) grant a decree for an amount of Rs.3,23,76,838/- (it should be Rs.3,23,76,838/- as stated in Para 30 of the plaint) towards penalty under Clause-2 of the Agreement.

(b) grant a decree for Rs.1,62,53,028/- towards the risk and cost expenditure incurred by the Defendant under Clause 3 of the Agreement.

(c) Award interest @18% p.a. from the date of filing of the Suit till realisation.

(d) Costs in the suit may be awarded in favour of the plaintiff and against the defendant.

Any other order or relief as this Hon'ble Court deems fit and proper may be passed in the facts and circumstances' of the present case."

2. The facts as noted from the plaint are, the plaintiff / DDA is duly constituted under the Delhi Development Act, 1957. It has multifarious activities including carrying out the construction contracts. The defendant is a registered contractor with the plaintiff authority. The plaintiff invited tenders for work of construction of 102 three bedrooms and 312 two bedrooms houses with cement concrete hollow blocks including internal electrification at Sector – 18A, Dwarka, Phase-II, New Delhi. The defendant submitted its tender along with other intending tenderers. The tender of the defendant for the work was accepted by the plaintiff and a written contract, namely Agreement No. 19/EE/WD-12/DDA/2000, was executed between the parties. The date of start of the work was October 30, 1999 and the date of completion was October 29, 2000, i.e., the work was to be completed within a period of 12 months.

3. The salient features of the contract are as under: -

Tendered amount	:	Rs.14,48,28,032/-.
Stipulated date of start	:	October 30, 1999.
Stipulated date of completion	:	October 29, 2000.
Work rescinded on	:	April 26, 2001.
Work restored on	:	June 23, 2001.
Second rescission on	:	July 27, 2001.

Work was re-awarded on : August 14, 2001.

4. The defendant had to construct the houses using cement concrete hollow blocks instead of bricks. The cement concrete hollow blocks were the main constituent of the work. It is averred, that the defendant was under a duty to get the cement concrete hollow blocks manufacturing machine at site on the start of the work. But the defendant failed to bring the machine at site. A meeting was held between the parties on October 25, 1999, wherein defendant promised that the blocks would be brought at site. Vide letter dated November 3, 1999, plaintiff reminded the defendant that during the meeting on October 25, 1999, defendant promised that the cement concrete hollow blocks manufacturing machine shall be brought to the site for installation. But unfortunately, neither the machine nor the accessories have been received at site. In the said letter, it was further stated that the land earmarked for installation of the machine had been shown to the defendant by the Executive Engineer, WD-12, DDA, New Delhi and therefore there was no cause for delay.

5. It is the case of the DDA that the floor plan elevation and section plan were handed over to the defendant on October 23, 1999, i.e., even before the stipulated date of start of the project. The architectural and structural drawings were also handed over before the stipulated date of the start, but the defendant did not pay any heed and did not start the work and the plaintiff was constrained to write another letter dated November 16, 1999 to the defendant whereby it was again brought to the notice of the defendant that the defendant had still not installed the cement concrete hollow blocks manufacturing machine at the site shown by the Executive Engineer WD-12, DDA, New Delhi nor the defendant had provided the tentage accommodation for site office. It is the case of the plaintiff that it had categorically stated

that the defendant should take up the work immediately as all the architectural and structural drawings for foundation sections have been made available to the defendant.

6. It is the case of the plaintiff that the defendant in order to cover up its delay in installing the machine for cement concrete hollow blocks sent a fax message dated November 16, 1999, requesting the plaintiff for allotment of a plot of land to install the machine. In response to the said message, the plaintiff immediately vide letter dated November 17, 1999 clarified that the plaintiff had already shown the defendant the area where it was required to put the machine for fabrication of cement concrete hollow blocks at site and regarding the site office also necessary directions have been given to the defendant. The defendant was also intimated that set of architectural drawings including layout had already been handed over to it.

7. It is averred in the plaint that on January 12, 2000, a coordination meeting was held wherein the Project Manager of the defendant Mr. D.M. Shah was present. In the said meeting again it was stated by the plaintiff that the cement concrete hollow blocks manufacturing machine should be installed immediately. This was reiterated by the plaintiff vide letter dated January 19, 2000. In fact, it is averred that on January 19, 2000, another letter was addressed by the plaintiff to the defendant categorically stating that the progress of work was very slow and that the defendant did not seem to be serious about completion of work within the targeted period.

8. It is averred that again vide letter dated January 28, 2000, the defendant was apprised about various commitments made by the Project Manager of the defendant in the second coordination meeting and that regretfully the same have not been complied with. It is also averred that the plaintiff informed the defendant that till January 28, 2000, the requisite

machines had also not been installed at the site of work. The defendant was also asked to submit the detailed bar chart to show how the awarded work could be completed within the stipulated time. In this letter the plaintiff apprised the defendant that by inordinately delaying the work, the defendant is making itself liable for action under Clause 2 of the agreement unless some concrete steps are taken by the defendant for speeding up the progress of the work. It is averred that again vide letter dated February 4, 2000, plaintiff wrote to the defendant stating that the plaintiff vide its previous letters dated January 19, 2000, January 14, 2000, January 10, 2000 and January 7, 2000 and other verbal directions had called upon the defendant to speed up the work. Defendant was informed that till that date, the required machines had not been brought at site, thus delaying the work inordinately. It was reiterated by the plaintiff that the said work being time bound project, no slippage would be allowed. It was further submitted in the letter that it was felt that the work would not be completed by defendant within the stipulated period and as such the plaintiff would be constrained to take action under Clauses 2, 3(a), 3(b) and 3(c) of the agreement.

9. It is the case of the plaintiff that the defendant had not taken the matter seriously despite so many letters written to it. As there was no sight of the work being completed within the stipulated date of completion, the plaintiff issued a show-cause notice dated February 9, 2000 to the defendant as to why action under sub-section 3(a) and / or 3(b) and / or 3(c) of the agreement be not taken against the defendant.

10. It is averred that after the issuance of the show-cause notice under clause 3 of the agreement, the defendant on February 14, 2000 requested the plaintiff that he would visit the office of the plaintiff to sort out all pending issues and ensure speedy implementation of the project. The defendant

further stated that the project was delayed partially due to non allotment of land for installing machines and in addition for some time the work at site was not permitted in view of the visit of Hon'ble Prime Minister on the New Year's Day.

11. It is averred by the plaintiff that this letter of the defendant was promptly replied by the plaintiff vide its letter dated February 29, 2000, whereby the plaintiff categorically answered each allegation of the defendant against the plaintiff. It is stated by the plaintiff in this letter that the request for allotment of land was received in the office of the plaintiff on November 1, 1999 and the same was duly handed over to the defendant on December 8, 1999 when the defendant had contacted the office for the same. That this delay was also on the part of the defendant as no representative of the defendant firm was present to take over the plot. It is the case of the plaintiff that it further stated that no work was stopped on the ground of probable visit of Hon'ble Prime Minister. Therefore, the baseless excuses raised by the defendant in its letter dated February 14, 2000 were not tenable and without any basis. The sincerity of the defendant could be seen from the fact that vide its letter dated February 14, 2000, the defendant had stated that it's representative would visit the plaintiff's office on February 16, 2000 to sort out the pending issues. But till February 29, 2000, the representative had not visited the office of the plaintiff. However, one Mr. Piyush attended the office of the plaintiff and stated that the machines available could not be brought to Delhi and another cement concrete hollow blocks manufacturing machine would be sent to the site at Delhi.

12. It is averred that the plaintiff requested Mr. Piyush to furnish the documents / papers of having procured this machine at Delhi, but the same was also not sent. All these circumstances showed that the reply dated

February 14, 2000 sent by the defendant to the plaintiff was without any basis.

13. It is the case of the plaintiff that the defendant suddenly sent the deluge of letters dated March 9, 2000, March 13, 2000 and March 16, 2000. These letters were replied by the plaintiff on March 23, 2000 clarifying that the allegations made by the defendant in the aforesaid letters are without any basis and are untenable.

14. It is the case of the plaintiff that on April 24, 2000 and May 6, 2000, it intimated the defendant that, on-site inspection carried out on April 15, 2000, it was found that the progress of the work was extremely slow at site and there are discrepancies in the work. Further, it was stated that cement concrete blocks manufacturing machine had still not been installed after so many letters.

15. It is the case of the plaintiff that the defendant wrote letters to the plaintiff dated July 4, 2000 and July 6, 2000, assuring to speed up the work. The plaintiff replied to the same vide letters dated July 10, 2000 and July 21, 2000. That again vide letter dated July 24, 2000, the defendant assured to start the work in full swing. Letter was replied by the plaintiff vide letter dated August 17, 2000 stating that the progress of work has still not picked up in spite of assurances. Again vide letter dated October 16, 2000, plaintiff requested the defendant to increase labour in sufficient numbers to speed up the work on top priority basis as assurances have been given by the defendant to the plaintiff and in the meeting with the Lieutenant Governor of Delhi that the work will be completed by December, 2000. According to the plaintiff, vide letters dated January 8, 2000 and February 7, 2001, the defendant wrote to the plaintiff that the work on December 31, 2000 and January 1, 2001 was stopped. In the next letter dated February 7, 2001, the defendant had stated

that they had diverted their resources to Ahmedabad as Gujarat had suffered a major earthquake on January 26, 2001 and again the defendant assured to expedite the work. This letter was replied by the plaintiff vide letter dated February 23, 2001, whereby the plaintiff sympathized with the circumstances in Gujarat and again requested the defendant to expedite the progress of the work at Dwarka as the delay was being viewed seriously. It is averred that the plaintiff again wrote a letter dated March 15, 2001 to the defendant to expedite the work. Finally, vide letter dated March 30, 2001, the plaintiff wrote to the defendant that as the stipulated date of completion of work was October 29, 2000 as per the agreement and till date the work has not been completed, the defendant has made itself liable to pay compensation to the plaintiff under Clause 2 of the agreement.

16. The defendant was given a fortnight time to show-cause as to why compensation under Clause 2 should not be levied upon the defendant. The defendant did not give any reply to the show-cause notice and on April 30, 2001, the Superintending Engineer levied compensation to the tune of Rs. 1,61,23,810/- under Clause 2 of the agreement. Further, it is the case of the plaintiff that vide letter dated April 26, 2001, it rescinded the contract with the defendant under Clauses 3(a), 3(b) and 3(c) of the agreement and the defendant was intimated to come for the recording of the final joint measurement of the work on May 7, 2001.

17. It is the case of the plaintiff that after rescinding the work, the defendant wrote letter dated May 10, 2001 addressed to the Hon'ble Lieutenant Governor of Delhi and letter dated May 19, 2001 addressed to the plaintiff whereby the defendant requested to look into the case sympathetically as due to the earthquake in Gujarat, the Directors concerned lost 8 of their family members and relatives, due to which they are facing

mental agony and suffered huge economic loss. The plaintiff on sympathetic ground and as a last opportunity acceded to the request of the defendant and it vide its letter dated June 25, 2001 requested the defendant to take up the balance work on the terms and conditions of the original agreement with immediate effect. It is further stated by the plaintiff that defendant's letter dated May 19, 2001 shall also form part of the offer. That again vide letter dated June 26, 2001, the plaintiff called upon the defendant stating that vide letter dated June 25, 2001 and information dated June 23, 2001, the defendant was called upon to start the work immediately and efforts were also made to contact the defendant on telephone but there was no response.

18. Noting the fact that the work has not started, the plaintiff again vide letter dated July 21, 2001 sent a show-cause notice to the defendant as to why action under Clauses 3(a), 3(b) and 3(c) be not taken against it. The same was answered by the defendant. Finally vide letter dated July 27, 2001, the plaintiff rescinded the work given to the defendant due to inordinate delay and laches on the part of the defendant. Already on May 29, 2001, a fresh tender for said work was floated by the plaintiff at the risk and cost of the defendant and vide letter dated August 4, 2001, the plaintiff awarded the said work to M/s. IDEB Construction Projects Pvt. Ltd., New Delhi.

19. It is the case of the plaintiff that the work was awarded to the aforesaid company at the item rate of 3.35% above the schedule of rates. That the difference in the cost of the work awarded to the defendant and M/s. IDEB Construction Projects Pvt. Ltd. is Rs.1,62,53,028/- and as per Clause 3 of the agreement, the work which was to be executed on account of risk and cost of the defendant, the same is liable to be paid by the defendant. It is the case of the plaintiff that it is under these circumstances that the present Suit has been filed for the prayers noted above.

20. Written statement along with counter-claim have been filed by the defendant. It is the case of the defendant in the written statement that the defendant started the work forthwith with an intention to complete the work within the stipulated timeframe. However, on account of intervening circumstances, which are solely attributable to the plaintiff, including delay in handing over plot for installation of blocks manufacturing plant, construction of site office, delay in supply of duly approved architectural drawings and structural details, irregular supply of cement etc. the work could not progress at the required pace.

21. It is averred in the written statement that subsequently on January 26, 2001, the state of Gujarat suffered a devastating earthquake during which the defendant suffered huge financial loss and the Directors of the defendant Company lost as many as 8 of their family members. As a result of the earthquake the defendant had to divert its attention and resources towards its own projects and also rehabilitation work in Gujarat. On April 26, 2001, the plaintiff rescinded the contract on the ground of delay in completion of the project allegedly committed by the defendant. However, the defendant addressed several communications to the plaintiff once again informing it of the losses suffered by it and diversion of its attention and resources on account of earthquake and requested the plaintiff to consider the case of the defendant sympathetically and recall its decision to rescind the contract.

22. It is stated in the written statement that in continuation of the above, the defendant vide its communication dated May 19, 2001 requested the plaintiff to withdraw its decision to rescind the contract and extend the date of completion of project to February 15, 2002. The plaintiff favourably considered the said request and it vide its letter dated June 25, 2001 extended

the date of completion of project to February 15, 2002. The said extension was duly accepted by the defendant vide its letter dated July 2, 2001.

23. It is the case of the defendant that having extended the date of completion, the plaintiff and the defendant novated / altered the original contract and entered into a fresh binding contract as regards the date of completion of the project. Having entered into the aforesaid altered fresh binding contract, the defendant was contractually entitled to complete the project by February 15, 2002. However, the plaintiff in utter disregard of its contractual obligations unilaterally withdrew the date of extension and rescinded the contract vide its letter dated July 27, 2001. It is averred that the defendant vide its communication dated August 7, 2001 expressed its willingness to complete the project and requested the plaintiff to withdraw the unilateral recession of the contract. However, the plaintiff failed to consider the said request and allotted the project to a third party in breach of the contract. That apart, it is the case of the defendant that the suit is not maintainable inasmuch as the defendant has duly discharged its construction obligation and has not committed any delay whatsoever in construction of the project. Even assuming though not admitting that the date of completion of project was October 29, 2000, i.e., the originally stipulated date of completion and not the extended date, i.e., February 15, 2002, still the slow progress, if any, in construction is not due to the defendant, but was on account of factors solely attributable to the plaintiff, including delay by the plaintiff in handing over the land for installation of cement concrete hollow blocks manufacturing machine plant and site office, delay in providing the duly approved architectural drawings and structural details, non-supply of timely and adequate quantities of cement, revision of plans etc. According to the defendant as per the agreed terms, the defendant was entitled to

corresponding extension of time for the aforesaid periods of delay attributable solely to the plaintiff. In the counter-claim, the defendant has prayed for the following relief: -

“In view of the aforesaid it is most respectfully prayed that this Hon'ble Court may be pleased to:

- a) decree the counter claim in favour of the counter claimant and against the defendant in sum of Rs. 1,46,87,546/- (One Crore Forty Six Lacs Eighty Seven Thousand Five Hundred and Forty Six Only) and interest thereon @24% p.a. from the date of payments of the respective sums till their actual realisation; and*
- b) pass such other/further order(s) as this Hon'ble Court may deem fit and proper in the interest of justice.”*

24. Suffice it would be state that the aforesaid amount has been sought under various heads like job work done, security deposit, part rate, electric work done at site, quality control, escalation, materials left at side, tube well and PVC pipe, labour huts, site office and store, TDS and damages etc.

25. On the basis of the pleadings following issues were framed by this court vide order dated December 15, 2005:

- 1. Whether the plaintiff is entitled for recovery of Rs.3,23,76,830/- towards penalty under clause 2 of the agreement? OPP*
- 2. Whether the plaintiff is entitled for recovery of Rs.1,62,53,028/- on account of risk and cost expenditure incurred under clause 3 of the agreement? OPP*
- 3. Whether the plaintiff is entitled for interest. If so on what amount, for what amount, for what period and at what rate? OPP*
- 4. Whether the termination / recession of contract by the plaintiff is illegal, if so, to what effect? OPD.*
- 5. Relief.*

26. An additional issue was also framed by this court on February 3, 2009 in the following manner:

"Whether the defendant is entitled to a sum of Rs.1,46,87,546/- and interest thereon @ 24% p.a. from the date of payments of the respective sums till their actual realization ?" OPD

27. In total six issues have been framed by the court. The plaintiff has filed the evidence by way of an affidavit of Mr. S.S. Bhalla. The affidavit was exhibited as Ex.PW-1/A. It is also noted that the plaintiff exhibited around 56 documents and the same has been exhibited as Ex.PW-1/1 to PW-1/56. In the like manner, the defendant has exhibited 30 documents and the same have been exhibited as D-1 to D-30. It is further noted from the record that PW-1, Mr. S.S. Bhalla was cross-examined partially. In other words, his cross-examination could not be completed. This court on January 10, 2019 because of non-appearance on behalf of the defendant and its inability to cross-examine this witness had closed the cross-examination of PW-1. Further on August 13, 2019, the Court on recording that plaintiff does not want to examine any further witness had closed the plaintiff's evidence. That apart, as there was no appearance for the defendant even the defendant's evidence was closed.

28. Mr. Arun Birbal, learned counsel for the plaintiff would after giving the factual aspect of the case which has already been noted above had submitted that the claim of the plaintiff / DDA is on the basis of provisions of the agreement, i.e., Clause 3 and Clause 2, which entitles the plaintiff to impose penalty and to seek the difference of the amount for which the contract has been awarded to a third party. It was his submission that the defendant did not carry out the work at the desired speed. He has drawn the attention of the court to the affidavit (Ex.PW-1/A) filed by PW-1 in support of his contention. He also justified the imposition of penalty in terms of

Clause 2 by stating that Clause 2 permits the Superintending Engineer of the DDA to impose penalty up to 10% of the permitted value of the contract. In this regard he has drawn my attention to Clause 2 of the agreement. That apart, it was his submission that since the pace of doing the work by the defendant was highly unsatisfactory, the defendant was given show-cause notice dated March 31, 2001, Ex.PW-1/36, under Clause 3 of the agreement and ultimately the contract was rescinded by the DDA vide letter dated April 26, 2001 Ex.PW1/37. According to Mr. Birbal, the burden to prove the termination / recession of the contract by the plaintiff / DDA is illegal is on the defendant, but no prayer nor any evidence has been led by the defendant to that extent. All the documents filed by DDA have been admitted by the defendant in terms of the order dated December 15, 2005 of this Court. There was no cross-examination of the witness of DDA on merit of the dispute. Moreover, as the defendant did not appear in support of its case, an inference is liable to be drawn that the case of the plaintiff is proved. Similarly, it was his submission that the defendant has filed a counter-claim, but did not lead any evidence in support of its counter-claim. Thus, DDA did not lead evidence to rebut the counter-claim. In the end, he states, DDA is entitled to the relief as prayed for.

29. Having heard Mr. Birbal and perused the record, it is noted that on October 22, 1999, plaintiff and defendant had entered into the agreement (Ex.PW-1/56) for carrying out the construction work of 102 three bedrooms and 312 two bedrooms houses with cement concrete hollow blocks including electrification. These houses were to be constructed with cement concrete hollow blocks of the given specification instead of bricks.

30. It is the case of the plaintiff that the defendant failed to bring the machine to manufacture cement concrete hollow blocks, whereas the case of

the defendant is that the plaintiff had shown a plot behind Sector-18A, Dwarka, New Delhi which on inspection revealed that it is lying in a low lying zone and subject to severe water-logging. In any case, it is the case of the defendant that the land was allotted to it on December 8, 1999, pursuant thereto, the issue of installation of machine arose. It is the case of the plaintiff that it wrote many letters including letter dated January 19, 2000 (Ex.PW-1/6) calling upon the defendant to speed up the work and reminding the defendant that the required machines have not been brought at site. It is a fact as noted from the letter of plaintiff dated May 6, 2000 (Ex.D-7) that the defendant, till the date of that letter, had not installed the cement concrete hollow blocks manufacturing machine at the site. This aspect has not been disputed by the defendant as no communication of the defendant in reference to the communication of the plaintiff dated May 6, 2000 has been placed on record. I also note that it is the case of the defendant that the plaintiff had delayed the supply of duly approved architectural drawings and structural details and there was irregular supply of cement. On the drawings it is the case of the plaintiff that the floor plan, elevation and section plan were handed over to the defendant on October 23, 1999, i.e., before the stipulated date of start of the project. In response to the above stand of the plaintiff in Para 6 of the plaint, the defendant has not disputed that drawings were supplied on October 23, 1999. It is the case of the defendant in the written statement that the drawings were supplied after consistent follow up by the defendant including writing letters dated November 16, 1999, November 19, 1999 and March 16, 2000. I find that two letters dated November 16, 1999 and March 16, 2000 are placed on record. The letter dated November 16, 1999 (Ex.D-2) placed on record do not reveal that the defendant had asked for drawings. Further, the letter dated March 16, 2000 placed on record by

the plaintiff at Page 20 of the document reveal that the defendant had asked the plaintiff to issue final architectural drawings with new bedroom dimensions and margins according to the block dimensions. The letter do not suggest any delay on the part of the plaintiff to furnish drawings, which delayed the work. Even on the aspect of cement, it is the case of the defendant itself that 5940 bags have been received from the plaintiff, and 3060 bags were short. It is not the case of the defendant that 5940 bags have been utilized and for want of cement, the work has stopped. It is the case of the plaintiff that till the letter dated April 24, 2000 (Ex.PW-1/13) only 4% progress was achieved at the site against the required achievement of about 30%. I also note, it was also mentioned by the plaintiff that the cement concrete hollow blocks manufacturing machine has not yet been installed at the site.

31. In the aforesaid background, the plaintiff issued a show-cause notice dated February 9, 2000 (Ex.PW-1/9) to the defendant as to why action under clauses 3(a), 3(b) and 3(c) of the agreement be not taken against it. The notice was replied by the defendant on February 14, 2000 (Ex.D-5) wherein it is stated that the representative of the defendant shall visit the plaintiff to sort out the pending issues. A plea was also taken by the defendant that the delay was caused in the work for certain reasons attributable to the plaintiff. This letter of defendant was replied by the plaintiff on February 29, 2000 (Ex.PW-1/11) wherein the stand of the defendant that the delay was on account of plaintiff was denied. In any case, it is the case of the plaintiff that one Mr. Piyush, representative of the defendant visited the plaintiff and stated that the machines available could not be brought to Delhi and another cement concrete hollow block manufacturing machine would be sent to the site at Delhi. This proves that the machines which were to be installed in

November-December, 1999 had not been installed even after issuance of the show-cause notice dated February 9, 2000. So, the plea taken by the defendant is only a ploy attributing the issue of delay to the plaintiff. That apart, I may state that the plaintiff has referred to various communications exchanged between the parties including the letters dated July 4, 2000 and July 6, 2000 wherein, the defendant has assured the plaintiff to speed up the work. Despite the assurances, work at the site did not pick up. In fact, in the meeting with the Lt. Governor assurance was given by the defendant that the work would be completed by December, 2000. The defendant could not adhere to the said date. The work continued beyond December, 2000. In the communication dated February 7, 2001, the defendant had taken a plea that it had to divert its resources to Ahmedabad as Gujarat had suffered a major earthquake on January 26, 2001 and it again assured the plaintiff that it shall expedite the work.

32. It is the case of the plaintiff that the defendant has been making lame excuses for delay and trying to shift the blame on the plaintiff. In any case, it is noted that on March 30, 2001, the Superintending Engineer gave notice under Clause 2 of the agreement as to why compensation should not be levied for delay in completion of the project. The defendant did not give any reply to the show-cause notice and on April 30, 2001 (Ex.PW-1/34), the Superintending Engineer levied compensation to the tune of Rs.1,61,23,810/-. That apart, the plaintiff vide letter dated April 26, 2001 (Ex.PW-1/37) rescinded the contract of the defendant under Clauses 3(a), 3(b) and 3(c) of the Agreement. That apart, I find that pursuant thereto the defendant wrote letters dated May 10, 2001 (Ex.D-14) and May 19, 2001 (Ex.PW-1/42) to the Hon'ble Lt. Governor and to the plaintiff respectively to extend the time

period to complete the work till February 15, 2002. The plaintiff accepted the request vide its letter dated June 25, 2001 (Ex.PW-1/43).

33. It is the case of the defendant that it accepted the terms of the letter dated June 25, 2001 of the plaintiff. Be that as it may, the plaintiff issued letter dated July 21, 2001(Ex.PW-1/49) which is in the nature of show-cause notice to the defendant as to why action under clauses 3(a), 3(b) and 3(c) of the agreement be not taken against the defendant. It appears that no reply to the show-cause notice was given. Finally, the plaintiff vide its letter dated July 28, 2001 (Ex.PW-1/53) withdrew the letter dated June 25, 2001 (Ex.PW-1/43).

34. I may state here that Clauses 3(a), 3(b) and 3(c) of the Agreement under which the action has been taken against the defendant reads as under:

CLAUSE-3: *The Engineer-in-Charge may without prejudice to his right against the contractor in respect of any delay or interior workmanship or otherwise on to any claims for damage in respect of any breaches of contract and without prejudice to any right or remedies under any of the provisions of this contract or other wise and whether the date for completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases:*

(i) If the contractor have been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in any inefficient or otherwise improper or unworkmanlike manner shall commit to comply with the requirements of such notice for a period of 7 days thereafter or, if the contractor shall delay or suspend the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure completion of the work by the date for completion or he has already failed to complete the work by that day.

(ii) If the contractor being a company shall pass resolution or the court shall make an order the company

shall be wound up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

(iii) If the Contractor commits any breach of the terms and conditions of this contract.

(iv) If the contractor commits any act mentioned in Clause 21 hereof, when the contractor has made him self liable for action under any of the cases afore said, the Engineer-in-Charge on behalf of the Delhi Development Authority shall have powers;

(a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination or rescission the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of Delhi Development Authority.

(b) To employ labour paid by the Delhi Development authority and to supply materials to carry out the works or any part of the work debiting the contractor with the cost of the labour and the price of the materials (of the amount of which cost and price certified by the Engineer-in-Charge shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor, provided always that action under the sub-clause shall only be taken after giving notice in writing to the contractor. Provided also that if the expenses incurred by the Authority are less than the amount payable to the contractor at his agreement rates, the difference should not be paid to the contractor.

(c) After giving notice to the contractor to measure up the work of the contractor and to take such part

there of a shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Engineer-in-Charge shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Delhi Development Authority under this contract on any other account what-so-ever from his security deposit or the proceeds of sales there of sufficient part thereof as the case may be.

In the event of any one or more of the above courses being adopted by the Engineer-in-Charge the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any materials or entered into any engagements or made any advances on account or which a view to the execution of the work or the performance of contract. And in case action is taken under any of the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work there to for actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid value so certified."

35. The aforesaid Clauses empower the plaintiff to rescind the contract. It also lays down the procedure to be followed by the plaintiff and action to be taken for awarding the work to a new contractor. I find that the defendant in its counter-claim has not challenged the letters dated April 26, 2001 (Ex.PW-1/37) and July 28, 2001 (Ex.PW-1/53) as there is no prayer made in that regard. So, in the absence of any prayer challenging the letter dated July 28, 2001 it has to be said that the extension of time till February 15, 2002 which has been withdrawn has been accepted by the defendant. Similarly, in the absence of any prayer clause challenging the letter dated April 26, 2001, it

must be said that the rescinding of the contract has been accepted. That apart, I find that a limited cross-examination of the plaintiff's witness PW1 was made by the defendant and the same has no bearing on the letters dated April 26, 2001 and July 28, 2001. Further, the defendant has not produced any evidence in support of its case against the letters dated April 26, 2001 and July 28, 2001. So, it must be said that the letters dated April 26, 2001 and July 28, 2001 have attained finality. Accordingly, issue no.4 as framed, whether the termination / recession of the contract by the plaintiff is illegal and if so, to what effect has to be decided against the defendant. It is ordered accordingly.

36. Now coming to issue nos. 1 and 2, Mr. Birbal is right that the defendant did not carry out the work at the desired speed and delayed the same. The examination in chief (Ex.PW-1/A) filed by PW1, witness of the plaintiff narrates the facts highlighting the case set up by the plaintiff. The cross-examination of PW-1 remained inconclusive and had no bearing on the case as set up by the plaintiff. In fact, I find that the defendant has not even challenged the letter dated April 30, 2001 (Ex.PW-1/34) of the Superintending Engineer imposing penalty of 10% of the permitted value of the contract on the defendant, i.e., Rs.1,61,23,810/-. The said penalty has been imposed under clause 2 of the agreement which is reproduced as under:

“CLAUSE-2: The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the Tenth Day after the date on which the order to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the stipulated period of the contract be proceeded with all due diligence and the contractor shall

pay as Compensation an amount equal to one per cent, or such smaller amounts as the Superintending Engineer Delhi Development authority (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished, after the proper dates. And further, to and ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceed, one month (save for special jobs) to complete one-eighth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, three eighth of the work, before one half of such time has elapsed and three-fourth of the work, before three-fourth of such time has elapsed. However, for special job if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-Charge the contractor shall comply with the said time schedule.

In the event of the contractor failing to comply with this conditions, he shall liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent of the estimated cost of the work as shown in the tender.

The contractor shall be required to submit a detailed programme for completion of work within the stipulated period in the form of a Bar Chart, covering all major activities to the Engineer-in-Charge within 10 days from the date of award of work. Modification suggested by the Engineer-in-charge shall be ensured by the contract or that the time schedule as laid down in the aforesaid Bar Chart is adhered. To in case of any slip the time lost will have to be made good by the contractor by speeding up the activities in such cases he shall be bound to follow the Engineer-in-Charge."

37. Further, it is the case of the plaintiff that it had, after rescinding the Agreement with the defendant, awarded the contract for construction of

houses to M/s. IDEB Construction Projects Pvt. Ltd. vide letter dated August 4, 2001 (Ex.PW-1/54) at the risk and cost of the defendant. The defendant has not contested this aspect of awarding the contract to the above company. The witness PW-1 has also averred this aspect in his affidavit (Ex.PW-1/A). There is no cross-examination of the said witness by the defendant. Hence, the case as set up by the plaintiff has to be accepted and the plaintiff is entitled to the difference of the cost that has been incurred by the plaintiff which is Rs.1,62,53,028/-. Accordingly, issue no.1 is decided in favour of the plaintiff. The plaintiff is entitled to a decree of recovery of Rs.3,23,76,838/-. The break-up of which is Rs.1,61,23,810/- (penalty under Clause 2 of the agreement) and Rs.1,62,53,028/- (the amount under Clause 3 of the risk and cost).

38. In so far as issue no.2 is concerned, as the amount of Rs.1,62,53,028/- is already included in the amount of Rs.3,23,76,838/- under issue no.1, this issue has become infructuous. It is ordered accordingly.

39. In so far as issue no.3 is concerned, issue no.1 having been decided in favour of the plaintiff, the plaintiff shall also be entitled to interest @ 9% per annum pendente-lite on the awarded amount. Plaintiff shall also be entitled to future interest @ 6.25% per annum from the date of the judgment till realization.

40. In so far as the issue framed by the court vide order dated February 3, 2009 is concerned, the letters dated April 26, 2001 (Ex.PW-1/37) and July 28, 2001 (Ex.PW-1/53) having been upheld, the defendant is not entitled to any relief as prayed for in the counter-claim. CC(COMM) 80/2017 is dismissed. The issue is accordingly decided against the defendant.

41. The Suit is decreed on the aforesaid terms. Decree sheet be drawn accordingly. No costs.

IA. 7620/2008

In view of order dated September 5, 2008 in IA. 7619/2008, this application has become infructuous.

V. KAMESWAR RAO, J

MAY 26, 2020/jg

