

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-4380-2010 (O&M)

Date of decision : 16.07.2015

Bharat Sanchar Nigam Limited & others

.....Appellants

Vs

M/s Surya Builders & Engineers

.....Respondent

Coram : Hon'ble Mr. Justice Rajiv Narain Raina

Present : Mr. Madan Mohan, Advocate
for the appellants

Mr. Kulvir Narwal, Advocate
for the respondent.

Rajiv Narain Raina, J. (oral)

The Bharat Sanchar Nigam Limited (for short 'BSNL')-was the defendant and is in second appeal against the concurrent findings of fact recorded by the learned subordinate courts of first and second instance in a case arising out of execution of a works contract signed between the employer and contractor amidst allegations of delay in execution of the project and its financial impact.

Having regard to the letter dated 16.12.2006 from the Executive Engineer (C) BSNL Civil Division, Rohtak addressed to the Superintending Engineer (C), BSNL Civil Circle, Rohtak, there can be no doubt that the disputed period is 4 months and 5 days in completion of the contract for the construction of 2 numbers of Type III staff quarters at Narnaul. The functionary of the employer BSNL has himself found that several hindrances were placed in execution of the contract by the agents and employees of BSNL. For instance, there was delay of 7 days due to non supply of working drawings stalling work for the period 13.5.2005 to

03.06.2005. There was delay of 9 days due to non laying of electrical conduit in first floor slab resulting in work held up between 30.08.2005 to 08.09.2005. There was delay of 9 days due to non laying of electrical conduits in terrace slab from 03.10.2005 to 11.10.2005, which was recommended to be justified ground for grant of 'extension of time'.

Similarly, there was delay of 19 days due to non laying of electrical conduit in walls from 21.10.2005 to 08.11.2005, out of which 50% of this period was recommended to be justified i.e. 10 days for grant of 'EOT'. Hindrance no. 6 was caused due to timely decision of septic tank, under ground water tank external public health and road work not taken from 27.11.2005 to 27.01.2006, however, though no delay was found on the part of the contractor since it was because of overlapping of this period with other hindrances attributable to the BSNL.

To put the icing on the cake, a delay of 41 days was caused only because of employer could not decide on the colour scheme of the buildings which accounted for loss of man hours for the period 01.02.2006 to 17.03.2006.

As a result of apathy, 76 days delay was found justified against the actual delay of 125 days and it was recommended that 76 days be accounted for towards extension of time.

Mr. Narwal appearing for the contractor respondent submits that these figures would impact the penalties and reduce them considerably from the total claim of ₹ 1,99,467/- imposed by the employer BSNL. The method of calculation is laid down in clause -II reproduced at page 57 of the appeal paper book.

A few dates may be significant and are noticed. The contract was awarded by BSNL on 12.05.2005 in favour of the respondent. In the first leg of the civil works a serious impediment was put by BSNL from 30.05.2005 till 3.6.2005 when work drawings were not supplied as affirmed in Ex. P-1. The work was to be completed by 26.12.2005. Due to impediments and delays in decision making by the BSNL the contractor was compelled to ask for extension of time on 4.11.2005 since, it would not have been possible to physically complete the construction on or before 26.12.2005.

Mr. Madan Mohan, learned counsel appearing for BSNL submits that it was on the basis of the delays on the part of the contractor that the appellant was cornered and left with no choice except to extend the date of the contract subject to levy of penalty under clause-II of the contract agreement vide letter dated 5.4.2006. Therefore, BSNL had not waived its right to levy penalty while extending time for completion of the work and fixing fresh target date. The work was to be completed on and by 30.04.2006 and was completed within the extended time frame and the final payment was made to the contractor on 14.11.2006 on the bills. While making final payment BSNL held back the security amount of ₹ 1,99,467/- deposited by the contractor as performance guarantee. Later on, this amount was forfeited by the order of BSNL which was challenged in the suit by the contractor on the ground that the delay was not wholly attributable to the contractor as pointed out in Ex.P-2. There were admissions on the part of the employer that their inactions have led to delay in completion of the project.

During the trial the plaintiff-contractor summoned documents and record from BSNL to prove that the order forfeiting the security amount was not fair and just. The application was preferred on 8.9.2009 for summoning witnesses from BSNL together with the record of the case with respect to the decisions taken for extension of time and of the circumstances which had then prevailed to delay the completion of the project within the time frame initially fixed.

Witness Sham Lal PW-2 an official from BSNL appeared but did not bring the record. Nor was the record produced by BSNL on its turn to produce evidence. The Court of first appeal drew an adverse inference from this and to my mind correctly. The first appeal court was further of the view that BSNL had failed to show that time was the essence of contract and they suffered liquidated damages on account of delay in execution of work. If the cut off date were to be strictly followed and there was a risk and cost clause in the contract BSNL could have rescinded of the contract and appointed a fresh contract at the risk and cost of the respondent but that was not done and, therefore, the lower appellate court was not incorrect in its reasoning that time was not the essence of the contract even though in the letter of extension of time, it was provided that notwithstanding the provisional extension time shall continue to be the essence of the agreement. It is also nobody's case that the work was not completed within the extended time. Therefore I would not read proviso in the extension letter strictly for two reasons. Firstly, that employer continued the contract with the contractor and secondly, employer itself was at fault at many junctures in the progress of execution of the contract and by BSNL's acts of omission

they contributed substantially in project delays over which the contractor could have no control.

Lastly, Mr. Madan Mohan, Advocate appearing for BSNL submits that in a declaratory suit penalty cannot be refunded unless the court fee has been paid on the amount. He cites ruling in ***Bansal Highway vs. General Manager, Gramin Sadak Vikas Pradhikaran Pariyojna Kriyanvayan and others, 2009(5) RCR (Civil) 320*** a decision of the Madhya Pradesh High Court in support of his contention that ad valorem court fee is leviable when claim is for recovery of money. In the present case the contractor instituted suit questioning the legality and validity of an order passed by an instrumentality of State forfeiting security deposit for non-completion of the works contract in time. When the order falls, money has to be restored by release to rightful owner. Plaintiff was able to prove by evidence that obstacles were placed by BSNL in the very beginning and from time to time before it can be heard on delay or find fault with the plaintiff

It may be noted that the suit was not filed for declaration but for a mandatory injunction for a direction for refund of plaintiff's money and not for recovery of money owed by BSNL to the contractor. In suits for mandatory injunction within the jurisdiction of this Court plaintiffs are required to pay fixed court fee and, therefore, it is not possible to apply the law in ***Bansal Highway*** within the jurisdiction of this High Court which is in any event distinguishable on facts and prayers made in the suit. Therefore, the Court cannot compel the decree-holder to affix *ad valorem* Court fee on the plaint for refund of money to claim a decree. I would find

no fault in the judgment and decree of the court a quo which does not give rise to a question of law for decision, much less a substantial question of law warranting interference in the second appeal jurisdiction under section 100 of the CPC.

Accordingly, the appeal is found without merit and is dismissed with costs as ordered by both the courts below.

(RAJIV NARAIN RAINA)
JUDGE

16.07.2015
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