

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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RSA No. 1002 of 2015 (O&M)

Date of decision : May 15, 2015

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Union of India through its Executive Engineer, Chandigarh
Central Division No. II CPWD Sector – 7-B, Chandigarh

.....Appellant

Versus

M/s Engineers Construction Company, House No. 1144,
Sector 12-A, Panchkula through its Sole Proprietor Sh. U.V Gupta

.....Respondent

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CORAM: HON'BLE MS. JUSTICE RITU BAHRI

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Present: Dr. Ashwinie Kumar Bansal, Advocate for the appellant.

1. *Whether Reporters of Local Newspapers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

RITU BAHRI, J

C.M No. 3003-C of 2015

For the reasons mentioned in the application, delay of 118 days in refiling the appeal is allowed. C.M is allowed.

C.M No. 3004-C of 2015

For the reasons mentioned in the application, delay of 12 days in filing the appeal is allowed. C.M is allowed.

RSA No. 1002 of 2015

Union of India has come up in this regular second appeal against the judgment dated 3.3.2014 passed by the District Judge, Chandigarh, whereby appeal against the judgment and decree dated 15.2.2011 passed by Civil Judge (Junior Division) Chandigarh was dismissed and the judgment of the trial Court was upheld. Vide the trial Court judgment, suit of the appellant-plaintiff (hereinafter referred to as 'the plaintiff') for recovery of Rs.10,20,373/- (Rs.4,76,919/- as principle and a sum of Rs.5,43,454/- as interest @ 14% w.e.f 4.11.1993 till filing of the suit totalling Rs.10,20,373/-) and future

interest @ 14% p.a from the date of decree till realization was dismissed.

Union of India entered into an agreement with respondent-defendant (hereinafter referred to as 'the defendant') M/s Engineering Construction Company for construction for general pool residential accommodation for central government employees in Sector 46-A and B Chandigarh. The rates of the defendant being the lowest, the work was allotted to the defendant and the estimated cost of the value of the contract was Rs.58,76,702/-. As per the agreement, the contract was to be commenced w.e.f 24.8.1991 and the same was to be completed by 23.8.1992. The defendants could not complete the job within stipulated time and made a request for extension of time for completion of the work which was not considered to be justifying as the defendant had failed to show the progress of the work despite various notices. The contract with the defendant was rescinded on 22.5.1993 in terms of clause 3 of the Contract Agreement. A notice was issued for levy of compensation for delaying the work. Vide letter dated 16.10.1993, the defendant gave a reply refuting the said claim. The Superintending Engineer exercising his powers under Clause 2 considered the entire matter and found the defendants to be guilty for delaying the completion of work and passed the order levying compensation of Rs. 4,76,919/- vide letter dated 4.11.1993. The defendant did not challenge the above said order and they were directed to deposit the amount.

Other dispute arose between the parties and as a result the Arbitrator

was appointed to adjudicate the same including the levy of claim of compensation. Since the levy of compensation was not challenged by the defendant, it was taken out of reference by the Chief Engineer which was apparent from the award of the Arbitrator duly published.

On notice, the defendant filed written statement and on merits stated that as per clause 5 of the said agreement, extension of time could have been granted to the defendant but the authority instead of considering the same intentionally and deliberately withheld the same without communicating the fate of his application and forced the defendant to abandon the work. Plaintiff had failed to implement the contract in letter and spirit thereby incapacitating the defendant to complete the work and that the work was delayed due to the breaches and default and hindrances which were notified to the plaintiff from time to time and the same were detailed while applying for extension of time but were not considered by the plaintiff-department due to malice and biases which amounted to unlawful repudiation/cancellation of the contract agreement and also held so by the Arbitrator in his award dated 18.6.2001.

The arbitrator held that the refusal to give extension of time to conclude the contract was not justified and as per clause 3, time was not the essence of the contract and hence it should not have been repudiated on 22.5.1993. The termination of the contract was held to be illegal. Moreover, the Arbitrator by Ministry of Urban development in his Award Ex. P-12 allowed the balance payment of the contract to the extent of 50% value of material taken over by the

department on account of the losses and damages suffered by the contractor etc. to the tune of Rs.4,39,926/- excluding Rs.20,000/- found to be paid by the contractor to the plaintiff along with interest at the rate of 14% and disallowed the claim of the Union of India in the present case pertaining to extra cost for completing the balance work at the risk and cost of contractor except one claim of Rs.20,000/-on account of recoveries for O.C observation. The said award was never challenged and rather it was implemented by the Union of India in its totality. Hence, the finding regarding illegal cancellation of contract and qua action taken under clause 3 as well as alleged action under clause 2 were held to be illegal and unlawful. Both the courts found that clause 2 when read as a whole stipulates the levy of compensation during the stipulated period of contract only for the delay and that too stage wise as and when the delay occurred and nowhere authorizes the Superintending Engineer to levy the penalty after the expiry of contractual period and more particularly after the cancellation of contract. Clause 2 further stipulates that if the contractor fails to maintain the required progress in terms of clause 5 and last line says that the progress remains below that specified in clause 5 or that the work remained incomplete, then the compensation is to be levied towards the items of group which has been delayed by the contractor. In the present case, the compensation was levied by the Superintending Engineer after cancellation of the contract. Since the Arbitrator had recorded a finding that the cancellation of the contract was illegal, the plaintiff-

Union of India had no right to recover compensation under Clause 2 or extra cost under clause 3 from the contractor. Once the termination of the contract was held to be illegal, the plaintiff could not levy liquidated damages nor claim extra cost from the contractor. Before imposing the penalty, no personal hearing was granted to the contractor.

Hon'ble Supreme Court of India in the case of **J.G Engineers Pvt. Ltd. vs. Union of India and another 2011 (5) SCC 758** has observed in paragraph 17 as under:

17. In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated

damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or 21 claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims

had to be set aside as they related to excepted matters, cannot be sustained.

In view of all that has been discussed above and after going through the judgments passed by both the Courts, the present regular second appeal is liable to be dismissed. The plaintiff has implemented the award Ex. P-12 dated 18.6.2001 in which a finding has been recorded that despite repeated requests for grant of extension of time for concluding the contract, the same was not granted. Hence the order cancelling his contract was illegal. Once the cancellation has been found to be illegal, no compensation can be claimed from the contractor and the suit has been rightly dismissed. As the contractor was not responsible for delay, no case of levy for damages or compensation was made out.

As there is no illegality or infirmity in the judgments passed by the courts below, they do not require any interference. No substantial question of law arises for consideration in this regular second appeal. Hence the same is dismissed.

May 15, 2015
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(RITU BAHRI)
JUDGE