

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

% *Judgment Reserved on : October 12, 2015*
Judgment Delivered on : October 29,, 2015

+ **RFA (OS) 48/2015**

M/S. SAINI CONSTRUCTION COMPANYAppellant

Represented by: Mr.Raman Kapur, Sr.Advocate
instructed by Mr.Dhiraj Sachdeva
and Mr.Varun Kapur, Advocates

versus

DELHI JAL BOARDRespondent

Represented by: Mr.Suresh Tripathi, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The appellant was the plaintiff and the respondent was the defendant before the learned Single Judge. We shall be referring to the parties by their nomenclature in the suit.

2. Shorn of unnecessary details, relevant facts for the purposes of adjudication of the present appeal are that the plaintiff filed a suit for recovery of ₹66,72,626/- (Rupees Sixty Six Lakhs Seventy Two Thousand Six Hundred and Twenty Six only) together with interest @ 15% per annum on the original side of this Court against the defendant : Delhi Jal Board.

3. Concise, case of the plaintiff was:-

a) On May 10, 2006, the plaintiff a sole proprietorship concern was awarded work of *'providing and laying 800 mm diameter rising*

main/feeder main from Vikas Marg to Vishwakarma Park (Geeta Colony), UGR & BPS in Trans Yamuna Area' vide order No.1/2006-2007 by the defendant.

b) As per the contract entered into between the parties, the stipulated date of start of work was May 22, 2006 and work was to be completed within a period of six months from date of start of work i.e. on or before November 21, 2006.

c) The plaintiff made all necessary arrangements for start of work on the stipulated date but could not timely start the work on account of failure of defendant to fulfill its obligations under the contract viz. (i) providing full and hindrance free site for execution of work; (ii) issuance of drawings/details for the works; (iii) providing lay out for execution of work; (iv) obtaining necessary permissions from local authorities; (v) making timely payments for execution of work; and (vi) inspection and approval of material/pipes etc. before procurement and use.

d) The plaintiff could not start the execution of the work on time because of failure of the defendant in taking necessary road cutting permission(s) from local authorities such as MCD, PWD, DDA etc. before start of work. The defendant acknowledge in its letter dated August 24, 2006 that road cutting permission from MCD, PWD is likely to be obtained by August 30, 2006 and thus no work could be undertaken at the site before September 01, 2006. (We note that major emphasis was placed by the plaintiff on the fact that defendant did not timely take road cutting permission from the local authorities).

e) The defendant did not approve the drawings of valves submitted by agency M/sPAVCO Engineering in time, particularly those of sluices valves, which delayed the completion of work.

f) Despite its best efforts the plaintiff could not complete the execution of the work on time due to hindrances encountered by it at the site; such as faulty underground electricity/MTNL cables, damaged and leaking old water sewerages etc.

g) The plaintiff submitted the drawings for approval on July 03, 2006 but the same were approved by the defendant only on October 19, 2006 which majorly delayed the completion of work.

h) The contract required the plaintiff to procure pipes/MS Plates from SAIL however SAIL did not have requisite materials in its stock which constrained the plaintiff to procure pipes/MS Plates from local market. Further, the pipes/valves etc. procured by plaintiff were not timely inspected by third party M/s MEACON. The non-availability of requisite material(s) with SAIL and delay of testing of pipes/valves by third party majorly contributed to the delay in completion of work.

i) On various occasions, the plaintiff wrote to the defendant to the effect that plaintiff cannot be blamed for delay in completion of work and the delay is entirely attributable to the defendant.

j) Despite the fact that delay occasioned in completion of work was entirely attributable to the defendant, the defendant illegally levied penalty for delay in completion of work calculated @ 9% of contract value upon the plaintiff in terms of clause 2 of contract. Additionally, the defendant illegally rescinded the contract on May 21, 2007 and forfeited security deposit and encashed performance guarantee of plaintiff in terms of clause 3 of contract.

4. In the backdrop of afore-noted averments made in the plaint, the plaintiff claimed a sum of ₹66,72,626/- (Rupees Sixty Six Lakhs Seventy Two Thousand Six Hundred and Twenty Six only) from the defendant calculated in the following manner:-

“i) Amount of performance guarantee illegally encashed by defendant = ₹9,76,700/-;

ii) Amount of security deposit illegally forfeited by defendant: = ₹7,73,000/-;

iii) Amount of penalty illegally levied by defendant (9% of contract value) = ₹17,58,033.90;

iv) Amount claimed on account of damages, compensation etc for breach of contract committed by defendant = ₹10,00,000/-;

v) Amount claimed on account of expenses incurred by plaintiff on supervisors, security guards etc. = ₹1,56,000/-

vi) Amount claimed on account of Loss of Profit = ₹10,62,341/-;

vii) Amount claimed on account of payment due for executed work = ₹5,62,713.85.

Total = ₹66,72,626/-”

5. We note that the plaintiff has summarized the reasons which it i.e. the plaintiff claimed delayed the completion of work and were entirely attributable to the defendant in paragraphs 11 and 12 of the plaint and the same reads as under:-

“11. That the Plaintiff further submit that the required permission for road cutting from MCD and PWD was awaited and the work could be taken up only in first week of September 2006 against the stipulated date of start on 22.05.2006. Four months time was lost initially without practically any work against 6 months allotted for completion of work. The hindrances were existing besides the road cutting permission that the PWD office was existing in the alignment of the work, which was required to be demolished. The approval of the drawings for the valves etc. were delayed considerably and inspection of materials M.S.Plates, valves were another bottle neck in the progress of work as explained in various references

from time to time. The Defendants have also been delaying the payment for the work executed by the Plaintiff.

12. That the Plaintiff explained the entire cause of delay vide their letter dated 22.12.2006. The plaintiff on 31.01.2007 brought out further hindrances during the work such as existing the underground services like cables of MTNL, Electricity, Telephone etc., damaged and leaking old water and sewerage line in the alignment. Plaintiff has procured sufficient quantity of pipes and placed orders of supply of 78 valves. Payments are still not being released for over ₹35 lakhs. The Plaintiff informed on 09.02.2007 that the testing of pipe are delayed by the third party M/S MEACON. This fact has also been confirmed by Defendant vide their letter dated 23.02.2007. M/s Shiv Durga Land also confirmed on 24.02.2007 that the valves are received but there are to be checked by M/S MECON.

(Emphasis Supplied)

6. In the written statement filed the defendant essentially contended that the plaintiff is blameworthy for delayed start/completion of work. Briefly summarized, the case set up by the defendant in its written statement is as under:-

a) Initially, the date of start of work was April 08, 2006 but the same got extended to May 22, 2006 due to failure of plaintiff in depositing performance guarantee within a period of fifteen days of issuance of Letter of Intent on March 24, 2006.

b) The plaintiff did not timely arrange MS Plates which fact stands admitted by the plaintiff in its letter dated November 27, 2006 wherein plaintiff has expressed for not arranging MS Plates in time due to 'family problems' and sought extension of time for completion of work till February, 2007. Further, Clause 1.4.1 of Special Conditions of Contract required the plaintiff to procure MS Plates from reputed manufacturers like SAIL, TISCO and JINDAL but plaintiff procured MS Plates from

open market, that too after considerably delay, thereby breaching the essential term of the contract concerning quality of the material to be used in laying of the pipes.

c) Drawings of valves were not required to be approved by the defendant since specifications regarding valves already formed part of the contract. In fact, the plaintiff never arranged for the valves constraining the defendant to arrange for the same.

d) There was no obligation on the defendant to obtain road cutting permission from local authorities. On the contrary, clause 1.12.4.1 of Special Conditions of Contract prescribed that *'For areas which require special permission from any other authority, separate drawing shall be prepared by the Contractor for getting permission from appropriate authority. Such permission can be for road crossing, railway track crossing, road cutting, cable shifting, Nallahs crossing and other utilities etc. Application for such permission addressed to the utility authority shall be moved by the Contractor and pursued by him. Any delay for getting the permission shall be to the contractors account. DJB shall help the contractor to the extent of issuing an essential letter. Amounts demanded by utility department for restoration of heir utilities shall initially be paid by the Contractor after informing the Employer and such amount paid to the other departments shall be reimbursed by the DJB with in three weeks to the Contractor as is clarified in the earlier Chapter.'* requiring the contractor i.e. the plaintiff to obtain road cutting permission from the local authorities.

e) The work was originally required to be completed till November 21, 2006 however the plaintiff was given extension till February, 2007. When the plaintiff could only complete 50% of work even after lapse of about three months of extended date of completion of work the defendant

was constrained to rescind the contract on May 21, 2007 and levy penalty upon plaintiff for delayed execution of work.

7. Being relevant, we note that the defendant replied to paragraphs 11 and 12 of the plaint in its written statement as follows:-

“11. That the contents of the Para-11 of the Plaintiff are wrong and therefore denied. The road cutting permission, as stated in the foregoing, was required to be obtained by the plaintiff himself. The hindrances alleged to have been noticed by the Plaintiff were to be taken care of by the Plaintiff himself in accordance with the contractual conditions. There was building that was required to be demolished as stated by the plaintiff, it is submitted that the new contractor, who completed the work in question, could complete the said work without demolishing the said building. The question of approval of drawings of valves did not arise for the reasons stated in the foregoing. Third party inspection was taken at the manufacturing unit for fabrication of the pipes. During the inspection, it was observed that the plates which were procured for manufacturing of the pipes were not as per the specifications. To use the plates below specifications required the permission from the competent authority. On the request of the Plaintiff, vide letter dt. 9.2.2007, the process of taking permission was processed (copy of the letter dt.9.2.07 is annexed as Annexure-R-4). After taking permission, the inspection of the pipes could be possible by the third party agency. There was no fault of the department for delay in inspection and the same was done by the third party from time to time as requested by the Plaintiff.

(12) That the contents of the Para-12 of the Plaintiff are wrong and therefore denied. The content of this para on the reply appears to be repetition of the earlier paras. The cause of delay as alleged to have been explained vide letter dated 22.12.2006 are not explainable. The letter dt. 22.2.07 written by the defendant rather demolishes the false pleas of the Plaintiff with regard to delay in execution of the work. This is incorrect that the Plaintiff has procured sufficient quantity of pipes and placed orders of supply of 78 nos. of pipes. The fact remains that requisite number of pipes were never procured by the

Plaintiff. So far as payment of ₹35 lacs is concerned, it is submitted that no payment of ₹35 lacs was ever due to be paid to the plaintiff. The Plaintiff was paid ₹17 lacs and the said amount stood released in favor of Plaintiff in time. It is submitted that during inspection, it was observed that the pipes brought by the Plaintiff was of less thickness and found to be below specifications i.e. less than 8mm thickness as per the requirement of the contract. A request was made by the Plaintiff vide letter dt.9.2.07 requesting that since by mistake the said quality of pipes were sent, therefore, they might be kindly approved by the Plaintiff. A request of the Plaintiff was accordingly processed for approval of the competent authority and a decision dt.23.02.07 that the competent authority was pleased to render the decision thereby allowing the Plaintiff to use the said pipes. Even though they did not confirm the provision of contract. Therefore, it is evident that there is no delay on behalf of the defendant in allowing the inspection of the said pipes, as alleged.

*It is submitted that the Plaintiff was to arrange the valve as per the contract conditions. There was, however, no step was taken by the Plaintiff with regard to the same. The use of the valve so as to provided interim relief to the area residents was considered and therefore the defendant at its own had arranged the said sluice valve on 1.3.07. It may be noted that the Plaintiff in this regard **had acted some** considerable delay, namely even after lapse of three months and originally the scheduled completion date, the Plaintiff could not arrange the said valve. In fact, the letter dt.28.02.07 written by the Plaintiff and received by the defendant on 2.3.07 requesting for the inspection of valve at Kolkata was of no consequence by the said time, as explained herein above, the defendant had arranged the said valve on its own.*

(Emphasis Supplied)

8. In the replication filed the plaintiff denied the averments made by defendant in its written statement and reiterated the stand taken by it in the plaint.

9. On the basis of pleadings of parties, following issues were settled by the learned Single Judge:-

“(i) Whether the recession or termination of contract dated 24.03.2006 vide letter dated 21.05.2007 by the defendant was lawful? OPP

(ii) Whether the time was of essence both at the inception and during the performance of the contract dated 24.03.2006? OPP

(iii) Whether the penalty imposed under Clause 2 of the contract dated 24.03.2006 was lawful? OPP

(iv) Whether forfeiture of security deposit and encashment of performance guarantee by the defendant was lawful? OPP

(v) Whether the plaintiff is entitled to damages and loss of profit? OPP

(vi) Whether the plaintiff is entitled to sums referred to in Paragraph 22 at Page 21 of the plaint amounting in all to ₹5,62,713.85/-? OPP

(vii) Whether the plaintiff is entitled to interest? If so, what would be the amount, rate and period? OPP

(viii) Whether the plaintiff has suffered any loss or damage as a consequence of any act or omission and/or during commission of the plaintiff. If so, to what extent? OPD

(ix) Reliefs.”

10. At the trial, the plaintiff examined Mr.Hawa Singh Saini, proprietor of plaintiff concern, who deposed on the lines of the case set up in the plaint. Being relevant, we note following portion of cross-examination of the witness:-

“I did not write any letter to the civic agencies for seeking permission to cut the road. (Vol. I wrote letter to the defendant

for the said permission). I had not sent any letter to the defendant stating therein that delay had occurred due to my family problem. Till February, 2007 approximately 50% of work was complete. I had intimated the defendant and also sought the permission to acquire plates from open market and the same is already exhibited as Ex.P4. I have no idea whether defendant had approved my request or not....

MS Plates were received immediately, but I do not recollect the date when the same were received. I placed one consolidated order for the MS Plate, but the same was not supplied in time. Accordingly, I acquired the same from market and sought necessary permission from the defendants. I had also furnished non-availability certificate from the supplier. It is correct that I had sent the letter dated 20.09.2006 and 27.12.2006, both the letters bears my signatures. The same are already exhibited as ExD5 and D13 respectively. I had sent a letter to the defendant stating therein that I will not charge any extra amount for providing collar joint. (Vol. The said letter was obtained from me under pressure)....

....It is correct that Sluice Valves was to be arranged by me. (Vol. Which I had already arranged, but my drawings were not approved by the defendant and third party). It is correct to suggest that the said Valves were supplied by the defendant to me....”

(Emphasis Supplied)

11. In support of its case, the defendant examined Mr.P.K.Atray, Executive Engineer (Project), W-1, Delhi Jal Board who deposed on the lines of the case set up by the defendant in its written statement. Being relevant, we note following portion of cross-examination of the witness:-

“....It is correct that there were several primary obligations which were to be fulfilled by the defendant, those obligations were duly fulfilled. The road cutting permission from MCD and PWD was to be applied by the plaintiff. The work was originally to be started on 08.04.2006 and date of completion was six months i.e. 21.11.2006. It is correct that as per

Ex.PW1/9 letter dated 24.08.2006 road cutting permission was likely to be obtained by 30.08.2006. It is wrong to suggest that the hindrance free site was not provided at the stipulated time.

....

It is wrong to suggest that due to timely permissions not being given the work to be undertaken by the plaintiff was delayed. It is wrong to suggest that there were hindrances from the other agencies like MTNL, Power supply. It is wrong to suggest that the department did not make timely payments which were also one of the causes of delay in completion of the project. It is wrong to suggest that the work was illegally rescinded and an illegal penalty was imposed under Clause 2 of the Agreement.

It is wrong to suggest that I am deposing falsely.”

(Emphasis Supplied)

12. Be it noted here that the plaintiff did not give any suggestion to the witness of the defendant viz. Mr.P.K.Atray to the effect that timely inspection of material(s) was not conducted by third party M/S.MEACON which (also) led to delay in completion of work.

13. Since we find that the case set up by the parties essentially hinges upon the documentary evidence adduced by them, we extensively note the documentary evidence adduced by the parties.

14. The details of the relevant documentary evidence adduced by the plaintiff is as under:-

S. No.	Description of document	Whether admitted or denied by defendant	Particulars of document/Remarks, if any
1.	Ex.PW-1/1: Letter dated March 24, 2006 written by defendant to plaintiff.	Admitted.	The letter awards work in question to plaintiff. The letter records that plaintiff is required to deposit Performance Guarantee in sum of ₹9,76,700/- within

			fifteen days of issuance of said letter and date of start of work will be reckoned after sixteen days of issuance of said letter.
2.	Ex.PW-1/2: Letter dated May 10, 2006 written by defendant to plaintiff.	Admitted.	The letter records that Performance Guarantee was submitted by plaintiff on May 08, 2006 and date of start of work will now be reckoned as May 22, 2006.
3.	Ex.PW-1/3: Letter dated May 30, 2006 written by plaintiff to SAIL	Receipt of letter admitted.	Plaintiff placed an order of 350 MT of MS Plates of 8 mm thickness with SAIL.
4.	Ex.PW-1/4: Letter dated June 06, 2006 written by plaintiff to defendant.	Admitted.	Plaintiff informs that it has placed an order 350 MT of MS Plates with SAIL and same shall be available by June 15, 2006 and it has also purchased 50 MT of MS Plates from local market and pipes of 800 mm diameter are being cast at M/s Bamrah Fabrication, Noida and M/s Precision Engineers and Fabricators at Karala. The letter also records that defendant should assist the plaintiff to get necessary permission from local authorities such as DDA, MCD, PWD, Horticulture Departments of MCD, PWD, Flood Control Department.
5.	Ex.PW-1/7: Letter dated July 03, 2006 written by	Admitted.	Letter records that drawings submitted by M/s Pavco Engineering be approved by

	plaintiff to defendant.		the defendant.
6.	Ex.PW-1/8: Letter dated July 06, 2006 written by Executive Engineer, Delhi Jal Board to Executive Engineer, MCD.	Admitted.	Letter records that MCD should urgently grant road cutting permission for work in question as work is of highly urgent nature and involves public interest.
7.	Ex.PW-1/9: Letter dated August 24, 2006 written by Executive Engineer, Delhi Jal Board to plaintiff.	Admitted.	The contents of said letter shall be noted in the later part of this judgment.
8.	Ex.PW-1/10: Letter dated October 19, 2006 written by defendant to plaintiff.	Admitted.	Letter records that plaintiff should immediately procure required valves in accordance with specifications given in contract.
9.	Ex.PW-1/11: First letter dated October 26, 2006 written by plaintiff to defendant.	Receipt of letter admitted.	This letter is written by plaintiff in response to letter dated Letter dated October 19, 2006 written by defendant. The letter records that on October 18, 2006 a meeting was held between plaintiff and an official of defendant wherein it was decided that defendant shall approve drawings of sluice, air and non-return valves within a day or two but nothing has been heard in said regard till date.

			The letter further records that defendant should approve the drawings at earliest so that same could be forwarded to manufacturer M/s Shiv Durga for its casting.
10.	Ex.PW-1/12: Second letter dated October 26, 2006 written by plaintiff to defendant.	Admitted.	This letter is written by plaintiff in response to letter dated Letter dated October 19, 2006 written by defendant. The letter records that on October 18, 2006 a meeting was held between plaintiff and an official of defendant wherein it was decided that plaintiff shall procure sluice, air and non-return valves as per BQ and tender conditions; plaintiff has accordingly ordered the manufacturer to do the same and manufacturer has stated that it will take him one month to complete said job. The letter further records that MS pipes of 800 mm diameter shall reach the site after a week and work shall be completed at the earliest without further loss of time.
11.	Ex.PW-1/13: Letter dated November 09, 2006 written by plaintiff to defendant.	Admitted.	Letter records that defendant should permit the plaintiff to provide collar joints instead of butt welding.
12.	Ex.PW-1/14:	Admitted.	Letter essentially records

	Letter dated November 27, 2006 written by plaintiff to defendant.		that plaintiff is not blameworthy for delay in start/completion of work.
13.	Ex.PW-1/15a: Letter dated February 05, 2007 written by plaintiff to defendant.	Admitted.	Letter essentially records that plaintiff is not blameworthy for delay in start/completion of work.
14.	Ex.PW-1/16: Letter dated February 09, 2007 written by plaintiff to defendant.	Contents of letter denied.	The contents of said letter shall be noted in the later part of this judgment.
15.	Ex.PW-1/17: Letter dated February 26, 2007 written by plaintiff to defendant.	Receipt of letter admitted. Contents of letter denied.	The letter essentially records that execution of work majorly got delayed due to failure of defendant in timely getting road cutting permission from local authorities; pipes were arranged and lying with manufacturer since June, 2006; pipes could not brought to site before October, 2006 due to delay in inspection/approval of the same by third party/defendant; pipes were immediately laid after inspection and approval thereof in October, 2006 and 90% of work is completed till date.
16.	Ex.PW-1/18: Letter dated February 26, 2007 written by plaintiff to defendant.	Receipt of letter admitted. Contents of letter denied.	Letter essentially records that plaintiff is not blameworthy for delay in start/completion of work.

17.	Ex.PW-1/20: Letter dated March 22, 2007 written by plaintiff to defendant.	Admitted.	Letter seeks permission of defendant to extend the time for completion of work by June 30, 2007.
18.	Ex.PW-1/21: First letter dated March 28, 2007 written by plaintiff to defendant.	Receipt of letter admitted. Contents of letter denied.	Letter records that reliance placed by defendant upon Clause 1.12.4.1 of Special Conditions of Contract is misplaced. The letter further records that due to a typographical error it was wrongly stated in the letter dated March 26, 2007 that 90% of work is completed and correct position is that 50% of work has been completed.
19.	Ex.PW-1/22: Second letter dated March 28, 2007 written by plaintiff to defendant.	Admitted.	The relevant portion of letter shall be noted in the later part of this judgment.
20.	Ex.PW-1/23: Letter dated April 04, 2007 written by plaintiff to defendant.	Admitted.	Plaintiff informs that it has booked 150 MT of MS Plates of 8 mm thickness with SAIL on April 03, 2007; letter dated February 28, 2007 was written by plaintiff to defendant requiring the defendant to get sluice, air valves etc inspected from M/s MEACON but no satisfactory reply was received from defendant in said regard; defendant is once again requested to get inspected the materials from MEACON at the earliest.

21.	Ex.PW-1/24: Letter dated April 14, 2007 written by plaintiff to defendant.	Admitted.	Letter records that plaintiff cannot be blamed for delay in arranging the valves at the site for valves procured by plaintiff have not been inspected by plaintiff till date and permission be given to defendant to procure MS Plates from local suppliers as required MS Plates are not available with SAIL and other agencies named in the contract. Significantly, the letter talks about two endorsements dated April 11/16 April, 2007 regarding supply of material made by an official of SAIL on letter dated April 03, 2007 written by plaintiff to SAIL
22.	Ex.PW-1/25: Letter dated April 03, 2007 written by plaintiff to SAIL.	Receipt of copy of said letter admitted.	Plaintiff placed an order of 150 MT of MS Plates of 8 mm thickness with SAIL. Significantly, two endorsements dated April 11/16 April, 2007 have been made on said letter purportedly by an official of SAIL. The first endorsement dated April 11, 2007 is to the effect <i>'Regret material is not available at Delhi warehouse on date'</i>. The second endorsement

			dated April 16, 2007 is to the effect ' <i>Plates are supplied as per quality & tolerance of IS (illegible).</i> '
23.	Ex.PW-1/26: Letter dated May 05, 2007 written by plaintiff to defendant.	Receipt of letter admitted.	Letter records that due to non-availability of requisite stock with SAIL plaintiff has procured 23 MT of MS Plates from M/s Radhey Enterprises vide invoice dated April 27, 2007 however the defendant is not making arrangements for inspection of said plates due to which reason plaintiff is unable to complete the work by June 30, 2007.
24.	Ex.PW-1/27: Letter dated May 16, 2007 written by plaintiff to defendant.	Admitted.	Letter records that the defendant delayed inspection of MS Plates procured by the plaintiff due to change of third party from MEACON to RITES for a period of about two months from April 01, 2007 to May 31, 2007.
25.	Ex.PW-1/28: Letter dated May 21, 2007 written by plaintiff to defendant.	Admitted.	Letter essentially reiterates the contents of letter Ex.PW-1/27 dated May 16, 2007 written by the plaintiff.
26.	Ex.PW-1/29: Letter dated May 21, 2007 issued by defendant to plaintiff.	Admitted.	Letter informs that penalty under Clause 2 of contract has been imposed upon plaintiff for delaying the completion of work.
27.	Ex.PW-1/30: Letter dated May 21, 2007 written by defendant to	Admitted.	Letter informs that defendant has rescinded the contract and encashed/forfeited

	plaintiff.		performance guarantee and security deposit of plaintiff under Clause 3 of contract on account of plaintiff having delayed the completion of work.
28.	Ex.PW-1/32: Letter dated May 28, 2007 written by plaintiff to defendant.	Admitted.	By virtue of said letter, plaintiff responds to letter (s) dated May 21, 2007 of defendant essentially to the effect that defendant and not plaintiff is blameworthy for delay in completion of work.
29.	Ex.PW-1/33: Legal notice dated July 16, 2007 issued by plaintiff to defendant.	Admitted.	Legal notice issued by plaintiff to defendant essentially stating therein that actions of defendant of rescinding the contract and invoking clauses 2 and 3 of contract are illegal and arbitrary.

15. Being relevant, we note that letter Ex.PW-1/9 dated August 24, 2006 written by the Executive Engineer, Delhi Jal Board to the plaintiff reads as under:-

“Kindly refer above said subject. It is to inform that the road cutting permissions from M.C.D. and PWD are likely to be obtained by 30.8.2006. You are hereby requested to keep the required pipes in readiness, get them tested as per contract and gear up for undertaking the work at site from September 1st week onwards. It may be treated as most urgent.”

(Emphasis Supplied)

16. The letter Ex.PW-1/16 dated February 09, 2007 written by the plaintiff to the defendant reads as under:-

“On the above subject in continuation to our letter dated 31.1.2007, 5.2.2007 and 6.2.2007, it is submitted that apart

from 10 Nos. of Pipes inspected and approved by you alongwith third party M/s Macon on 3.2.2007, further 15 nos of pipes were ready by 6.2.2006, and as such vide our letter dated 6.2.2007 we had requested your goodself to arrange the visit of rep. of M/s Macon and get the pipes inspected and approved at the site. But till date the visit has not been arranged and pipes have not been inspected. Further about 55 Nos. of pipes are ready for inspection at factory. You are therefore requested to expedite the factory visit for inspection and approval of pipes, so that the same can be brought to site and laid.

Regarding supply of valves etc. we have received letter dated 2.2.2007 from the manufacturer, who had promised to supply the same by the last week of Feb, 2007, in view of position detailed therein. The photocopy of the letter is enclosed herewith for your ready reference. The request for payments for the work already done as made in our previous letters may kindly be looked into and expedite.”

17. The relevant portion of the letter Ex.PW-1/22 dated March 28, 2007 written by the plaintiff to the defendant reads as under:-

“On the above subject with reference to your letter No.370 dated 1.3.2007 it is submitted that after approval by MECON the pipes have been brought at site and already used. Regarding inspection of valve we had requested for inspection vide our letter dated 28.2.2007 received in your office on 2.3.2007. But till date no program has been given and no date has been fixed though it is more than one month since....”

18. The details of the relevant documentary evidence adduced by the defendant is as under:-

S. No.	Description of document	Whether admitted or denied by plaintiff	Particulars of document/Remarks, if any
1.	Ex.DW-1/1: Letter dated April 07, 2006 written by plaintiff to	Admitted.	Letters records that plaintiff is unable to submit the Performance Guarantee up to April 26, 2006 ‘due to

	defendant.		<i>unavoidable circumstances and bank strike</i> '.
2.	Ex.D-2: Letter dated September 05, 2006 written by defendant to plaintiff.	Denied.	Letters records that MS Plates of 88 mm diameter have not been procured by plaintiff till date; same may be procured immediately and date and time be fixed up for inspection of the same.
3.	Ex.D-3: Show cause notice dated September 12, 2006 issued by defendant to plaintiff.	Receipt of notice admitted. Contents of notice denied.	Notice issued to plaintiff calling upon him to show cause why actions under clauses 2 and 3 of contract be not taken against him for delaying completion of work.
4.	Ex.D-4: Letter dated September 13, 2006 written by plaintiff to defendant.	Admitted.	Letter records that ' <i>order of supply has been placed and same shall be procured shortly</i> '.
5.	Ex.D-5: Letter dated September 20, 2006 written by plaintiff to defendant.	Admitted.	The said letter was written by plaintiff in response to show cause notice Ex.D-3 dated September 12, 2006 issued by defendant and contents of same shall be noted in the later part of this judgment.
6.	Ex.D-6: Letter dated September 21, 2006 written by plaintiff to defendant.	Admitted.	Letter records that the plaintiff has purchased 10 mm thick plates and pipes are being casted at M/s Amar Singh Bambra at Greater Noida and order has been given for purchase of MS Plates for 8 mm thickness.
7.	Ex.D-7: Letter dated October 09,	Admitted.	The contents of said letter shall be noted in the later

	2006 written by plaintiff to defendant.		part of this judgment.
8.	Ex.D-8: Letter dated October 11, 2006 written by plaintiff to defendant.	Admitted.	Letter records that plaintiff has purchased MS Plates of 8 mm thickness and pipes are being casted at M/s Amar Singh Bambra at Greater Noida and third party may test the same on <u>September 13, 2006.</u>
9.	Ex.D-11: Letter dated November 20, 2006 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	Letter records that plaintiff was granted extension for completion of work till February 2007; only 10% of work has been completed till date and work be completed within extended time.
10.	Ex.D-12: Letter dated December 15, 2006 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	Letter (again) cautions the plaintiff and work in question is not progressing at a satisfactory pace.
11.	Ex.D-13: Letter dated December 27, 2006 written by plaintiff to defendant.	Admitted.	The contents of said letter shall be noted in the later part of this judgment.
12.	Ex.D-16 (Ex.DW-1/4): Letter dated February 09, 2007 written by plaintiff to defendant.	Admitted.	The contents of said letter shall be noted in the later part of this judgment.
13.	Ex.D-17 and Ex.D-18: Two letters dated February 14, 2007 written by plaintiff to defendant.	Admitted.	Letters (again) cautions the plaintiff and work in question is not progressing at a satisfactory pace.

14.	Ex.D-22: Letter dated February 22, 2007 written by defendant to plaintiff.	Admitted	By virtue of said letter, the defendant refutes the claim of plaintiff that delay in completion of work is attributable to defendant. The letter further records that plaintiff is misreading letter dated August 24, 2006 written by the defendant on the aspect of 'road cutting permission' and it was plaintiff which was required to obtain road cutting permission from local authorities in terms of clause 1.12.4.1 of Special Conditions of Contract.
15.	Ex.D-19: Letter dated February 28, 2007 written by plaintiff to defendant.	Admitted.	Letter records that directions be issued by defendant to M/S MEACON for inspection of materials (sluice valves and other valves etc) at the factory of M/s Shiv Durga Company at Kolkata.
16.	Ex.D-20: Letter dated February 28, 2007/March 01, 2007 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	The contents of said letter shall be noted in the later part of this judgment.
17.	Ex.D-21: Letter dated March 14, 2007 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	Letters (again) cautions the plaintiff and work in question is not progressing at a satisfactory pace. Letter further records that plaintiff failed to honor its commitment to procure valves in the month of

			February, 2007 which constrained the defendant to arrange sluice valve required for interconnection on March 01, 2007.
18.	Ex.D-22 and Ex.D-23: Two letters dated March 19, 2007 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	Letters (again) cautions the plaintiff and work in question is not progressing at a satisfactory pace.
19.	Ex.D-25: Letter dated April 12, 2007 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	The relevant portion of said letter shall be noted in the later part of this judgment.
20.	Ex.D-26: Letter dated May 14, 2007 written by defendant to plaintiff.	Receipt of letter admitted. Contents of letter denied.	The relevant portion of said letter shall be noted in the later part of this judgment.
21.	Ex.D-28: Reply to legal notice dated July 16, 2007 issued by plaintiff.	Receipt of notice admitted. Contents of notice denied.	----

19. The letter, Ex.D-5 dated September 20, 2006, written by the plaintiff in response to the show cause notice Ex.D-3 dated September 12, 2006, issued by the defendant reads as under:-

“With reference to your Letter no.F2(33)/EE (Project)I/2006/2007/1467 dated 12.9.2006 and telegram dated 12.9.06 it is stated that due to some family circumstances, I could not purchase the 8mm thick M.S. plates and work was not started in time. The order has been placed for purchase of 8mm

thick plates and same will be received very soon. The 100 mm thick plate have been purchased and sent to manufacturing site to M/S Bamrah Fabrication. The inspection of MS plates can be done. The pit has been made for hanging the pipe by trenchless.

It is also promised that the work will be completed within the completion period of CA. The progress report can be taken in the month of November 2006. If any delay is found in completion of the work in time the action can be taken as per CA. Therefore it is humbly requested that the notice under clause 2, 3 may please be withdrawn.”

(Emphasis Supplied)

20. The letter Ex.D-7 dated October 09, 2006, written by the plaintiff to the defendant reads as under:-

“Please refer to your Letter No. F.2(33)/EE(Project)-I/2006/1524 dt. 4.10.2006 on the above noted subject.

The details of documents required by your goodself are as under:-

1. *Bills attached and remaining plates will be procured 50 MT/- 100 MT/- per month.*

2. *The plates are being tested by Third Party M/s. Mecon Limited. After testing the plates the pipe will be coated and will be brought at the site within a period of 15 days. After that 15 pipes in the month of November, 60 pipes in December, 70 pipes in Jan and remaining in February 2007.*

3. *The work of laying of pipes will be taken up after receipt of pipes i.e. end of this month.*

4. *I am determined in completing the work please.*

Submitted for your kind perusal please.”

(Emphasis Supplied)

21. The letter Ex.D-13 dated December 27, 2006 written by the plaintiff to the defendant reads as under:-

“It is humbly submitted in connection with above work that 4 pipes have reached the site and 18 pipes are lying in the factory which shall reach the site in today’s night and 24620 kgs of MS Plates have reached the factory against bills Nos.1057 and 1058 dated 04.12.2006 and the photocopies of bills are attached. In addition to this, 80 tonnes plates have been booked and same shall reach the factory in the next week.

Therefore I request and assure you that the work which I was require to complete in December could not be completed by me in December due to domestic problems and shall complete the same in January under any circumstance and I again assure as stated by me in my previous letters that I shall complete the work in February under any circumstance.

Therefore I humbly pray that I be given opportunity till February (28-2-07).”

(Translated Version) (Emphasis Supplied)

22. The letter Ex.D-16 (Ex.DW-1/4) dated February 09, 2007 written by the plaintiff to the defendant reads as under:-

“It is submitted that during inspection of pipe on 3-2-07 some shortcoming was found in thickness of pipe which was very less. It was also discussed in the factory that same was OK according to plate code but there was some shortcoming according to contract. Till date plates confirming to the specifications given in the contract were procured, my intention was also the same, but this time due to some reason a shortcoming has occurred in this lot. I assure you that this type of shortcoming shall not occur in future and plates shall be again procured as per contract specifications.

I request that if you feel right then this shortcoming be compensation with money. This lot had about 55 pipes 6 meters long which are prepared or being prepared in the factory. The compensation be taken in the next running bill.”

23. The letter dated Ex.D-20 dated February 28, 2007/March 01, 2007 written by the defendant to the plaintiff reads as under:-

“Sir,

As you aware that during inspection on 3.2.07, some deficiency in plate thickness was noticed. The same issue was raised by IIIrd party inspection agency M/S MECON Ltd. As per Contract Clause 1.6.1 of spl. Condition, no negative tolerance in plate wall thickness is allowed. So these pipes were unfit under the said clause, and the same was conveyed to you on phone.

M/S MECON Ltd., IIIrd party inspection agency had raised the issue and seeking the decision through their inspection note dated 3.2.07 on the deficiency in plate thickness.

Under this circumstances, inspection for these pipes was only possible, when the approval from the competent authority was received. Accordingly on your request made through letter dated 9.2.07. Case for granting permission to use the same lot of MS plate of negative tolerance was perused due to urgency of work. On approval by the competent authority on 22.2.07, M/S MECON was requested to inspect the pipes at factory. Factory was inspected jointly by DJB an official & Sh. Taneja from MECON Ltd. on 22.2.07. On that day pipes were not ready for hydro testing, as well as outside coating & wrapping of thirteen finished pipes was found of lesser thickness i.e. 1.5 mm to 2.5 mm in place of 4 mm. and thus rejected and asked to rectify. M/s MECON was conveyed the approval for use of the said lot of plate on 23.2.07. On rectifying the out side coal tar wrapping, inspection was again done on 24.2.07 at factory and final acceptance for the delivery of pipes will be given by M/S MECON Ltd., after submission of desired test report/result of outer surface wrapping & inside lining from the lab.

Department had never delayed for arranging IIIrd party inspection & making inspection for delivery of pipes at site. Where as you are failed to arrange desired test result, so please expedite immediately without any further delay.

Regarding the supply of valves, you failed to stick to your programme. Till date no inspection has been done of these valves, so how could valves can be supplied when only one day is left in completing Feb.07.”

24. The relevant portion of the letter Ex.D-25 dated April 12, 2007 written by the defendant to the plaintiff reads as under:-

“Sir,

With reference to above letter it is to point out here that the delivery of the pipes at site was possible only on your request dated 9.2.07 to allow as a special case for deficit plate thickness for a lot of fifty pipes only. The approval was taken by the competent authority & conveyed to MECON regarding the plate thickness confirming as per I.S. 3589 on 23.2.07. Regarding the inspection of valves, we have already intimated M/S MECON Ltd. for inspection of valves on 12.3.07. It was also desired to know through that intimation letter, likely time & date of inspection. So that if possible department may like to join the inspection. Inspection programme is still awaited from M/S MECON. However 800mm dia main sluice valve which was to be fixed by you at interconnection was arranged by the department & the same was fixed on 1.3.07, after your failure to procure the same by that date. As well as 300mm dia sluice valve which was required to fix at scour point was arranged by you from the local market & the same was fixed on 10.3.07.”

(Emphasis Supplied)

25. The relevant portion of the letter Ex.D-26 dated May 14, 2007 written by the defendant to the plaintiff reads as under:-

“Your request through letter dated 28.2.07, delivered in this office on 2.3.07 for inspection of the valves at Kolkata after fixing of valve which was already arranged by the department shows that it was deliberately delayed by you. The valves, which were not ready since last few months, suddenly became ready, which shows your misleading approach/intention. Major valves like sluice valve, non return valve, scour valve, pressure

relief valve & air valves were to be fixed in the stretch which has already been commissioned. In this stretch either the required valve was arranged by the department or purchased from local market. Non return valve & pressure relief valve were not fixed due to urgency. All such above activities show that delay in arranging valve is totally on your part.”

26. Vide impugned judgment and decree dated February 03, 2015, the learned Single Judge has dismissed the suit filed by the plaintiff.

27. Briefly stated the reasons given by the learned Single Judge are as under:-

a) The plaintiff commenced the execution of work with one month delay by not submitting Performance Guarantee within the prescribed period.

b) In view of clear prescription contained in clause 1.12.4.1 of Special Conditions of Contract that plaintiff has to obtain road cutting permission from local authorities the defendant can in no way be blamed for delay caused in obtaining road cutting permission, particularly when seen in light of deposition of Hawa Singh Saini PW-1, the proprietor of plaintiff concern, that he did not write any letter to any civic agency seeking road cutting permission. Letter Ex.PW-1/9 dated August 24, 2006 written by the defendant cannot override or supersede express terms of contract entered into between the parties. The non-timely grant of road cutting permission was a substantial reason for delay in execution of work and attributable to plaintiff alone.

c) The other reasons given by the plaintiff which led to delay in execution of work and were attributable to defendant viz. (i) MS plates/pipes and valves could not be timely procured by plaintiff because of delay in approval of drawings by the defendant; (ii) drawings were not approved by defendant within time; (iii) delay on part of third party M/S

MECON in approving MS pipes; (iv) insistence of defendant of procuring MS pipes/plates from SAIL and same being out of stock with SAIL; and (v) delay in releasing of payments by defendant, were also against the terms of the contract.

d) The communication exchanged between the parties, particularly letter Ex.D-4 dated September 13, 2006 written by the plaintiff to the defendant reveals that the plaintiff had procured MS plates/pipes with considerable delay and falsifies the claim of plaintiff that plaintiff had placed an order of MS plates with SAIL on May 30, 2006.

e) In view of the approval granted by the competent authority of the defendant to the plaintiff to use plates below specifications the inspection of pipes was not possible by the third party and thus delay in inspection by third party is also attributable to plaintiff alone.

f) The communication exchanged between the parties reveals that the plaintiff did not on time arrange the valves and attempt on the part of the plaintiff to seek approval of drawings of valves from the defendant was a ploy to delay the matter inasmuch as procurement of valves was not correlated with the approval of drawings; specifications of valves already formed part of contract and approval of drawings/designs was not necessary.

g) Letter Ex.D-22 dated February 22, 2007 written by the defendant to the plaintiff belies the claim of the plaintiff that the defendant did not timely release the payments of running bills to the plaintiff.

h) The defendant was well within its right to rescind the contract on May 21, 2007 on account of delay on part of the plaintiff in executing the work, particularly in view of the prescription contained in clause 1.12.2.1 of Special Conditions of Contract that time is essence of the contract.

i) The defendant was well within its right to levy penalty (10% of contract value) in terms of clause 2 of contract entered into between the parties in view of dictum of law laid down by Supreme Court in the decision reported as (2003) 5 SCC 705 ONGC Vs. Saw Pipes Ltd. that where contract itself has pre-estimated liquidated damages which would be incurred by the department in the case of breach, there is no necessity on the part of department to prove actual losses suffered by it.

j) The plaintiff has failed to establish its case that the delay in execution of work was attributable to the defendant and damages, if any, suffered by it on account of recession of contract by the defendant. In fact, it was the defendant which suffered damages on account of failure of plaintiff to complete the work within stipulated time.

28. Aggrieved by the aforesaid, the plaintiff has filed the above captioned appeal under Section 96 of Code of Civil Procedure.

29. In the present appeal, the plaintiff (appellant) as also defendant (respondent) have reiterated their respective stands taken by them before the learned Single Judge.

30. As already recorded in the order dated October 12, 2015 passed by us in the present appeal (while reserving the arguments in the present appeal) the plaintiff had limited the arguments to the penalty in sum of ₹17,58,033.90, earnest money (converted into security deposit) in sum of ₹7,73,000/- and invocation of performance guarantee in sum of ₹9,76,000/- and gave up claim for damages in sum of ₹10 lacs for profit which the plaintiff could have earned for the balance work as also claim in sum of ₹5,62,713.85 which were allegedly illegally recovered from the running bills for the work done.

31. In addition to reiterating the stand taken by plaintiff before the learned Single Judge, learned senior counsel appearing for plaintiff advanced following two arguments:-

A The learned Single Judge did not correctly appreciate the letter Ex.PW-1/9 dated August 24, 2006 written by defendant to the plaintiff. Counsel emphasized that letter Ex.PW-1/9 clearly brought out that it was defendant (and not plaintiff) which was liaisoning with local authorities (MCD and PWD) for obtaining road cutting permission and that plaintiff could not commenced the work at site before first week of September, 2006 as site was not made available to the plaintiff before that time. Counsel pointed out that letter Ex.PW-1/8 dated July 06, 2006 written by Executive Engineer, Delhi Jal Board to Executive Engineer, MCD seeking road cutting permission further made matter clear that it was defendant who was required to obtain road cutting permission from local authorities.

B The learned Single Judge did not even touch, much less deal, with the argument advanced by the plaintiff that one of the substantial reasons for delay in execution of work was on account of delay in carrying out inspection of materials (pipes, plates, valves etc.) by third party M/s MECON. Counsel emphasized that letter Ex.D-25 dated April 12, 2007 written by defendant to plaintiff brings out that inspection of materials was considerably delayed by third party M/s MECON. It was highlighted that letter Ex.D-25 records that on March 12, 2007 defendant had sent intimation to third party M/s MECON to carry out inspection of material but received no response from MECON in said regard even one month thereafter till April 12, 2007. Counsel argued that said aspect of matter, particularly letter Ex.D-25 dated April 12, 2007 written by defendant to plaintiff, has been completely lost sight by the learned Single Judge.

32. From the afore-noted conspectus of facts, it is apparent that the core question to be adjudicated in the present appeal is: Who is responsible for delay in execution of work in question? Whether plaintiff (contractor) or defendant (Delhi Jal Board)?

33. On March 24, 2006 Letter of Intent was issued by the defendant awarding the work of '*providing and laying 800 mm diameter rising main/feeder main from Vikas Marg to Vishwakarma Park (Geeta Colony), UGR & BPS in Trans Yamuna Area*' to the plaintiff.

34. The plaintiff was required to furnish Performance Guarantee within a period of fifteen days of issuance of Letter of Intent and execution of work was to be started on April 08, 2006. However, it was claimed by plaintiff that it could not furnish Performance Guarantee up to April 26, 2006 '*due to unavoidable circumstances and bank strike*'. (See letter Ex.DW-1/1 dated April 07, 2006 written by plaintiff to defendant.) The Performance Guarantee was furnished by the plaintiff only on May 08, 2006 and execution of work was now to be started on May 22, 2006. We do not know the '*unavoidable circumstances*' due to which plaintiff could not timely submit the Performance Guarantee for plaintiff has chosen not to throw light upon the same. The fact of the matter is that start of work got delayed by about one and half month on account of delay on part of plaintiff in furnishing the Performance Guarantee.

35. On June 06, 2006 the plaintiff informed the defendant that it has placed an order of 350 MT of MS Plates with SAIL and same shall be available by June 15, 2006 and it has also purchased 50 MT of MS Plates from local market and pipes of 800 mm diameter are being cast at M/s Bamrah Fabrication, Noida and M/s Precision Engineers and Fabricators at Karala. (See letter Ex.PW-1/3 dated May 30, 2006 written by the

plaintiff to SAIL and letter Ex.PW-1/4 dated June 06, 2006 written by the plaintiff to the defendant.)

36. However, the letters produced (and proved) by the defendant tell a different story. Letter Ex.D-4 dated September 13, 2006 written by the plaintiff to the defendant records that '*order of supply (of 8 mm MS Plates) has been placed and same shall be procured shortly*'. Letter Ex.D-5 (an admitted document by proprietor of plaintiff) dated September 20, 2006 written by the plaintiff to the defendant records that the plaintiff could not purchase 8 mm thick MS Plates due to some unavoidable family circumstances and thus work could not be started on time. (Most significantly, letter Ex.D-5 nowhere makes mention of the fact(s) that start/completion of work got delayed due to delay in obtaining road cutting permission by the defendant or delay in inspection of material(s) procured by the plaintiff by the third party M/S MECON). Letter Ex.D-6 dated September 21, 2006 written by the plaintiff to the defendant records that the plaintiff has given order for purchase of MS plates of 8 mm thickness. A conjunctive reading of letters Ex.D-4, Ex.D-5 and Ex.D-6 dated September 13, 2006, September 20, 2006 and September 21, 2006 respectively written by the plaintiff to the defendant completely belies the claim made by the plaintiff in its letter Ex.PW-1/4 dated June 06, 2006 that it has placed an order of 350 MT of MS Plates with SAIL and same shall be available by June 15, 2006 and it has also purchased 50 MT of MS Plates from local market and pipes of 800 mm diameter are being cast at M/s Bamrah Fabrication, Noida and M/s Precision Engineers and Fabricators at Karala. In fact, the first lot of pipes (procured by the plaintiff) saw the light of day only in the first week of October, 2006 i.e. after a lapse of period of more than four months from the date of start of execution of work as admitted by the plaintiff

itself in the letter Ex.D-7 dated October 09, 2006 written by the plaintiff to the defendant.

37. The plaintiff then started the story of approval of drawings of valves by the defendant before procurement of valves. (See letter dated July 03, 2006 written by plaintiff to defendant. dated October 26, 2006 written by plaintiff to defendant.) The falsity in said story of plaintiff is writ large from two letters dated Ex.PW-1/11 and Ex.PW-1/12 dated October 26, 2006 written by plaintiff to defendant. Whereas first letter Ex.PW-1/11 records that on October 18, 2006 a meeting was held between the plaintiff and the staff of the defendant wherein it was decided that the defendant shall approve drawings of sluice, air and non-return valves within a day or two but nothing has been heard in said regard till date; the second letter Ex.PW-1/12 records that on October 18, 2006 a meeting was held between the plaintiff and the staff of the defendant wherein it was decided that the plaintiff shall procure sluice, air and non-return valves as per BQ and tender conditions; the plaintiff has accordingly ordered the manufacturer to do the same and manufacturer has stated that it will take him one month to complete said job. As per the plaintiff two diametrically opposite decisions were taken by the staff of the defendant in the meeting held on October 18, 2006, which cannot be the case. The falsity of said story of the plaintiff, in turn brings out that the plaintiff has not procured valves on time and was making up stories to somehow or the other cover up the delay in procuring the valves.

38. We now note letter Ex.D-13 dated December 27, 2006 written by the plaintiff to the defendant. Most significantly, the letter Ex.D-13 (an admitted document by the proprietor of plaintiff) records that the plaintiff has not been able to complete work within prescribed period due to domestic problems and he be given time till February, 2007 to complete

the work. (Yet again, letter Ex.D-13 nowhere makes mention of the fact(s) that start/completion of work got delayed due to delay in obtaining road cutting permission by the defendant or delay in inspection of material(s) procured by the plaintiff by the third party M/S MECON).

39. Evidence show that the defendant generously accepted the request of the plaintiff and granted extension of time of about three months to the plaintiff to complete the work by February 28, 2007, as against the original date of completion of November 21, 2006. However, the things did not change for good and execution of the work continued to progress at a snail pace. By this time, the plaintiff changed tack and started blaming the defendant for the delay in execution of the work primarily for the reasons: - (i) defendant did not obtain timely road cutting permission from local authorities which considerably delayed the start of work; (ii) third party M/s MECON did not timely conduct inspection of material(s) procured by the plaintiff leading to major delay in execution of work.

40. It does not lie in the mouth of the plaintiff to claim that the defendant was required to obtain road cutting permission from the local authorities in view of clear prescription contained in clause 1.12.4.1 of Special Conditions of Contract that the **Contractor (Plaintiff)** is required to obtain road cutting permission from the local authorities. The letters Ex.PW-1/8 and PW-1/9 dated July 06, 2006 written by Executive Engineer, Delhi Jal Board to Executive Engineer, MCD and dated August 24, 2006 written by Executive Engineer, Delhi Jal Board to plaintiff respectively heavily relied upon by the plaintiff nowhere brings out that it was the defendant which was pursuing the matter regarding grant of road cutting permission with the local authorities. At best, letters Ex.PW-1/8 and PW-1/9 merely bring out the defendant was assisting the plaintiff in the matter regarding grant of road cutting permission by the local

authorities. In view of the clear prescription contained in clause 1.12.4.1 of Special Conditions of Contract requiring the plaintiff to obtain road cutting permission from the local authorities, the plaintiff could not have shunned its obligation of obtaining the road cutting permission and putting the same on the defendant. In this regards, it is also worth mentioning that Hawa Singh Saini PW-1, proprietor of plaintiff concern, has admitted in his testimony that he did not write even a single letter to any civic agency seeking road cutting permission.

41. On the issue of alleged delay of inspection of material(s) by third party M/s MECON, we find that first letter on said aspect is letter Ex.D-8 dated October 11, 2006 written by the plaintiff to the defendant records that the plaintiff had purchased MS Plates of 8 mm thickness and pipes were being casted at M/s.Amar Singh Bambra at Greater Noida and third party may test the same on **September 13, 2006**. There is a major fallacy in the letter Ex.D-8, in that, said letter is dated October 11, 2006 and requires the third party to inspect MS Plates on September 13, 2006 i.e. a month prior to issuance of letter Ex.D-8.

42. There is then a lull of about three months on the aspect of delay of inspection by M/S MECON after which plaintiff wakes up on February 09, 2007 by writing letter Ex.PW-1/16 to the defendant talking about delay in inspection of material(s) by the third party M/S MECON. On the same day i.e. February 09, 2007 another letter Ex.D-16 (an admitted document by proprietor of plaintiff) was written by the plaintiff to the defendant admitting therein that third party : M/S MECON has found shortcomings in the pipes procured by the plaintiff; and the plaintiff be permitted to use said deficient pipes and that the plaintiff would ensure in future that no shortcomings is found in the pipes in future. On one hand, the plaintiff was complaining about delay in inspection by M/S MECON

and on other hand was seeking condonation of defects found by M/S MECON in the inspection. Strange!

43. Thereafter a very clever game was played by the plaintiff. Due to delay in procurement of sluice valve by the plaintiff, the defendant itself arranged the sluice valve on March 03, 2007. Having come to know of the same, the plaintiff cleverly wrote letter Ex.D-19 dated February 28, 2007 to the defendant stating therein that defendant should get inspect the sluice and other valves from M/S MEACON at factory of its manufacturer at Kolkata. The letter Ex.D-19 dated February 28, 2007 was received by the defendant at its office on March 02, 2007, a fact admitted in letter Ex.PW-1/22 dated March 28, 2007, by which time the sluice valve was already arranged by the defendant.

44. On the issue of inspection of material by M/S MECON, it is also worth noting that plaintiff has claimed in its plaint that defendant as also manufacturer M/S Shiv Durga had confirmed in letters dated February 23/24, 2007 written by them that third party M/S MECON is delaying inspection of material(s) procured by the plaintiff. No such letters has produced on record by the plaintiff and adverse inference should be drawn against plaintiff on said count. We thus find no merit whatsoever in the claim made by the plaintiff that execution of work got delayed on account of delay on part of third party M/S MECON in inspecting the materials procured by the plaintiff.

45. Lastly, we note that another track was taken by the plaintiff to contend that it is not blameworthy for delay in completion of work viz. requisite material was not available with SAIL. In support of said contention, plaintiff placed reliance upon two endorsements dated April 11/16 April, 2007 purportedly by an official of SAIL on the letter Ex.PW-1/25 dated April 03, 2007. The first endorsement dated April 11, 2007 is

to the effect '*Regret material is not available at Delhi warehouse on date*'. The second endorsement dated April 16, 2007 is to the effect '*Plates are supplied as per quality & tolerance of IS (illegible)*.' No official from SAIL has been produced in witness-box by the plaintiff to establish that said endorsements were indeed made by an official of SAIL. Further, we find that plaintiff talks about said two endorsements in its letter Ex.PW-1/25 dated April 14, 2007. How could the endorsement dated April 16, 2007 find mention in the letter dated April 16, 2007? There is thus a big question mark on the genuineness of said two endorsements purportedly made by an official of SAIL.

46. The upshot of the above discussion is that the delay in start/completion of execution of work is entirely attributable to the plaintiff.

47. Concededly, clauses 2 and 3 of the contract entered into between the parties prescribes levy of penalty @ 10% of contract value as also forfeiture of security deposit and invocation of performance guarantee upon the contractor (plaintiff) in case of breach of contract committed by the contractor.

48. Law on the subject has been authoritatively laid down in paragraph 68 of decision of Supreme Court reported as 2003 (5) SCC 705 ONGC vs. Saw Pipes Ltd. which reads as under:-

"68. From the aforesaid discussions, it can be held that:

(1) Terms of contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed

the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

49. In a nutshell, Supreme Court holds in Saw Pipes’s case (supra) that a liquidated damage would be a damage which on the face of it ensues if there is a breach of a contract, but its estimation is not possible and thus the parties would be perfectly justified in quantifying the same as a reasonable pre-estimate of the loss. Such an amount would be recoverable as a loss; without proof of the quantum of the loss; because the quantum has been agreed to by the parties; and the loss is inherent.

50. Suffice it to state that observations made by Supreme Court in para 68 of Saw Pipes’s case (supra) are squarely applicable in the present case as per which delayed constructions such as completing construction of road or bridges within stipulated time would be difficult to be linked with actual losses suffered by the State and in such cases the pre-estimated damages envisaged in the contract have to be paid.

51. Now, laying of water pipes is not something from which revenue would be generated by the State. It is a public utility service for providing

water to its citizens. That apart, in a delayed project, interest on blocked capital would obviously be a measure of damages.

52. In view thereof, no fault can be found with the act of defendant of levying penalty in terms of clauses 2 and 3 of contract entered into between the parties upon the plaintiff for having delayed execution of work in question.

53. In view of above discussion, the present appeal is dismissed with cost against the appellant and in favour of the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

OCTOBER 29, 2015
mamta