

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

RSA No.2949 of 2010 (O&M)

Date of decision : 16.10.2018

Punjab Water Supply Sewerage Division No.1 Jalandhar through its
Executive Engineer

...Appellant

Versus

Sujinder Singh Dhillon and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Vijay Kumar Kaushal, Advocate for the appellant.

Mr. Bhoop Singh, Advocate for respondent No.1.

ANIL KSHETARPAL, J.

Arguments were heard. Judgment was reserved. The judgment
is being released.

Defendant No.1-appellant is in the Regular Second Appeal
against the judgment passed by the learned First Appellate Court reversing
the judgment and decree passed by the trial Court.

In the considered opinion of this Court, the following
substantial questions of law arise for consideration:-

1. Whether the judgment and decree passed by the learned First
Appellate Court awarding the damages, is result of mis-reading and
non-reading of the evidence?
2. Whether in a suit for award of damages, the Court can award the

damages on the basis of the assumption that 10% of the total tender amount is normal profit of the Contractor?

FACTS:-

The plaintiff was allotted work pursuant to a tender floated for construction of 96” i/d (240 mm) RCC-cum-brick circular P.T. Sewer, construction of M.II. Chambera erection of RCC Vent shaft any all other works contingent thereto at Jalandhar (From point A/16 to treatment plan) (under Satluj Action Plan) at approximate cost of ₹125.35 lacs. The important conditions relevant for deciding of the litigation are as under:-

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Condition No.4	Any other item got done not included in the NIT	@CSR+CP
Condition No.5	Dewatering for 96 i/d sewer	@CSR+CP
Condition No.6	Excavation for depth exceeding 9 m	NS rates what not exceeding 10.5 m

Conditions:-

- 1. The open excavation will be done as per site conditions of approval of side slopes to be adopted from head office by the Engineer Incharge.*
- 2. TIME LIMIT: The time limit for the completion of this work is 15 months. The time will be reckoned after approval (if any from head office) and actual Nishans given to the contractor by the Department at site.*
- 3. All other terms and conditions as per NIT.*

The Contractor was to get the spot/points identified for starting the work. However, the Contractor after the allotment of work on 12.04.1996 did not take any action for a period of 6 months. The plaintiff did not even sign the contract agreement which was pre-condition. The plaintiff got the spot/points identified only for the first time on 04.10.1996.

The spot identification was taken only for 200 square feet long area whereas he was awarded the tender for 3000 feet length. The Contractor only did some excavation work but left the work in between. Various communications were sent by the officials on 29.11.1996, 30.12.1996 and 08.01.1997 bringing to his notice that the work is at stand still and the proper arrangement has not been made for protection of excavated earth. It was brought to his notice that public is removing the excavated earth and the plaintiff is not taking any action. Ultimately, the contract awarded was cancelled and the Contractor was penalized for not carrying out the work as awarded. The plaintiff thereupon filed a suit for recovery of ₹30,00,000/- and also challenged the order through which he was penalized for not carrying out the work.

The defendants-appellants contested the suit and asserted that although the Contractor was required to excavate the earth upto 34 feet depth, however, he dug only for 18 feet and that also at some spots only in irregular manner. The assertions made by the plaintiff were totally denied and it was brought to the notice of the Court that vide order dated 19.05.1997, penalty of ₹12.54 lacs has been imposed on the plaintiff.

The parties led the evidence and the learned trial Court after appreciating the evidence, dismissed the suit filed by the plaintiff. It may be significant to note that the subsequent contract was awarded at the risk and at the costs of the plaintiff at higher costs.

However, learned First Appellate Court reversed the judgment passed by the learned trial Court and decreed the suit by awarding the amount of ₹12,50,000/- approximately, total 10% of the total cost of the

work towards expected profit and also ordered for recovery of ₹2,60,000/- deposited as earnest money and ₹3,00,000/- as expenses incurred on excavation.

Learned First Appellate Court has given following reasons for reversing the judgment passed by the trial Court:-

- a) As per the contract, the identification of the points at the spot for excavation work were given only for 200 feet length rather than entire length of 3000 feet.
- b) As per the contract, the slopes were to be approved by the Head Office but no approval has been received from the Head Office till filing of the suit.
- c) Spring water was found and no rate had been fixed for de-watering.
- d) There was difference in the worst spring level as disclosed by the Department than actual at the spot.

If one carefully see condition No.5, extracted above, it is provided that for de-watering, the payment was agreed at CSR+CP. Still further, as per condition No.4, any other item got done but not included in Notice Inviting Tender shall also be payable at CSR+CP. In such circumstances, the Contractor was not correct in asserting that the amount for de-watering has not been fixed. In the considered opinion of this Court, the Contractor was not correct in stopping the work in between under the pretext that water has started oozing out at depth lesser than expected.

As regards delay in giving demarcation of point at the spot from where digging was to be started, it may be noted that the plaintiff did not take any step for a period of 7 months, although, the work was to be

completed in 15 months. There is no reliable evidence which has been led by the plaintiff to prove that there was delay on the part of the Department to demarcation and identify the points on the spot from where digging was to start. Rather on careful perusal of the allotment letter, it is apparent that the plaintiff-Contractor was called upon to start the work immediately. The Contractor did not sign the agreement. The evidence has been led by the defendants to prove that as per the norms of the Public Works Department, initially the demarcation and identification of the spot is given for 50 feet reach so that the work starts. In the present case, the demarcation and identification of the spot was given to the Contractor for 200 feet but the Contractor failed to dig/excavate even 200 feet out of 3000 square feet to be excavated. The total depth which was to be excavated by the plaintiff was upto 34 feet but the plaintiff-Contractor had only excavated upto 18 feet depth and that also at some specific portions and not complete 200 square feet.

Next reason given by the Court that there was no approval of the slopes by the Head Office till filing of the suit, is also erroneous. Ashok Kumar, Sub Divisional Engineer, an Official has been examined who has stated that there was no requirement of the approval from the Head Office for slopes. Relevant part of the evidence of Ashok Kumar, Sub Divisional Engineer, reads as under:-

“It is correct that excavation was to be done after sanction of slopes in work by head office reg. which it is shown in clause 6 of Ex.P21 which was done in proceedings Ex.P20 by the department. But there was no necessity of the same because cross section of excavation was already approved

by Head Office and according to the same on the spot work was done after demarcation. It is wrong that approval sanction was sent and till date the filing of the case, no approval was received. It is wrong that there is no sanction of head office about Ex.D2. Our head office is at Chandigarh. Ex.D2 which CMS action, there is approval of Head Office on it and the same is a part of DIT. It is correct that digging was done by the plaintiff upto 20 ft. self said some was 18 ft. It is wrong that upto 20 ft the water had come.”

Hence, the First Appellate Court clearly erred in overlooking this evidence. Still further, the other reasons assigned by the Court are equally erroneous. The First Appellate Court erred in assuming that the alleged communications sent by the plaintiff under postal certificate ought to have been delivered to the defendants-appellants, although, there is no reliable evidence to prove that the communications were sent and reached defendants-appellant's Department.

As regards the next reasoning of the Appellate Court with regard to difference in worst spring level, as disclosed by the defendants and found at the spot, it may be noted that the conclusion drawn by the First Appellate Court is also without any reliable evidence. As per the statement of Ashok Kumar, Sub Divisional Engineer, who has appeared for the Department, he has stated that the Contractor had excavated a few trenches upto the depth of 18'/20' feet x 10 feet wide and required depth of 34 feet was not excavated at any place and no water had started oozing out.

Next reason given by the First Appellate Court that the Department has not produced any dispatch register to prove the

communication, is equally erroneous as the plaintiff when appeared in evidence has admitted the receipt of these communications. In these communications, the plaintiff was being repeatedly called upon to expedite the work.

In view of the aforesaid discussions, the First Appellate Court clearly erred in reversing the well-reasoned judgment of the trial Court.

Now the stage is set for answering the questions of law framed earlier.

1. Whether the judgment and decree passed by the learned First Appellate Court awarding the damages, is result of mis-reading and non-reading of the evidence?

In view of the detailed discussions above, it is apparent that the learned First Appellate Court has reversed the judgment of the trial Court by overlooking the material evidence available on the file, as also mis-reading the relevant part of the evidence. Hence, question No.1 is answered in favour of the appellant.

2. Whether in a suit for award of damages, the Court can award the damages on the basis of the assumption that 10% of the total tender amount is normal profit of the Contractor?

Although, once the appellant has been found to be at fault, this question is not required to be answered, however, the learned First Appellate Court has overlooked the provisions of the Contract Act, which provide that before awarding the damages, the Court is required to prove the quantum of damages or compensation for any loss arising from a contract/promise which had not been fulfilled. Before awarding the damages, a party is required to prove before the Court by leading cogent

evidence to this effect. The First Appellate Court erred in assuming that expected profit at the rate of 10% of the cost of the contract can be awarded under the head "Expected Profit". Learned First Appellate Court has relied upon the judgments passed by Hon'ble the Supreme Court titled as **Dwaraka Das Vs. State of Madhya Pradesh & Anr., 1999(1) Apex Court Journal 531 (S.C.)** and **M/s A.T. Brij Paul Singh and Bros. Vs. State of Gujarat, AIR 1984 Supreme Court 1703.**

On careful examination of both the judgments, it is apparent that the First Appellate Court has erred in not reading the judgments passed by Hon'ble the Supreme Court. Hon'ble the Supreme Court has not held that in every case on account of loss of expected profit, 10% amount of the total projected cost is to be awarded. These judgments have been passed in a particular fact situation and it cannot be said that these judgments lay as a ratio decidendi that in every case, 10% of the total project cost must be awarded as damages.

The judgment passed by Hon'ble the Supreme Court in Dwarka Dass's case (Supra), it is apparent that Hon'ble the Supreme Court was dealing with entirely different situation and Hon'ble the Supreme Court, with greatest respect, has not laid down that in every case, 10% of the total project cost is to be awarded towards assumed profit. Similarly, in the judgment passed by Hon'ble the Supreme Court in M/s A.T. Brij Paul Singh and Bros.'s case (Supra), Hon'ble the Supreme Court has only held that the Contractor is entitled to claim damages for loss of profit also. However, the aforesaid judgment does not lay down that even if the breach is on the part of the Contractor, still Contractor is to be awarded 10% of the total cost

value as expected profit.

In view of the aforesaid discussions, the questions of law framed earlier are answered in favour of the appellant and against the respondents.

In view of the aforesaid, judgment and decree passed by the First Appellate Court is reversed and the judgment and decree passed by the trial Court is restored.

Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

16.10.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No