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

% ***Judgment Pronounced on: 01.11. 2018***

+ **CS(OS) 607/2003**

**M/S. HARCHARAN DASS GUPTA
CONSTRUCTION PVT. LTD.**

..... Plaintiff

Through **Mr.Harish Malhotra, Sr. Adv. with
Mr.V.K.Sharma, Adv.**

versus

MCD & ANR.

.... Defendant

Through **Mr.V.Gangotra, Adv. for MCD.**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This suit is filed by the plaintiff seeking a decree of declaration declaring the levy of compensation to the tune of Rs.20,61,637 by defendant No.2 as communicated to the plaintiff vide letter dated 2.1.2003 in respect of the work "Construction of Pedestrian Sub Ways on Netaji Subhash Marg Opp.Red Fot " as being illegal, void, unjust, improper and not binding on the plaintiff. A decree of permanent injunction is also sought to restrain the defendants from withholding or making a recovery of the said sum of Rs.20,61,637/-.

2. The relevant facts are that the plaintiff is stated to be a company incorporated under the Companies Act and is engaged in the business of building construction and is registered as a Class-I Contractor with MCD.

3. Tenders were invited for the construction of pedestrian sub way on Netaji Subhash Marg Delhi” by defendant No.1. Plaintiff submitted its bid and was awarded the contract vide communication dated 16.4.1998. An agreement was executed on 21.4.1998. The stipulated date for start of work was 25.4.1998 and completion of time was one year. Accordingly, the work was to be completed on 24.4.1999.

4. It is pleaded that the work envisaged construction of two subways. Subway-1 being at Netaji Subhash Marg at Jain Mandir (Police Post) and Subway 2 being opposite Lajpat Rai Market, Delhi. The case of the plaintiff is that on account of obstructions, delays and hindrances on the part of the defendant the completion of work got delayed. The work was actually completed on 31.10.2001 i.e. after a delay of 2 years 6 months and 7 days.

5. It is the case of the plaintiff that the delay took place on account of various reasons including obstructions at site at Netaji Subhash Marg, Jain Mandir. When the work started on the due date i.e. 25.4.1998, during excavation of foundation, underground water line and electric cables were encountered which were a hindrance in the excavation. Repeated requests were made to have the hindrances removed. It is further pleaded that there was delay in handing over of the designs and drawings. Further, payments of running bills for the work executed to maintain the flow of funds was also delayed.

6. It is further pleaded that instead of removing the obstructions and obstacles which were being faced by the plaintiff for timely completion of the work the Executive Engineer of the defendant on 4.1.1999 levied a penalty under clause 2 of the Agreement at 6% of the estimated cost of the work as shown in the Agreement. The plaintiff immediately protested vide

communication dated 5.3.1999 but there was no response. It is further pleaded that correspondence continued with the defendant pointing out the various issues hampering progress in the work, namely, non-availability of the second site, the impossibility of execution of work relating to excavation due to sub-soil water, delay in payment of running bills, delay in submitting of the plans etc. It is pleaded that the defendants were guilty of the following:-

“A. There were hindrances at site which were not being removed well in time.

B. Payment of the running account bills were not being made regularly and in time, thus, adversely affecting the plaintiff financially.

C. Site for the work was not provided in time in accordance with the agreement and even till 24th of December, 1999 the complete site was not handed over.

D. Designs and drawings were not provided timely thereby delaying the execution of the work. The drawings with regard to the Police Post were given only on 17th April, 2001.

E. Additional work worth about Rs. 20 lacs was required to be done by the plaintiff and in this behalf instructions were given to the plaintiff on 6th of June, 2001 only.”

7. It is further pleaded that in addition to the above, it was also the liability of defendant No.1 to settle the final bill and to make the payment which was more than Rs.20,00,000/-. However, it is pleaded that instead of taking care of the above issues, after completion of the work on 31.10.2001 on 2.1.2003 a letter was issued by defendant No.2 under Clause 2 of the Agreement again slapping a levy of Rs.20,61,637/- by way of compensation @ 10% of the estimated cost for the delay in execution of the work till 31.10.2001. Hence, the present suit.

8. Defendants in the written statement have denied the allegations made in the plaint. It is pleaded that time was the essence of the work as per the Agreement. It is further stated that in the event the Contractor/plaintiff failed to comply with the condition of working with due diligence and timely completion of the contract he was liable to pay a compensation of such amount as the Engineer Incharge may decide on the estimated cost of the whole work provided that the compensation will not exceed 10%. It is pleaded that in the present case there is a delay of 2 year 6 months and 7 days on account of which the defendant had no alternative but to levy compensation by invoking clause 2 of the Agreement. Reliance is placed on communications addressed to the plaintiff where it was stated that the issue of shifting of cables etc. was being looked into but there was ample scope for carrying out the work within the existing framework. It is stated that the underground water line and electric cable did not come in the way of excavation of the work by the plaintiff who had ample space for continuing the work. Reliance is placed on the communications written by the defendant to the plaintiff on 22.5.1998, 29.5.1998, 2.6.1998 and 25.6.1998. A Show Cause Notice was also served on the plaintiff on 10.7.1998 for slow progress of work. Existence of various hindrances has been denied. It is pleaded that the defendants have rightly levied 10% penalty totaling Rs.20,61,637/-. The communications relied upon by the plaintiff are denied.

9. I may also note that arising out of the same contract between the parties dated 21.4.1998 the plaintiff had also initiated arbitration proceedings against the defendant. On 9.3.2007 the learned Arbitrator passed an award in favour of the plaintiff herein and against the defendants herein. Claim No.1 in the Award pertained to the 17th running bill for Rs.22 lacs payment of

which had not been made by the defendants. The learned Arbitrator noted that this claim is contested on the ground that the compensation of Rs.20,61,637/- has been levied against the claimant/plaintiff. The award also notes that the matter regarding levy of compensation by defendant MCD is subjudice before this court and under clause 2 it is an 'accepted matter' and not arbitrable. Hence the learned Arbitrator refrained from adjudicating that issue. However, an award was passed in favour of the plaintiff herein for Rs.20,61,637/- subject to decision of this court under claim No.1. The defendants have filed objections under section 34 of the Arbitration Act against the said award being OMP 424/2007.

10. On 4.11.2015 while adjudicating OMP 424/2007 this court had noted about pendency of the present suit and the necessity of these matters being heard together. I have heard arguments in OMP 424/2007 and this suit together. By a separate judgment today I have also decided the said objections filed by MCD against the said Award of the learned Arbitrator dated 9.3.2007.

11. Coming back to the present suit on 20.8.2008 this court framed the following issues:-

“1. Whether the suit filed by the plaintiff is not tenable in view of the objection contained in para 5 of the Preliminary Objections ? OPD.

2. Whether the plaintiff has not come to this Hon'ble Court with clean hands or has suppressed material facts and terms and conditions of the Agreement, as alleged in para 6 of the application ? If so, its effect ? OPD.

3 Whether the suit of the plaintiff is not maintainable in view of the objections contained in para 7 of the Preliminary objections ?OPD

4. Whether the plaintiff is entitled to a decree for declaration as prayed for in the plaint ? OPP.

5. Whether the plaintiff is entitled to a decree/or permanent injunction as prayed in the plaint ? OPP.

6. Relief.

12. Parties have led their evidence. Plaintiff has led the evidence of Shri D.R.Mittal/PW-1. Defendant has led the evidence of Shri Anil Tyagi, Executive Engineer as DW-1.

13. I have heard learned counsel for the parties. Learned senior counsel for the plaintiff has submitted as follows:-

(i) He submits that as per clause 2 of the agreement the functionary who is authorized to levy damages on the plaintiff is the Executive Engineer. He submits that a perusal of the communication dated 2.1.2003 would show that the same is not issued by the Executive Engineer but is issued by the Superintendent Engineer (City Zone) who had no authority to execute any such communication. Reliance is placed on judgment of the Bombay High Court in *State of Bihar and Others vs. Hindustan Construction Company Ltd.& Anr., AIR 1998 Bombay 331* to support his contentions. Hence, it is pleaded that the communication dated 2.1.2003 is null and void.

(ii) It is further pleaded that damages have been imposed on the plaintiff by the impugned communication dated 2.1.2003 in violation of principles of natural justice. No show cause notice was issued to the plaintiff. No hearing was given to the plaintiff. Simply a communication dated 2.1.2003 was issued demanding the said amount

as damages. It is pleaded that the said communication being in violation of principles of natural justice is null and void.

(iii) It is further pleaded that admittedly the work was completed on 31.10.2001. Extension of time was granted to the plaintiff upto 30.7.2001. Thereafter for the alleged delay the impugned letter dated 2.1.2003 has been issued. It is pleaded that no such levy can be made retrospectively. Even otherwise, the same is highly belated and cannot be sustained.

(iv) It is further pleaded that there was no delay on account of any facts attributable to the plaintiff. Reliance is placed on the evidence led by the plaintiff to state that the plaintiff has proved the factum of obstructions in completion of the work and several factors on account of which the delay took place which are wholly attributable to the defendants. He further submits that there is no meaningful cross-examination on this aspect of the plaintiff's witness PW-1 D.R.Mittal. Reliance is placed on judgments of this court in *State Bank of India vs. S.S.Technocrats Private Limited*, 2015(6) R.A.J. 300 (Del) and *M.L.Mahajan vs. DDA & Anr.*, (2005) 1 Arb.LR 561 to plead that courts have held that in similar circumstances that the question of imposition of damages would not arise.

14. The learned counsel for the defendants has denied the submissions of the plaintiff.

15. I will first deal with issues No.4 and 5, namely, as to whether the plaintiff is entitled to a decree for declaration and; whether the plaintiff is entitled to a decree for permanent injunction, as prayed. I may first see the affidavit by way of evidence of PW-1 Shri D.R.Mittal. In his affidavit by

way of evidence he has pointed out that the work was hindered and delayed as during excavation of foundations, underground waterlines and electric and telephone cables were encountered which despite information to the defendant were not removed timely. There was also non- payment of running bills of the plaintiff by defendant No. 1. Further, the second site of the subway was not made available simultaneously with the first site. Further the drawings/plans relating to the Police Post in the subway at Jain Mandir were made available only on 17.4.2001. Other such aspects are stated. It was specifically pleaded that the causes for delay in completion of work were not attributable to the plaintiff company but attributable to defendant No.1. Reliance was also placed on various letters written by the plaintiff pointing out the hindrances non-payment of bills etc. including communications dated 6.7.1998, 11.8.1998 and 17.11.1999. Other numerous letters were also written. It is also stated that the originals of these letters were sought to be produced from defendant No.1 vide notice dated 2.1.2004 (Ex.P3), However, defendants have failed to produce the originals.

16. I may have a look at some of these communications relied upon by the plaintiff. On 6.7.1998 (Ex. P-7) the plaintiff has written to the defendants about electrical poles coming in the way, water lines and telephone cables causing obstruction on account of which excavation work cannot be taken up further. Similarly, on 11.8.1998 (Ex P-9) a communication is written to the defendants regarding DVB cables. Another communication is written on 7.9.1998 (Ex. P-10) again, repeating the hindrances caused by water line and telephone cables which are yet to be removed. It is also stated that the first running bill amounting to Rs.3,90,668/- had been sent for which payment is still pending. Similarly, on 14.12.2001(Ex-19) the plaintiff wrote to the

defendant stating that the work is complete and requested extension of time to be sanctioned and the bills be finalized. In the communication again various hindrances are mentioned including the issues relating to encroachment of space, telephone cables, waterline being exposed, electrical poles coming in the way, leakage of drinking water etc. It has also been pointed out that delays occurred due to rainy season, labour shortage due to harvesting season and stoppage of work on account of Independence Day and Republic Day.

17. In the light of this evidence led by PW-1 in his affidavit by way of evidence, it was manifest that the defendant should have cross-examined the said witness extensively about the stated grounds for delay as elaborated in his evidence. A perusal of the cross-examination of Mr.D.R.Mittal PW1 on 5.2.2009 shows that there is no relevant cross-examination on this aspect. Only one question was asked as to whether the plaintiff wrote any letter to the defendant specifically mentioning the reasons for delay. The plaintiff has accepted the said suggestion. Relevant portion of cross-examination of PW1 is as follows:

“Q. Did you mention causes of the delay and proposed time of completion of balance job in any letter written so to the defendant for grant of extension of time?

A. I had mentioned the causes of delay in the letters such as drawing was not supplied to me and after considering the same, extension of time was granted to me at every time.

Q. I put it to you that you did not write any letter to the defendant specifically mentioning therein causes of delay and proposed time to complete the balance time. What have you to say?

A. It is incorrect.

Q. Please see letters dated 10.07.1998, 04.01.1999, 20.07.1998, 17.07.1998, 21.08.1998, 17.09.1998, 29.10.1998,

02.11.1998, 01.12.1998 and 25.06.1998 and tell whether these were received by you?

A. All these letters were received by us. Now these are marked as Ex.PW1/D1 to Ex.PW1/D10 Mark A.”

18. In contrast the defendants have led the evidence of Shri Anil Tyagi the Executive Engineer (DW1). He has filed his affidavit by way of evidence and also an additional affidavit by way of evidence. There is no meaningful evidence led by him as to why delay took place in completing the work. In this affidavit by way of evidence there is only reference to the penalty imposed on the defendant under clause 2 of the Agreement. He has also tendered and exhibited the original file regarding extension of time to complete the work as Ex.DW1/14, a file which is running into 124 pages. In his cross-examination DW-1 states that he is not deposing from personal knowledge but has deposed on the basis of official records.

19. A perusal of the file exhibited by DW1 i.e. DW1/14 shows that the first page is a note for time extension prepared by the Assistant Engineer dated 05.04.2002. The note states as follows:

“As soon as the contractor took the work in hand and re-started the work the following cables etc were met;

- a) Telephone cable
- b) Electric poles
- c) Unfiltered water line of C.P.W.D.
- d) Water line of Delhi Jal Board

1. Although these services did not result in stoppage of work and the contractor always had ample scope of continuing the work. The department approached various services Departments and got the services removed at the earliest possible. But it cannot be denied that the smooth running of the

work was hampered. The delay/hold up period on this account cannot be quantified, as the work remained continued as per the existing site conditions.

2. There was some encroachment at the part of site of one subway opposite Old Lajpat Rai Market due to existing of Dhabas and depot of Delhi Energy Development Agency, which was using it for parking of battery buses. Again here the contractor continued the work of construction of subway beside this encroached area. But the smooth running of the work was hindered and the delay/hold up period on this account also cannot be quantified. Since the site was located in the congested area, the work was to be taken in phases, which was a condition of the contract.

3. There was extreme delay in supplying the drawing of Police Post by the Police Department which is also a part of the Project. The structural work of the subway where Police Post was to be constructed was completed on 24.07.2000 whereas Police Department supplied the drawing on 17.04.2001. Thereby the delay period between 24.07.2000 to 17.04.2001 is 8 months 24 days. Since there was another sufficient space/scope of work so the work was not totally stopped during this period only 10% of the work can be taken to be held up. Hold Up Period: 27 days.

4. A very important aspect of hindrance to the work was encountered during the observation of Independence Day and Republic Day celebration each year. For each event the areas adjoining Red Fort were cleared of all obstruction and the entire area was placed under the control of defence services. And the material, machinery, labour were removed one week in advance of each event and the re-arranging of infrastructure by contractor takes another week and thus each even account for hindrance of 14 days.

In all during execution period, seven such events occurred and as such $7 \times 14 = 98$ days i.e. 3 months 8 days is considered for extension.

Hold up period: 3 months 8 days.

5. The case of delayed payment is another aspect, which cannot be overlooked. As is pertinent to note that MCD is generally short of funds and is not able to make timely payment and thus effects the overall progress of the work since no labour establishment can be maintained smoothly without timely payment. Though no definite period is being included in the recommendation for extension, this fact cannot be brushed off.”

Hence, it is clear from the perusal of the said note that the defendants were fully aware that there were various problems being encountered while work was being executed.

20. In my opinion, the evidence placed on record by the plaintiff pointing out the various obstructions faced by the plaintiff for timely completion of the project has gone completely unchallenged and un-rebutted by the defendant. The evidence shows that despite requests of the plaintiff the defendant failed to take steps to remove the obstructions. Further the defendants have failed to lead any evidence to show the causes of delay. It is manifest that the only conclusion that can be arrived at is that the defendants have been guilty of being negligent in removing the obstructions and hindrances to ensure timely completion of the work. As the defendants were themselves guilty of causing delay in completion of the contract, the defendants could not levy damages on the plaintiff as was done vide letter dated 02.01.2003.

21. In the above context reference may be had to the judgment of this court relied upon by learned senior counsel for the plaintiff in the case of

State Bank of India vs. S.S.Technocrats Private Limited(supra). This court has held as follows:-

“30. The fact that there were two EOTs granted up to 15th August 2007 with PVA frozen as on 30th April 2007 was indicative of time no longer being the essence of the contract. It was safe to proceed on the basis that the stipulated date of completion stood shifted to 15th August 2007. SBI itself treated the actual date of completion of the work as 15th December 2007. SBI did not show how it had suffered any loss during the extended period between 15th August and 15th December 2007. As held in *J.G. Engineers v. Union of India* (supra) once the Arbitrator found that it was SBI which was responsible for delay, the claim for LD is unsustainable and the contractor is entitled to escalation. Secondly, the learned Arbitrator has returned a factual finding that it was the Petitioner who was responsible for the delay. Thirdly, no show cause notice appears to have been issued by SBI proposing imposition of LD at any point in time. The rejection of SBI's counter claim for LD cannot be faulted.”

This court hence held that the party responsible for the delay caused cannot impose damages.

22. I may also note another aspect of the functioning of the defendant. On 4.1.1999 even prior to the proposed date of completion which was 24.4.1999 the concerned Executive Engineer imposed a penalty of Rs.12,36,982/- by way of compensation @ 6% of the estimated cost. The work got completed thereafter on 31.10.2001. After having levied the compensation in January 1999 four years down the line the Superintendent Engineer again sent the communication on 2.1.2003 imposing damages now of 10% of the estimated cost. The said letter, which is the impugned letter, reads as follows:-

“To,
M/s. Harcharan Dass Gupta, Constn.Pvt.Ltd.

103, Sai Bhawan, Ranjit Nagar,
Commercial Complex,
New Delhi-110008

Sub: Const. of Pedestrian subways on Netaji Subhash Marg
Opp.Red.Fort

D/Sir,

The stipulated date of completion for the above mentioned work was 24.4.99 as per agreement No.D/EE(Pr.) CZ/98-99/1 dated 21.4.98. Extension of time for completion of the above mentioned work was granted by the Engineer-in-Charge upto 30.7.2001 without prejudice to the right of the Commissioner, MCD to recover liquidated damages in accordance with the provisions of clause-2 of the said agreement.

In exercise of power conferred on me under clause-2 of the agreement, I, R.K.Sabharwal, Suptdg.Engineer decide and determine that you are liable to pay Rs.20,61,637/- as and by way of compensation as stipulated in clause-2 of the agreement. The said amount of compensation is hereby levied on you for the period of delay in execution of the work till 31.10.2001 and at the rate of 10% as determined by me of the estimated cost of the work as shown in the agreement and you are hereby called upon to pay the same to the Commissioner, MCD with in a period of 15 days from the issue of this notice, failing which the said amount shall be recovered from your pending bills & security deposit lying with MCD.

Yours faithfully,

-sd-

(R.K.Sabharwal)

Suptdg.Engineer(City Zone)”

23. Clearly, the above document appears to be a mindless exercise. There is no reference to the earlier imposition of damages on 4.1.1999. There is no reference or allegation that delay took place in completion of the work due to

the acts/omission of the plaintiff. The functionary who has written the letter simply states that there is delay in completion of the work and imposes a penalty of 10% which was the maximum possible under the Agreement. The fact that four years ago a penalty of 6% had already been imposed is ignored. A reading of this communication alongwith the background facts shows a complete non-application of mind and mechanical exercise of power. The defendants did not even bother to give a show cause notice to the plaintiff before levying the damages. No opportunity was given to the plaintiff to explain its position. In my opinion, the said levy cannot in any manner be upheld being imposed in a mechanical manner without following elementary principles of fair play and natural justice.

24. There is another submission made by learned senior counsel for the plaintiff to challenge this document, namely, that the document dated 2.1.2003 is signed by the Superintendent Engineer whereas as per clause 2 of the Agreement itself it is the Executive Engineer who alone can levy the damages. Hence, it is pleaded that the damages have been imposed by a functionary who had no such power under the Agreement. In my opinion, this argument is unfounded. The Municipal Corporation of Delhi is a hierarchical organization. The Executive Engineer would obviously act in consonance with the policy and norms of MCD. A reading of clause 2 would show that merely because it mentions the post Executive Engineer would not mean that a functionary higher than the post of Executive Engineer could also not impose levy of damages on the plaintiff. The plea is unfounded.

25. Keeping in view the evidence led by the parties as noted above, in my opinion, the plaintiff has proved that the delay in completion of the work took place due to the obstruction /omissions caused by the defendants. The

plaintiff cannot be blamed for the same. Further the levy of damages by the defendant is a mechanical exercise of power done in violation of fair play and the principles of natural justice. Hence, the levy of compensation/damages for the alleged delay in completing the work is illegal and liable to be set aside. Issues No.4 and 5 are answered accordingly.

26. I may now deal with issue No.1 i.e. as to whether the suit filed by the plaintiff is not tenable in view of objections contained in paragraph 5 of the preliminary objection. In para 5 of the preliminary objections in the written statement it is stated that there was a delay of 2 year 6 months and 7 days for completion of the contract for which there is no explanation and therefore the suit filed by the plaintiff is not tenable in the eyes of law. No submissions were made on this issue. It is clearly covered by my findings above on issues No.4 and 5 and is answered accordingly.

27. Regarding issue No.2 about the plaintiff not having come with clean hands the issue was not argued. There is no material on record to show that the plaintiff has suppressed any material facts or terms and conditions. The issue is accordingly answered against the defendants.

28. Issue No.3 is whether the suit is maintainable in view of objections contained in paragraph 7 of the preliminary objections. Paragraph 7 merely says that the suit is not maintainable as the same is not based on true facts and circumstances. It is manifest that this issue is also covered by the findings on issues No.4 and 5.

29. Accordingly, a decree is passed in favour of the plaintiff and against the defendants declaring the levy of compensation of a sum of Rs.20,61,637 by defendant No.2 as communicated in letter dated 2.1.2003 as illegal and not binding on the plaintiff. A decree of permanent injunction is also passed

in favour of the plaintiff and against the defendant restraining the defendants from withholding or making a recovery of the said sum of Rs.20,61,637/- or any part thereof from any amounts lying with defendant No.1 and payable to the plaintiff. Plaintiff shall also be entitled to costs. Suit stands disposed of. All pending applications, if any, also stand disposed of.

**(JAYANT NATH)
JUDGE**

NOVEMBER 01, 2018

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