

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

+ **RFA No. 341/2006**

% 1<sup>st</sup> October, 2018

NEW DELHI MUNICIPAL COUNCIL

..... Appellant

Through: Ms. Malvika Trivedi and Mr.  
Pawan Kr. Bansal, Advocates.  
(9810096538)

versus

MANOHAR STONE CRUSHING CO. & ANR.

..... Respondents

Through:

**CORAM:**

**HON'BLE MR. JUSTICE VALMIKI J. MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 21.12.2005 by which the trial court has dismissed the suit for recovery of an amount of Rs.19,04,094/- claimed as damages by the appellant/plaintiff, from the respondent no.1/defendant no.1/seller/supplier of stone dust and stone

grit on account of breach of contract by respondent no. 1/defendant no.1 in failing to supply the contracted quantity of stone dust and stone grit.

2. The facts of the case are that the respondent no.1/defendant no.1, in response to the tender for supply of stone grit and stone dust by the appellant/plaintiff, communicated its acceptance vide Letter dated 11.05.1992 alongwith the 'Schedule of Items' and their quantities. Therefore, vide acceptance Letter dated 11.05.1992, a contract was entered into between the parties whereby the respondent no.1/defendant no.1 had to supply stone grit and stone dust to the appellant/plaintiff. The appellant/plaintiff pleaded that the respondent no.1/defendant no.1 supplied only 47 cubic meter of stone dust till 13.05.1992, instead of the agreed contracted quantity of 11,760 cubic meters. As per the contract, the respondent no.1/defendant no.1 had a period of six months commencing from 11.05.1992 for supplying the contracted quantity of stone dust and stone grit. The value of the supply by the respondent no. 1/defendant no. 1 was a total amount of Rs. 23,11,190/-. The appellant/plaintiff further pleaded in the plaint that vide Letters and Show Cause Notices dated 10.06.1992,

24.06.1992, 17.07.1992, 22.07.1992 and the final Notice dated 06.08.1992, the respondent no.1/defendant no.1 was asked to resume supply, but the respondent no.1/defendant no.1 failed, and consequently, the appellant/plaintiff rescinded the contract. On the rescission of the contract, the security deposit of the respondent no.1/defendant no.1 was forfeited, and the respondent no.1/defendant no.1 was black-listed for a period of one year vide appellant's/plaintiff's Letter dated 19.10.1993. The appellant/plaintiff pleads that ultimately for the supply of the balance quantity of the material another, Tender Notice dated 07.12.1992 was issued and the respondent no.2/defendant no.2 was found to be the successful tenderer who supplied the quantity at a total amount of Rs. 34,03,705/-. Respondent no.2/Defendant no.2 completed the supply by 15.02.1994. Appellant/Plaintiff pleaded that it suffered a total loss of Rs.11,02,479/- on account of the difference of price as per the contract with the respondent no.1/defendant no.1 and the higher price paid to respondent no.2/defendant no.2. An amount of Rs. 2,20,496/- was claimed being an entitlement to vary the quantity equivalent by 20% in terms of the tender. Another amount was claimed of Rs. 2,31,119/-

being 10% of the total contract awarded to the respondent no.1/defendant no.1 as per Clause 2 of the Conditions of Contract. Thus, a total amount of Rs. 19,04,094/- was claimed from the respondent no.1/defendant no.1 in the suit.

3. The respondent no.1/defendant no.1 contested the suit and filed its written statement seeking dismissal of the suit. The main defence of the respondent no.1/defendant no.1 was that the contract stood frustrated because the Hon'ble Supreme Court, vide its orders stopped all the stone crushers w.e.f 15.08.1992, and therefore, the stone crusher of the respondent no.1/defendant no.1 was closed. Hence, the respondent no. 1/defendant no. 1 could not supply the contracted quantity.

4. Though the trial court has framed many issues and decided the same, in my opinion, this appeal can be decided primarily on the aspect of frustration of the contract. This Court, in deciding the present appeal, is giving reasons which are different from those given by the trial court, as this Court is empowered to do so under Order XLI Rule 24 CPC. The judgment of this Court can be sustained on

totally independent reasoning which is not found in the judgment of the trial court.

5. Section 56 of the Indian Contract Act, 1872 reads as under:-

**“56. Agreement to do impossible act.**—An agreement to do an act impossible in itself is void.

**Contract to do act afterwards becoming impossible or unlawful.**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

**Compensation for loss through non-performance of act known to be impossible or unlawful.**—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

6. It is undisputed that as per the contract entered into between the parties, i.e. the Tender Notice proved as Ex.PW1/2/ Ex.PW1/5, it was mandatory for a supplier to have its own stone crusher. Therefore, effectively the stone dust and stone grit which was to be supplied by a supplier had to be from its own stone crusher. Since the stone crushers were prohibited from stone crushing activity, vide the order of the Hon'ble Supreme Court w.e.f. 15.08.1992, hence, in the opinion of this Court, the contract of supply stood frustrated as

per Section 56 of the Indian Contract Act. Hence, once the contract stood frustrated, the respondent no.1/defendant no.1 cannot be held guilty for the breach of contract.

7(i). The issue of breach of contract in the present case can be divided into two parts. Firstly, the breach till 15.08.1992, and secondly, the breach post 15.08.1992 and till the completion of the period of supply of 11.11.1992. So far as the second period is concerned, there is no issue or question of breach of contract by the respondent no.1/defendant no.1 as the contract stood frustrated after 15.08.1992 as discussed above, but the issue is that can the respondent no.1/defendant no.1 be held guilty of breach of contract for non-supply of the contracted stone dust and stone grit prior to 15.08.1992 i.e. from 11.05.1992 to 15.08.1992.

7(ii). As regards to this aspect of whether there is any breach of contract by the respondent no.1/defendant no.1 for non-supply of the contracted quantity prior to 15.08.1992, it has to be seen as to whether there was any specific contracted quantity which the respondent no.1/defendant no.1 had to supply under the subject contract. Admittedly, the contract does not specify any monthly or period

specific supply of stone dust and stone grit. No doubt, learned counsel for the appellant/plaintiff is prima facie right in arguing that in terms of para 3 of the Additional Conditions and Specifications found in the Schedule of Quantities, the respondent no.1/defendant no.1 had to supply the material proportionately within the time allowed, however, in my opinion, this clause is completely vague because 'proportionately' can mean either every month, or once every two months. Hence, the supply could be made by the respondent no.1/defendant no. 1, either a total of three times in the contracted period of six months, or the supply could be made proportionately i.e. twice, once within the first three months period, and the remaining (half) supply within the subsequent three months period ending on 11.11.1992 i.e. the expiration of the stipulated six month period. Therefore, in the opinion of this Court, such a vague clause cannot be interpreted in favour of the appellant/plaintiff to argue that there was necessarily a fixed quantity of supply every month up till 15.08.1992, and for such deficient supply, the respondent no.1/defendant no.1 can be held guilty for breach of contract.

8            Another important aspect to be noted is, that the very same Clause 3 of the Additional Conditions and Specifications in the Schedule of Quantities, specifically provides that the contracted supply, in the alternative to proportionate supply, can also be supply as per the requirements and directions of the Engineer-In-Charge of the appellant/plaintiff as informed to the respondent no. 1/defendant no. 1. Admittedly, no such direction has been filed and proved on record of the Engineer In-Charge of the appellant/plaintiff, that the contracted quantity had to be supplied in what quantitative and proportionate manner, and in what amounts during the six month period ending on 11.11.1992. Therefore, even on this ground, it cannot be argued by the appellant/plaintiff that there was a particular fixed quantity which was to be supplied by the respondent no.1/defendant no.1 prior to 15.08.1992.

9.            In fact, any doubt in this regard is removed because the appellant/plaintiff has not pleaded any such case in its pleadings or in its evidence that the respondent no.1/defendant no.1 is guilty of breach of contract in not having supplied a particular contracted quantity till 15.08.1992, or such particular contracted quantity had to be supplied

by the respondent no.1/defendant no.1 in terms of the contract by 15.08.1992. Therefore, since there do not exist any pleadings or evidence of the appellant/plaintiff to any entitlement to a particular proportionate supply of a particular quantity till 15.08.1992, therefore, in my opinion, it cannot now be argued on behalf of the appellant/plaintiff for the first time in this appeal that the respondent no.1/defendant no.1 should be held guilty of deficient supply upto 15.08.1992.

9. In view of the aforesaid discussion, in my opinion, there is no merit in the appeal. Dismissed.

**OCTOBER 01, 2018/ib**

**VALMIKI J. MEHTA, J**