

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

% Date of decision: 26th February, 2018

+ W.P.(C) 1683/2015, CM No. 3031/2015

ABHEY KUMAR JAIN

..... Petitioner

Through: Ms. Anusuya Salwan, Adv. with Ms.
Renuka Arora & Ms. Nikita Salwan,
Adv.

versus

SOUTH DELHI MUNICIPAL CORPORATION

..... Respondent

Through: Mr. Ashok Kashyap, Adv. for SDMC

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the petitioner with the following prayers:-

“It is, therefore, most respectfully prayed that this Hon’ble Court may be pleased to:

(a) issue a writ, order or direction in the nature of certiorari quashing the circular dated 11.02.2015;

(b) Any other or relief as this Hon’ble Court deems fit and proper may be passed in the facts and circumstances of the present case.”

2. It is the case of the petitioner that it was awarded the work of improvement and strengthening of internal roads by dense carpeting by the respondent Corporation on September 28, 2013. The stipulated date of start of the work was October 07, 2013 and the date of completion was April 06, 2014. It is the case of the petitioner that immediately thereafter he had deployed all the men and material and resources to execute the work. It is his case, he was awarded four other works. The contract value of all the works was ₹3.75 crores against which the petitioner has executed the work of ₹2 crores. Despite having executed the work of ₹2 crores, not even a single penny was paid to the petitioner.

3. On April 15, 2014, the Executive Engineer (Project-I) issued a show cause notice as to why action should not be taken against the petitioner for slow progress of the work under Clause 2 of the Agreement and disciplinary action under Clause 23 of the Contract Enlistment Rules. It is his case, on April 23, 2014/April 25, 2014, he had informed the respondent that petitioner was executing five contracts in the same division for ₹3.75 crores and though work of more than ₹2 crores has been completed, no bill nor payment towards any of the contract has been made, which caused financial pressure on the petitioner to execute the work and requested that in case some payment would be released, the work could be completed immediately. On April 28, 2014, the petitioner was given a notice for personal hearing before Superintending Engineer. The hearing took place on May 06, 2014 wherein the petitioner informed the respondent that he is willing to complete the work urgently in case some payments are released as the petitioner

has executed the work of more than ₹2 crores but not even a single penny has yet been released. The Superintending Engineer assured that the payment would be released to the petitioner. On May 19, 2014, provisional extension of time was granted upto June 15, 2014. On May 22, 2014, the respondent informed the petitioner that his bills are prepared and he should meet the accounts department for some formalities. The petitioner visited the accounts department several times but was denied payment on one account or the other. On June 18, 2014, again provisional extension of time was granted by the respondent upto July 15, 2014.

4. It is the case of the petitioner, though extension was granted but no action was taken for release of the payments. It is also his case that on July 11, 2014 and August 05, 2014, further extensions were granted upto July 31, 2014 and September 30, 2014 for completion of the project but not even a single penny is paid towards the bills prepared. On July 14, 2014, a circular was issued by the respondent blacklisting the petitioner from doing business with the SDMC for a period of five years. The said circular was the subject matter of a Writ Petition being No. 7179/2014. On January 16, 2015, this Court set aside the circular arising out of the show cause notice dated April 15, 2014. The petitioner's case is, it intimated the respondent that the project has been completed and till date not a single penny has been paid towards this project and therefore again requested for release of payments. Vide the impugned order, the Executive Engineer, on the basis of a show cause notice dated April 15, 2014 has imposed and sought to recover penalty under Clause 2 of the Agreement.

5. The respondent has filed a counter affidavit wherein it has been stated that the date of start of the work was October 07, 2013 and completion was to be done on or before April 06, 2014. The petitioner had not started the work on the given date. In fact there was a slow progress of work, which was admitted by the petitioner. The respondent has referred to various letters dated November 20, 2013, December 06, 2013 and December 31, 2013 in that regard. It is the case of the respondent, to keep the contract alive, six number of provisional extensions upto September 30, 2014 were granted to the petitioner from time to time for completion of work without prejudice to the right of the respondent to recover liquidated damages in accordance with the provisions of Clause 2 of the Agreement. It is averred that the petitioner started the work on November 24, 2013 and stopped the work only after executing a very small portion of it on November 25, 2013. It is the averred that the petitioner himself wasted valuable time since October 2013 to December 2013 and made a false plea of temperature being less than 10 degree centigrade. Respondent refers to a letter dated December 31, 2013 to the petitioner wherein it has been stated that the petitioner has carried out 5% of the work in spite of 1/3rd stipulated time of completion of contract had expired. It is also averred that the petitioner had executed the work partly in two work orders i.e work order 5 and 6 but due to non completion of mandatory provision of payment that the concerned Executive Engineer shall ensure that no payment is made to the contractor until satisfactory report has been received from the third party, the payment was not released. In other words, the payment if at all was

against two work orders and could have been made only after quality check up is carried out with regard to the work done by the petitioner. In fact the respondent referred to a letter dated April 09, 2014 that more than 50% work is still to be done and some of the defects have been noticed, which may be rectified and the petitioner was asked to explain the reasons within three days. However, provisional extension of time for completion of work was granted without prejudice to the right of the respondent to recover liquidated damages in accordance with the provisions of Clause 2 of the Agreement. The respondent has denied the fact that they have assured the petitioner about the release of the payment against the present project as well as the other projects. In any case, it is their case that the payment could not have been released without following the formalities. It is also stated on May 21, 2014 approximate 30-35% work of dense bituminous macadam was found completed and, therefore, the bill could not be passed at that time. It is also stated that the samples of Asphaltic concrete, which were lifted on May 21, 2014 had failed in quality test. Thereafter, the work was re-executed vide order dated July 03, 2014. After the re-execution of the work, sample was again collected on August 28, 2014. The test report was received only on September 29, 2014, which was found satisfactory. It is the conceded case of both the parties that minus the amount recovered as penalty, rest of the amount has been paid to the petitioner.

6. Ms. Anusuya Salwan, learned counsel for the petitioner submits that in view of the finding of the High Court in W.P.(C) No. 7179/2014 decided on January 16, 2015 that pursuant to the

hearing, the Superintending Engineer did not reject the reason i.e non-payment of bills by the respondent was the reason for not completing the work in time, the impugned communication imposing penalty for delay of work attributable to the petitioner is unsustainable. She further submits that the final bills having been paid, suggests the completion of work on time and no delay on the part of the petitioner and as such the penalty could not have been imposed.

7. On the other hand, Mr. Kashyap, learned counsel for the respondent Corporation apart from reiterating the stand taken by the respondent in their counter affidavit would submit that the fact that the work was to be completed before April 06, 2014 could only be completed in September 2014 would suggest the delay on the part of the petitioner in completing the same. He states, the plea of non-payment of dues as a ground for not completing the work is only an afterthought. According to him, the payment could not have been released without completing the formalities including getting the work done checked through quality control. That apart the direction of the Superintending Engineer was for release of the payment only after completing the formalities. If the formalities could not be completed because of reasons attributable to the petitioner, the same cannot be taken against the respondent. In any case, it is his submission that the very start of the work was delayed by the petitioner. Even the performance of the work was slow. He submits that in the month of December-January, the work was stopped by the petitioner on the alleged ground of temperature being less than 10 degree centigrade. He also states, every extension was

subject to the right of the respondent to recover liquidated damages in accordance with the provisions of Clause 2 of the Agreement, which aspect has not been protested by the petitioner at any point of time. Rather, the petitioner has accepted the extension. The respondent was within their right to claim the penalty.

8. Having heard the learned counsel for the parties, the only issue, which needs to be decided is whether the minutes of the hearing held by the Superintending Engineer acknowledges the fact that the petitioner could not complete the work because of the non-payment of the bills by the respondent. A perusal of the same at page 125 of the paper book would reveal that the Superintending Engineer has directed for finalization of pending bills after ensuring requisite formalities/testing etc. In fact para 2 at page 126 of the paper book would reveal that the petitioner was required to take up the work immediately and complete the same simultaneously, failing which the Executive Engineer shall initiate action under Clause 2 of the Agreement and 23 of the Enlistment Rules without any further notice. The said noting does not suggest, the Superintending Engineer has accepted that the petitioner could not complete the work because of non-release of the payment. In any case, the payment could not have been released without fulfilling the necessary formalities including the quality checkup of the work.

9. The conclusion of this Court in the judgment dated January 16, 2015 in W.P.(C) No. 7179/2014 was the Superintending Engineer did not reject the reason as indicated by the petitioner. At the same time, the noting also does not suggest the Superintending

Engineer has accepted the reason indicated by the petitioner. The said conclusion would not help the case of the petitioner in any manner. It is a matter of record, the respondent has from time to time extended the contract for completion of the work subject to recovery of liquidated damages in accordance with the provisions of Clause 2 of the Agreement, which has been accepted by the petitioner. It is also not in dispute that the date of completion of the work was April 06, 2014 and the work in fact had gone beyond that period. The work is said to be completed only after the work is certified by the quality control, which was only in the month of September, 2014. It is apparent that the work has been delayed by the petitioner for which the respondent has invoked the concerned stipulation in the Agreement to impose penalty equivalent to 10% of the contractual value, which is justified.

10. I do not see any merit in the petition. The same is dismissed. No costs.

CM No. 3031/2015

In view of the order passed in the writ petition, the application has become infructuous.

V. KAMESWAR RAO, J

FEBRUARY 26, 2018/ak