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

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Delivered on 15th October, 2019

+ **RFA 312/2018**

ZILLION INFRA PROJECTS PVT LTD

..... Appellant

Through: Mr.Naveen Sharma, Advocate.

versus

HIGH TECH ENGINEERING

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

CM APPL No.48682/2018

This application was moved by appellant for service of respondent through substituted means. Per order dated 27.02.2019 it stands disposed of.

RFA 312/2018

1. Despite service through publication, none appears for the respondent. Hence, the appeal is heard.

2. This appeal is against an impugned order dated 28.11.2017 passed by the learned Additional District Judge-03, North-West District, Rohini Courts, Delhi (hereinafter referred as the learned *Trial Court*) in CS No.78476/2016 whereby the application of the respondent under Order VII Rule 11(d) CPC was allowed and the plaint of appellant was rejected.

3. The appellant had filed the aforesaid civil suit for recovery of Rs.54,93,210/- against the respondent which was dismissed on the ground of limitation per Article 27 of the Limitation Act, 1963 (hereinafter referred as '*the Act*'). Thus, the short question involved in this appeal is if the provisions of Article 55 of the Act or the provisions of Article 27 of the Act would be applicable for the purpose of computation of limitation in the suit for recovery of damages filed by the appellant.

4. There was yet another suit bearing CS (OS) No.58546/2016 filed by the respondent against the appellant herein, where the respondent had pleaded the work was measured for payment on 31.03.2011 and debit notes were raised and secondly the amount sought to be recovered became due and payable on 05.05.2011.

5. The CS No.78476/2016 as filed by appellant is in the nature of the counter claim to the aforesaid suit of the respondent, but since at that point of time the pecuniary valuation of the suit was beyond the jurisdiction of the learned District Judge, it was filed in this Court, but afterwards due to enhancement of the jurisdiction, the instant matter was also transferred to the learned District Judge, but in a different district.

6. Admittedly, there is a contract between the parties to the suit and the appellant has alleged breach of the terms and conditions of the contract by the respondent viz. delay in carrying out the work within the time stipulated in the work/contract order; rather for incomplete work and hence the suit for recovery of damages on account of breach of contract is filed.

7. The learned Trial Court vide impugned order dated 28.11.2017 while allowing an application of the respondent under Order VII Rule 11 (d) CPC had rejected the plaint on the ground the suit is barred by limitation per Article 27 of the Act.

8. The work order was awarded on 16.01.2010 by the appellant to the respondent for erection of Pre-Heater for K.C.P. Cement Plant involving the erection work, alignment, welding, cleaning and final inspection. The copy of work order has been annexed as Annexure-*PI* to the appeal.

9. Allegedly, the work within the scope of the work order/contract dated 16.01.2010 was left incomplete by the respondent, but was completed by the appellant on its own and it was only thereafter the quantification of the damages / losses could have been made.

10. It is the grievance of the learned counsel for appellant that while deciding the application under Order VII Rule 11 (d) CPC, the learned Trial Court had considered the averments made by the respondent in its written statement and has not confined itself to the averments made in the plaint. It is alleged the facts involved in the suit would fall within Article 55 and note under Article 27 of the Act. Further, it is averred the limitation being a mixed question of law and fact the learned Trial Court need to have examined the witnesses on this score to arrive at any conclusive finding.

11. Para No.9 of the plaint records the fact the defendant / respondent did not complete the work as per work order dated 16.01.2010 within the time stipulated period of six months and did not carry out the cleaning of

scrap and waste material which was left scattered all over the site by the respondent and had also failed to carry out the final inspection to the satisfaction of the appellant and consequently, the appellant had to deploy its work force for completing the incomplete work and also had to keep its equipment and machinery deployed for the said extra period much beyond the scheduled date of completion until final completion on 01.06.2011. The appellant had to carry out the cleaning of the entire site by deploying labour to remove scrap and waste material which was left littered and scattered by the respondent and had to carry out the final inspection. Thus, the appellant suffered losses on account of loss of business, depreciation on machinery, deploying of heavy machinery for the period over and above and beyond the scheduled period of completion and deployment of extra labour for the purposes of cleaning which all work was within the scope of work of the respondent as per the work order. The heavy machinery comprising of cranes and Major T & P and other tools and tackles including welding machines had to be put to use for that extra period and the machinery and resources of the appellant remained withheld for that extra period of time because of the delay caused by the respondent. It is alleged appellant could have used the said resources during that period on some other site and could have earned business profits at the standard rates provided in the market for work involving deployment of similar type of machinery, major T & P and tools and tackles, welding machines.

12. Thus, the crux of averments made in plaint show work order was given to the respondent defining scope of the work to be completed within six months which was spilled over and left incomplete by the

respondent and was later got completed by the appellant through someone else and hence for the purpose of losses incurred due to non-completion of the work; which losses could have been determined only after the work was complete, allegedly on 01.06.2011, hence the suit for damages could have been filed by appellant within three years only after 01.06.2011.

13. In written statement filed by the respondent, it has alleged '*no dues and clearance certificate*' was given to the respondent after completion of the work and after the verifying all the machines/tools /parts and cleaning of the scraps at the site and such certificate being issued by the appellant on 15.11.2010, the suit could have been filed within three years with effect from 15.11.2010.

14. The impugned order dated 28.11.2017 reveals the learned Trial Court was influenced of the '*no dues and clearance certificate*' issued by the appellant on 15.11.2010 and held such suit ought to have been filed within three years from the said date and hence the suit filed on 28.03.2014 was held to be beyond limitation. The learned Trial Court considered the '*no dues and clearance certificate*' dated 15.11.2010 for computing the period of limitation. However, a perusal of such certificate would reveal it was a certificate for '*No dues in planning at the time*' What does this phrase mean or how it need to be interpreted was a question which could be determined only after evidence. The nature of the suit brought before the Court was for losses suffered by the appellant for non-completion of the work which per appellant was spilt beyond the stipulated period and was got completed by the appellant through some

other source, hence the actual losses could have only been assessed or determined once the work was complete, which per appellant was completed on 01.06.2011, hence the suit filed on 28.03.2014 was well within time.

15. The Article 55 of the Act notes:-

Article	Description of suit	Period of limitation	Time from which period begins to run
55	<i>For compensation for the breach of any contract, express or implied not herein specially provided for.</i>	Three years	<i>When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.</i>

The breach continued till 01.06.2011 when it actually ceases, hence the limitation would start once the work was complete, which per appellant was only on 01.06.2011. Even otherwise, the plaint ought not to have been rejected on a plea obtaining ‘*no dues and clearance certificate*’ by the respondent allegedly absolving it of all liabilities. In fact such certificate ought not to have been looked into at all while dealing with an application under Order VII Rule 11 CPC. The allegations set out in the plaint only ought to have been examined.

16. In *Kamala and Others vs K.T.Eshwara and Others* (2008) 12 SCC 661 the Supreme Court held:-

“Order VII, Rule 11(d) CPC has limited application. For its applicability, it must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. What would be relevant for invoking clause (d) of Order VII, Rule 11 CPC are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. For the purpose of invoking said provision, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.”

17. In view of above, the impugned order dated 28.11.2017 passed by the learned Trial Court is liable to be set aside and suit of the appellant needs to be decided in accordance with law. The plea raised by the respondent in the application under Order VII Rule 11 (d) CPC cannot be decided without evidence of parties, such plea being based on facts and law. Ordered accordingly.

18. The suit of the appellant is thus restored to its original number. The appeal stands allowed. Needless to say the learned Trial Court be not influenced by any observation made above and decide the issues in accordance with law, per evidence of parties.

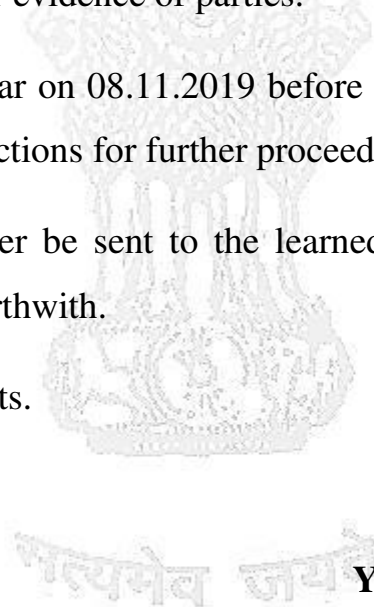
19. Appellant to appear on 08.11.2019 before the learned Trial Court/ Successor Court for directions for further proceedings.

20. Copy of this order be sent to the learned Trial Court/Successor Court for compliance forthwith.

21. No order as to costs.

OCTOBER 15, 2019

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 **YOGESH KHANNA, J.**