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

Date of decision: 12th March, 2019

+ **CS(COMM) 489/2016**

LIXIL WINDOW SYSTEM PVT. LTD. Plaintiff

Through: Mr. Amish Tandon, Mr. Sameer Abhyankar, Mr. Ayush Beotra, Mr. Akshay Joshi & Ms. Priyanka Arora, Advocates (M-9899977720)

versus

EAST COAST CONSTRUCTIONS & INDUSTRIES LTD Defendant

Through: Ms. Ruhini Dey, Advocate (M-9953443462)

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J.(Oral)

1. The Plaintiff has filed the present suit for recovery of a sum of Rs.2,66,88,639/- against M/s East Coast Constructions & Industries Ltd. which was awarded the work for construction of the Tamil Nadu Legislative Assembly building at Omandurar Estate, Chennai by the PWD. Vide Letter of Intent (*hereinafter 'LOI'*) dated 20th July, 2009, some portion of this work was assigned to the Plaintiff for execution. The total value of the work is Rs.9,27,99,680/-. The said LOI provided for the scope of work as under:

“SCOPE OF WORK

Your scope of work includes design, supply, fixing, testing and handling over of structural glazing and cladding work with cost of all materials, scaffolding,

labour, tools and tackles, consumables etc., as per client's specification and as directed by the client (PWD)/Architect."

2. The retention amount prescribed was 5% of each running bill. Payments were to be made as per the payment terms contained in the LOI. Subsequent to the LOI being issued, a service order was placed on the Plaintiff on 1st September, 2009. This service order is disputed by the Plaintiff.

3. The Plaintiff raised several RA bills being RA-01 to R-10. The said RA bills are admitted documents and are exhibited as Ex. PW 1/10, Ex. PW 1/11, Ex. PW 1/12, Ex. PW 1/13, Ex. PW 1/16, Ex. PW 1/17, Ex. PW 1/20, Ex. PW 1/21, Ex. PW 1/28 and Ex. PW 1/29. The Defendant made part payments of all the RA bills, however, there were outstanding payments qua each of the RA bills. The Plaintiff repeatedly sought payment of the outstanding sums including the retention money and the warehousing charges, however, the same were not cleared by the Defendant. The ground on which the outstanding sums were not paid was that the work executed by the Plaintiff was not certified by the PWD. According to the Defendant, the service order contained a clause to the following effect:

"TERMS AND CONDITIONS:

All other terms and conditions agreed between ECCI and the client, namely PWD, will be applicable to you on "Back to Back" basis except the following"

4. The defendant avers that as per the above clause, until and unless certification is made by the client i.e. PWD, the payment was not to be made. Parties then led evidence. The Plaintiff lead the evidence of Sh.

Apurba Kumar Chatterjee and Sh. Nitin Kumar, who have exhibited the following documents on record:

- i. Ex. PW 1/3 – Copy of covering letter dated 10th August, 2009 annexed to letter of guarantee issued by Oriental Bank of Commerce
- ii. Ex. PW 1/4 – Copy of letter dated 21st August, 2009 bringing the first amendment in the LOI
- iii. Ex. PW 1/5 – Copy of service order dated 1st September, 2009 issued by the Defendant
- iv. Ex. PW 1/6 – Copy of letter dated 3rd September, 2009 bringing the second amendment to the LOI
- v. Ex. PW 1/7 – Copy of letter dated 16th September, 2009 bringing the third amendment to the LOI
- vi. Ex. PW 1/8 – Copy of letter dated 26th September, 2009 bringing the fourth amendment to the LOI
- vii. Ex. PW 1/9 – Copy of the letter dated 22nd October, 2009 bringing the 5th amendment to the LOI
- viii. Ex. PW 1/10 - Copy of the 1st RA Bill dated 1st January, 2010
- ix. Ex. PW 1/11 - Copy of the 2nd RA Bill dated 31st January, 2010
- x. Ex. PW 1/12 – Copy of the 3rd RA Bill dated 28th February, 2010
- xi. Ex. PW 1/13 – Copy of 4th RA Bill dated 31st March, 2010
- xii. Ex. PW 1/15 – Copy of letter dated 16th June, 2010 from the Defendant to the Plaintiff
- xiii. Ex. PW 1/16 – Copy of 5th RA Bill dated 30th June, 2010
- xiv. Ex. PW 1/17 – Copy of the 6th RA Bill dated 1st August, 2010

- xv. Ex. PW 1/18 – Copy of letters dated 2nd August, 2010 and 17th August, 2010 from the Defendant requesting the Plaintiff to extend the bank guarantee
- xvi. Ex. PW 1/20 – Copy of the 7th RA Bill dated 2nd September, 2010
- xvii. Ex. PW 1/21 – Copy of 8th RA Bill dated 30th November, 2010
- xviii. Ex. PW 1/23 – Copy of letter dated 15th December, 2010 from the Defendant to the Plaintiff informing the Plaintiff of imposition of liquidated damages by PWD
- xix. Ex. PW 1/25 – Copy of letter dated 30th December, from Defendant to Plaintiff informing the Plaintiff of outstanding payment and bill certification details
- xx. Ex. PW 1/26 - Copy of letter from Defendant to Plaintiff extending the time for the completion of the work
- xxi. Ex. PW 1/27 - Copy of letter from Defendant to Plaintiff requesting for extension of the bank guarantee
- xxii. Ex. PW 1/28 – Copy of the 9th RA Bill dated 22nd February, 2011
- xxiii. Ex. PW 1/29 – Copy of the 10th RA Bill dated 31st March, 2011
- xxiv. Ex. PW 1/32 – Copy of letter dated 26th May, 2011 from the Defendant to the Plaintiff regarding bill certification, warehousing charges and interest cost.
- xxv. Ex. PW 1/33 – Copy of letter dated 14th June, 2011 from the Defendant to the Plaintiff informing the Plaintiff of the PWD's instructions to stop work at the Assembly site
- xxvi. Ex. PW 1/38 – Copy of letter dated 30th January, 2013

extending the validity of the bank guarantee

xxvii. Ex. PW 1/39 – Copy of legal notice dated 11th March, 2014 sent from the Plaintiff to the Defendant

5. The Defendant lead the evidence of DW-1 – Sh. N. Shanmugasundaram.

6. Ld. counsel for the Plaintiff submits that there was no procedure prescribed for obtaining certification from the PWD. Further, even with respect to the earlier works for which the payments were made, the certification from PWD was obtained by the Defendant and not by the Plaintiff. The obligation to obtain certification, was never cast on the Plaintiff. He submits that the total amount due, as per the outstanding amount in the RA bills is a sum of Rs.1,18,24,979/- along with retention amounts of 5% under each bill to the tune of Rs.45,05,306/- and the warehousing charges of Rs.16 lakhs, along with the interest thereon. Ld. counsel further submits that the Defendant itself has raised claims against PWD, which are pending in arbitration, in respect of the work executed by the Plaintiff.

7. On the other hand, Ld. counsel for the Defendant submits that the Plaintiff had delayed in the execution of the work. However, she does not dispute the fact that arbitral proceedings have been commenced against PWD and the work executed by the Plaintiff is part of the claimed amounts in the said proceedings.

8. The amount of the RA bills and the payments made by the Defendant stand admitted on record. The payments made by the Defendant are also not in dispute. On the basis of the above documents and evidence, from the record, it is clear that the said service order was issued by the Defendant to

the Plaintiff. The cross-examination of PW-1 – Sh. Apurba Kumar Chatterjee shows that the project was completed in March, 2011. The cross-examination of PW-1 does not dispute any of the documents exhibited by PW-1. His cross-examination reads as under:

“....

XXXXXXX by Shri Ravi Shankar, Counsel for the defendant.

It is correct that in terms of clause 7 of the LoI the plaintiff was supposed to submit the programme of completion of the Project. The plan was submitted. (Vol. It was to be given from time to time). I do not remember the date of the submission of the programme of completion of the Project. I can give the date of submission of the programme of completion of the Project after checking our records. It is correct that the project was to be completed by 28.02.2010 as per the letter of intent. The project was however completed in March, 2011. I do not remember the exact date. We had objected to the service order dated 01.09.2009 through various letters which are not on record but I can produce the same if required. It is correct that the drawings and grid lines were approved on 12.10.2009 and we commenced the work shortly thereafter.

It is wrong to suggest that the various claims raised by me in my affidavit Exhibit PW1/A are vague and incorrect.

It is wrong to suggest that I am deposing falsely.”

PW-2 Sh. Nitin Kumar relied on the documents exhibited by PW-1.

9. Even his cross-examination does not challenge the various RA bills and the calculation of the outstanding amounts. His cross-examination reads as under:

“...I am not personally aware whether any schedule of completion of project was submitted in terms of the

clause 7 of the Letter of Intent Ex. P1 as I am from finance department. I have not placed on record any bills/ vouchers regarding the cost of material used in the project and the amount of salaries and wages of employees/workers, expenses of the warehouse and factory. It Is correct that the sum of Rs. 3.99 cr. is not included in RA Bills. The RA Bills as made by us were certified by the respondent and payments were made after deductions of advances, taxes, retention money etc. as per the Letter of Intent. The warehouse charges are actually the rent paid by us for warehousing. I have not placed on record any documentary evidence to support /prove the amount of rent paid by us. It is wrong to suggest that I have filed false affidavit and have deposed falsely today.”

10. In the evidence of DW-1, he stated in para 13 as under:

“...I submit here that it is pertinent to know that the procedure of certification of the RA BILL requires inspection and certification of the same by the client and if the client does not approve then the RA bill amount cannot be certified.”

11. In cross-examination, a specific question was put to DW-1 in respect of the above statement made in paragraph 13 of his affidavit, to which he responded as under:

“Q. Can you point out any provision in the LOI which provides for such procedure?

Ans. There is no such provision in the LOI.”

12. A perusal of the pleadings, documents and evidence on record, shows that all the RA bills stand admitted by the Defendant. The total bill amount of the RA bills from RA- 01 to RA-10 is to the tune of Rs.9,01,06,125/-. After giving credit to the mobilization advance and the interest on the

mobilization advance, the total payable to the Plaintiff was Rs.7,88,20,750/-. The payment received was however Rs. 6,69,95,771/-. The outstanding amount is a sum of Rs. 1,18,24,979/-. The only defence of the Defendant is that PWD had not certified the work executed by the Plaintiff. The witness of Defendant admits in his cross-examination, in respect of his statement that certification was to be obtained, that no such procedure was contained in the LOI. The LOI was the basic contract between the parties. Even if the service order is considered as binding on the Plaintiff, the service order does not clarify as to who had to obtain the certification from PWD. It cannot be presumed that the Plaintiff had an obligation to obtain a certificate from PWD, as admittedly, there was no privity of contract between the Plaintiff and PWD. For PWD, the Plaintiff was a stranger. The only terms and conditions that were binding between the Plaintiff and the Defendant, were the LOI and the service orders. None of these documents impose any obligation on the Plaintiff to obtain a certification, from PWD. DW-1 admits so, in his cross-examination. Further, the Defendant in its written statement has made the following averments:

“53. REPLY TO PARA 64: The content of this para is wrong and denied. It is the defendant who is going through major difficulties due to non-completion of the project on time. As mentioned in the earlier paragraph that due to the inquiry order of the Governor the work is stalled and also the payments have been stalled moreover, the payments so made against the RA bills are also under scrutiny and can be recovered. Moreover, there is an ongoing arbitration matter between the client (PWD) and the defendant company. Hence, any amount recoverable from the Government i.e. PWD (client) will be known only after the conclusion of Arbitration Proceedings.”

Moreover, the certification of the work executed by the Plaintiff also forms part of the claim made by the Defendant in the above said Arbitration proceedings.”

13. From the above extract in the written statement, it is clear that the work executed by the Plaintiff constitutes part of the claim filed by the Defendant against PWD. Once the work is considered as having been executed, the non-certification by PWD cannot bind the Plaintiff, inasmuch as it did not have an obligation for obtaining any certification. Under these circumstances, the suit is liable to be decreed for the following sums:

i) Outstanding amount under the RA bill and the RA-01 to RA-10	Rs.1,18,24,979/-;
ii) Retention money which was withheld at 5% per RA bill	Rs.45,05,306/-;
iii) Warehousing charges to the tune of	<u>Rs.16,00,000/-</u>
TOTAL	Rs. 1,79,30,285/-

14. The Plaintiff shall also be entitled to simple interest @ 8% from 2nd May, 2014 which is the date of first listing of the suit till date. The payment be made within three months, failing which, simple interest @ 10% on the decretal amount would be liable to be paid.

15. The Plaintiff's name was changed to M/s Lixil Window Systems Pvt. Ltd. The amended memo is taken on record. The decree sheet be drawn in favour of M/s Lixil Window Systems Pvt. Ltd.

PRATHIBA M. SINGH
JUDGE

MARCH 12, 2019/Rahul