

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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SECOND APPEAL NO. 331/2007

- 1) M/s J.E.N. Builders
Vidya nagar colony, Bhandara
Through Partners Shri V.E.Epan s/o Epan
Aged about 54 years, occu: Contractor.
- 2) Shri Natwarlal s/o Bhavanbhai Gohil
Aged about 54 years, occu: Contractor.
- 3) Shri Mohan s/o Epan
Aged about 25 years, occu: Contractor
- 4) Shri Joseph s/o Abraham (K.A. Joseph)
Aged about 27 years, occu: Contractor.
- 5) Shri Methew s/o Epan
Aged about 22 years, occu: Contractor

Plaintiffs 1 to 5 all are
R/o Bhandara, Tah.& Dist. Bhandara.

..APPELLANTS

v e r s u s

- 1) The Executive Engineering
Public Works Division
Bhandara, Tah. & Dist. Bhandara.
- 2) The Superintending Engineering
Public Works Circle, Nagpur
Tah. & Dist. Nagpur.

.. RESPONDENTS

.....
Mr.D.C.Chahande, Advocate for the appellants
None for the Respondents though served.
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CORAM: ANIL L. PANSARE, J.

DATED : 21.06.2023.

JUDGMENT:

Heard Mr.D.C.Chahande, the learned counsel for the appellants. The Respondents though served, are absent.

2. This Appeal has been admitted on the following substantial questions of law :-

“(1) Whether the deviation of the work from original quantity of work in the contract to the tune of more than 60% is permissible as per terms and condition of the contract in absence of any specific provision?”

“(2) Whether the document i.e. Modified design and drawing unilaterally reduced/ executed by the respondent is binding upon the party/ plaintiffs who was not present or signed the said document?”

“(3) Whether reduction of quantity of work by the respondent more than 25% by complete change of drawing/ design of the building and further terminating of the contract is justified in absence of specific provisions in the admitted documents/ contract is justified?”

3. The appellants were the original plaintiffs whereas, the respondents were the original defendants. The respondents/defendants had awarded the work of construction of Workshop Building for Industrial Training Institute at Bhandara to the appellants. The appellants deposited the security deposit of Rs. 81,000/-. The layout was given and the drawings were handed over to the appellants. The appellants found that the drawings given were altogether different and there was a huge deviation. The appellants studied the drawings and

the cost of work was reduced to Rs. 18.60 lakhs from the original cost of Rs. 28.68 lakhs. Three items viz. Item Nos. 15, 39 and 43 of Schedule B of the tender were reduced by more than 60%. The appellants, therefore, requested the Respondent-Department to execute the work at the rate 4.96% above the scheduled rates. The request of the appellants was turned down. Thereafter, a fresh tender was called by the respondents. The amount of security deposit paid by the appellants was forfeited by the respondents. The appellants, therefore, filed Special Civil Suit No.43/1991 before the learned Civil Judge, Senior Division, Bhandara.

4. The trial Court, after considering the evidence - oral and documentary, and after hearing both the parties, was pleased to decree the suit vide judgment and decree dated 04.05.1995. The respondents preferred an appeal against the same before the District Judge, Bhandara in RCA No.119/2000. The first appellate Court vide judgment and decree dated 29.01.2007 set aside the trial court's judgment. The appellants, being aggrieved by the reversal of the decree, have taken exception to the judgment passed by the first appellate Court, by way of present appeal, which has been admitted on the substantial questions of law quoted hereinabove.

5. Heard Mr.S.D.Chahande, learned counsel for the appellants and with his assistance, gone through the record. The respondents are absent, though served. The controversy revolves around the powers of the Engineer-in-charge to alter the specifications and design and consequences of such alterations and specifications. This controversy will have to be resolved in terms of the tender clauses accepted by both

the parties. Clause No. 14, 15 and 37 are relevant and, therefore, are reproduced herein-below :-

“14. The Engineer-in-charge shall have power to make any alterations in, additions to, the original specifications, drawings, designs and instructions, that may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions in this connection which may be given to him in writing signed by the Engineer-in-charge and such alteration shall not invalidate the contract; and any additional work which the contract may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work. And if the additional and altered work includes any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in Schedule of Rates of the Division or at the rates mutually agreed upon between the Engineer-in-charge and the contractor, whichever are lower. If the additional or altered work, for which no rate is entered in the Schedule of Rates of the Division, is ordered to be carried out before the rates are agreed upon, then the contractor shall, within seven days of the date of receipt by him of the order to carry out the work, inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-in-charge does not agree to this rate he shall by notice in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable, provided always that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly herein-before mentioned then in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the rate of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final.

Where, however, the work is to be executed according to the designs, drawings and specifications recommended by the contractor and accepted by the competent authority the alterations above-referred to shall be within the scope of such designs, drawings and specifications appended to the tender.

The time limit for the completion of the work be extended in the proportion that the increase in its cost occasioned by alterations or additions bears to the cost of the original contract work, and the certificate of the Engineer-in-charge as to such proportion shall be conclusive.

15: (1) *If at any time after the execution of the contract documents, the Engineer-in-charge shall for any reason whatsoever (other than default on the part of the Contractor and for which Government is entitled to rescind the contract) desire that the whole or any part of the work specified in the tender should be suspended for any period or that the whole or part of the work should not be carried out at all he shall give to the contractor a notice in writing of such desire and upon the receipt of such notice the Contractor shall forthwith suspend or stop the work wholly or in part as required, after having due regard to the appropriate stage at which the work should be stopped or suspended so as not to cause any damage or injury to the work already done or endanger the safety thereof provided that the decision of the Engineer as to the stage at which the work or any part of it could be or could have been safely stopped or suspended shall be final and conclusive against the Contractor. The contractor shall have no claim to any payment or compensation whatsoever by reason of or in pursuance of any notice as aforesaid, on account of any suspension, stoppage or curtailment except to the extent specified hereinafter.*

2) *Where the total suspension of work ordered as aforesaid continued for a continuous period exceeding 90 days the contractor shall be at liberty to withdraw from the contractual obligations under the contract so far as it pertains to the unexecuted part of the work by giving a 10 days prior notice in writing to the Engineer, within 30 days of the expiry*

or the said period of 90 days, of such intention and requiring the Engineer to record the final measurements of the work already done and to pay the final bill. Upon given such notice, the contractor shall be deemed to have been discharged from his obligation to complete the remaining, unexecuted work under this contract. On receipt of such notice the Engineer shall proceed to complete the measurement and make such payment a may be finally due to the contractor within a period of 90 days fro the receipt of such notice in respect of the work already done by the Contractor. Such payment shall not in any manner prejudice the right of the Contractor to any further compensation under the remaining provision of this clause.

(3) Where the Engineer requires the contractor to suspend the work for a period in excess of 30 days at any time or 60 days in the aggregate, the contractor shall be entitled to apply to the Engineer within 30 days of the resumption of work after such suspension for payment of compensation to the extent of pecuniary loss suffered by him in respect of working machinery rendered idle on the site or on account of his having had to pay the salary or wages of labour engaged by him during the said period of suspension. Provided always that the contractor shall not be entitled to any claim in respect of any such working machinery, salary or wages for the first time 30 days whether consecutive or in the aggregate of such suspension or in respect of any suspension whatsoever occasioned by unsatisfactory work or any other default on his part. The decision of the Engineer in this regard shall be final and conclusive against the Contractor.

4) In the event of:

(i) Any total stoppage of work on notice from the Engineer under sub-clause (1) in that behalf.

(ii) Withdrawal by the Contractor from the contractual obligations to complete the remaining unexecuted work under sub-clause (2) on account of continued suspension of work for a period exceeding 90 days.

(iii) Curtailment in the quantity of an item or items originally tendered on account of any alteration, omission

or substitutions in the specifications, drawing, designs, or instructions under clause 14 (1) where such curtailment exceeds 25% in quantity and the value of the quantity curtailed beyond 25 per cent at the rates for the item specified in the tender is more than R. 5,000/-.

It shall be open to the Contractor within 90-days from the service of (i) the notice of stoppage of work or (ii) the notice of withdrawal from the Contractual obligations under the contract on account of the continued suspension of work or (iii) notice under clause 14 (1) resulting in such curtailment to produce to the Engineer satisfactory documentary evidence that he had purchased or agreed to purchase material for use in the contracted work, before receipt by him of the notice of stoppage, suspension or curtailment and require the Government to take over on payment such material at the rates determined by the Engineer. Provided however such rates shall in no case exceeds the rates at which the same were acquired by the contractor. The Government shall thereafter take over the material so offered, provided the quantities offered are not in excess of the requirements of the unexecuted work as specified in the accepted tender and are of quality and specification approved by the Engineer.

37. 1) *Quantities in respect of the several items shown in the tender are approximate and no revision in the tendered rates shall be permitted in respect of any of the items so long as, subject to any special provision contained in the specifications prescribing a different percentage of permissible variation, the quantity of the items does not exceed the tender quantity by more than 25 per cent and so long as the value of the excess quantity beyond this limit, at the rate of the items specified in the tender, is not more than Rs.5,000/-.*

2) *The contractor shall if ordered in writing by the Engineer, so to do, also carry out any quantities in excess of the limit mentioned in Sub-clause (1) here of on the same conditions as and in accordance with the specifications in the tender and at the rates (1) derived from the rates entered in the current schedule of rates and in the absence of such rates (ii) at the rate prevailing in the market the said rates being increased or decreased as the case may be by the percentage which the total*

tendered amount bears to the estimated cost of the work as put to tender based upon the schedule of rates applicable to the year in which the tenders are invited (for the purpose of operation of this clause, this cost shall be taken to be Rs.....)

3) Claims arising out of reduction in the tendered quantity of any item beyond 25 per cent will be governed by the provisions of clause 15 only, when the amount of such reduction beyond 25 percent at the rate of the item specified in the tender is more than Rs. 5,000/-."

6. A bare perusal of these clauses indicates that by clause 14, the Engineer-in-charge has been entrusted with the power to make any alterations in, additions to, the original specification, drawings, design and instructions, that may appear to him to be necessary or advisable during the progress of the work. The contractor shall be bound by these instructions and that the alterations shall not invalidate the contract. The clause thereafter deals with the payment of additional work that may be required by the contractor to be carried out in terms of the modifications so made, Clause 37(3) will govern the present controversy. It provides that claims arising out of the reduction in the tendered quantity of any item beyond 25% will be governed by the provisions of Clause 15 only. Clause No.15(4)(iii) provides for payment to be made to the contractor when the curtailment of quantity exceeds 25% of the schedule quantity. In such eventuality, the contractor shall issue notice under clause 14(1) before the Engineer-in-charge and produce documentary evidence that he had purchased or agreed to purchase the material for use in the contracted work, before receipt by him of the notice of curtailment and in such eventuality, the Department will be required to take over on payment such material at the rate

determined by the Engineer-in-charge. Thus, these three Clauses, if read together, would clearly show that the deviation in the work quantity is permissible in terms of the agreed Clauses between the parties. The contract also provides for alteration, modification, design and that such modification will be binding upon the contractor. The contract does not provide such modifications could be made only in the presence of the contractor or under his signature. Thus, Engineer-in-charge is empowered to modify the design which may increase or decrease the quantity of items to be executed.

7. In the present case, it appears that the appellants vide letter dated 11.01.1988 (Exh.40), issued in favour of the respondents raised a grievance in respect of the reduction in the tendered quantity and made a request to permit the appellants to carry out the work at the rate 4.96 per cent above the scheduled rates. The appellants have also given another option by stating that they be permitted to withdraw the entire work in terms of Clause 15 of the tender and absolve it from the contractual obligation. The appellants thereafter have written a letter to the Chief Engineer and made similar such request. The respondents appear to have issued various letter to the appellants requesting him to commence the work and also notified the appellants of the action under clause 3(a) of the agreement if the work is not commenced. Clause (3) empowers the Executive Engineer to rescind the contract, amongst others, and provides that in that case, the security deposit of the contractor shall stand forfeited.

8. The appellants failed to commence the work and, therefore, the respondents have terminated the contract and forfeited the security

deposit. As stated earlier, the terms of contract would clearly indicate that deviation in the work from scheduled quantity is permissible and that the modified design and drawing by Engineer-in-charge will be binding upon the contractor and that his presence or signature for modification of design and drawing is not necessary. The terms of contract also provide for termination of contract in terms of clause no.3. This being the contract between the parties and the contract having been signed by both the parties, the appellants and respondents will be bound by the terms of the contract and, therefore, the appellants cannot now raise a grievance as put forth by them.

9. That apart, the terms of contract also provide for raising claims and a complete mechanism is provided for resolving such claims. The appellants, in a given case, could have raised the claims, however, the appellants thought it proper not to continue with the work and that therefore, the respondents were fully justified in terminating the contract and forfeiting the security deposit in terms of the agreed clauses of the contract.

10. The substantial questions of law are accordingly answered in the affirmative. There is, thus, no substance whatsoever in the Appeal, and as such, the same is dismissed. No costs.

JUDGE

sahare