

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.01.2023

+ RFA(OS)(COMM) 1/2021

**MR. RAJNISH YADAV PROPRIETOR OF
M/S BHARAT CONSTRUCTION CO.**

..... Appellant

Versus

**THE NORTH DELHI MUNICIPAL
CORPORATION**

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Moni Cinmoy & Mr. Abhinav Akash,
Advs.

For the Respondent : Mr. Sanjeev Sagar & Ms. Nazia Parveen,
Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE PURUSHAINDR KUMAR KAURAV

JUDGMENT

VIBHU BAKHRU, J

1. Mr. Rajnish Yadav has filed the present appeal under Section 13 of the Commercial Courts Act, 2015 impugning a judgement dated 06.05.2020 (hereafter '**the impugned judgement**') passed by the learned Single Judge in C.S (COMM.) No. 719/2017 captioned **Mr. Rajnish Yadav v. The North Delhi Municipal Corporation**, whereby the learned Single Judge dismissed the suit filed by the appellant.

Factual Context

2. The appellant is engaged in the business of civil construction under the name of his proprietorship concern, 'Bharat Construction Company'. On 10.02.2012, the North Delhi Municipal Corporation (hereafter '**MCD**') awarded a contract for construction work at A-74, Phase-I, Naraina Industrial Area to DTC Nallah at Loha Mandi Naraina in Karol Bagh Zone vide work order No. EE-Project Karol Bagh/SYS/2011-2012/14 (hereafter '**the Project**'), to the appellant for an amount of ₹4,05,26,960/- (Rupees Four Crores Five Lakh Twenty Six Thousand Nine Hundred and Sixty Only).

3. The appellant states that he deployed men, materials and tools required for construction within a period of ten days from the date of the aforesaid work order. Subsequently, on 11.04.2012 and again on 12.06.2012, the appellant informed MCD that that he would be appointing a civil engineer and a diploma holder with the requisite educational qualifications to supervise on the project.

4. On 28.08.2012, MCD extended the period for completion of the Project to 30.11.2012. Thereafter, the time for completion of the Project was extended from time to time. By a letter dated 23.01.2014, it was finally extended till 31.03.2014.

5. The appellant claims that he submitted the running bills, including bills of escalation in terms of Clause 10 CA (Payment due to Variation in prices of Materials after Receipt of Tender) of the General Condition of Contract for Municipal Corporation of Delhi Works (hereafter '**the Agreement**'), and the same were cleared by the

respondent. The appellant continued to execute the works in terms of the work order, despite hindrances at the construction site.

6. The appellant claims that he completed the Project on 04.05.2015 and submitted the Final Bill on 12.05.2015. He states that MCD paid the 8th, 9th, and 10th Running Account Bills (RA Bills) but did not clear the Final Bill, including the amount due on account of escalation in costs, in terms of Clause 10 CC (Payment due to increase/decrease in Prices/Wages, excluding material under 10 CA, after receipt of tender for work).

7. On 15.04.2017, the appellant issued a legal notice to the respondent under Section 80 of the Code of Civil Procedure, 1908, demanding payment of the remainder amount; however, the respondent did not pay the same.

8. Aggrieved by the non-payment of his claims, the appellant / plaintiff filed a suit in this Court [being **CS(COMM) No.719/2017** captioned '*Rajnish Yadav v. The North Delhi Municipal Corporation*']. In the said suit, the appellant / plaintiff raised the following claims:

- (a) a claim for a sum of ₹83,349/- on account of non-payment of the Final Bill;
- (b) a claim for a sum of ₹51,09,949/- on account of escalation under Clause 10 CC of the Agreement;
- (c) a claim for a sum of ₹17,60,000/- on account of expenses incurred due to prolongation of the work; and

(d) a claim for a sum of ₹30,00,000/- on account of refund of earnest money.

In addition to the above, the appellant / plaintiff had also claimed interest at the rate of 18% per annum on the aforementioned claims.

9. Accordingly, the appellant / plaintiff sought a decree against MCD for an aggregate amount of ₹1,41,33,670/- along with, interest at the rate of 18% per annum from the date of filing of the suit till the date of actual payment, in addition to costs.

10. MCD contested the said suit and filed its Written Statement. MCD claimed that the suit was barred by limitation. According to MCD, by virtue of Section 478(2) of the Delhi Municipal Corporation Act, 1957 (hereafter '**the DMC Act**'), the claims were required to be raised within a period of six months from the date of cause of action. MCD stated that since the cause of action had arisen on 04.05.2015, when the appellant / plaintiff had completed the Project, the present suit was barred by limitation.

11. MCD contested the claim for the amount of ₹83,349/- under the Final Bill, *inter alia*, on the ground that the appellant / plaintiff had not applied for extension of time in the prescribed proforma. Insofar as the claim for escalation under Clause 10 CC of the Agreement is concerned, MCD contended that the said clause was inapplicable to contracts where the stipulated period of completion was less than eighteen months. MCD stated that since the time period for completion of the Project was six months, no escalation could be paid to the appellant / plaintiff under Clause 10 CC of the Agreement. Insofar as the claim for prolongation

of the Project is concerned, MCD resisted the same on the ground that no details or supporting documents were furnished by the appellant / plaintiff in respect of his claim for ₹17,60,000/-. MCD also denied the appellant's / plaintiff's claim for refund of the security deposit on the ground that Clause 45 of the Agreement prohibits refund of the security deposit until the contractor produces a clearance certificate from the Labour Officer. MCD also disputed the quantum of the security deposit available with it. It claimed that a sum of ₹27,88,530/- and not ₹30,00,000/- was deducted towards the security amount from the RA Bills and the earnest money deposited had been adjusted in the security deposit.

Impugned Judgment

12. The learned Single Judge rejected MCD's preliminary objection that the suit was barred by time. The learned Single Judge held that Section 478 of the DMC Act was not applicable as the suit was filed solely for enforcing the contractual obligations between the parties and was not pursuant to an act done or purported to have been done in pursuance of the DMC Act or the rules and regulations framed, thereunder. The learned Single Judge rejected the appellant's / plaintiff's claim for a sum of ₹83,349/-, on the ground that he had not obtained any prior permission to execute any extra item of work and further he had also not provided any details as to the breakup of the amount of ₹83,349/-.

13. The learned Single Judge accepted MCD's contention that Clause 10 CC of the Agreement was applicable only if the period of

completion of the contract was more than eighteen months as provided under Section 33.10 (2) of the Central Public Works Department Manual (hereafter '**CPWD Manual**').

14. The appellant / plaintiff's claim for ₹17,60,000/- on account of expenditure incurred for deploying the engineers during the extended period of the contract, was rejected by the learned Single Judge on the ground that the appellant / plaintiff had not provided any details as to the salaries paid to the engineers. Further, the appellant / plaintiff had also failed to establish that the two engineers named by him were present at the site and were engaged solely in doing the work related to the Project.

15. The appellant's / plaintiff's claim for refund of the security deposit was also rejected on the ground that he had not complied with the necessary formalities for refund of the security amount.

Reasons & Conclusions

16. The first and foremost question to be addressed is, whether the appellant / plaintiff had established that he was entitled to a sum of ₹83,349/-. As noted above, the learned Single Judge had rejected the said claim, *inter alia*, on the ground that the appellant / plaintiff had neither sought extension of time till the date of completion of the work nor, established that he had secured the approval for executing the extra items of work relating to the Project. We find that the said grounds are not tenable. The appellant / plaintiff had relied upon the measurement books, which clearly indicate that a balance of ₹83,349/- was payable after reducing the amounts covered under the RA Bills. It is also

material to note that the authenticity of measurement books or the measurements recorded therein, were not contested by MCD. MCD's contention that the amount was not payable as extension of time for the completion of work had not been granted is unpersuasive. Admittedly, the work was completed and MCD has not raised any claim on account of the alleged delay in completion of the works.

17. This Court had also pointedly asked the learned counsel appearing for MCD whether there was any material to indicate that the amount claimed related to extra items, which were not covered under the Agreement. He could not draw the attention of this Court to any evidence or material to indicate that the claim related to extra items, which were outside the scope of the contract or were not approved. It is clear from the measurement books that there was no dispute between the parties as to the value of the work executed. In view of the above, we are of the view that the appellant / plaintiff had established that he was entitled to the amount of ₹83,349/- as claimed and as reflected in the measurement books.

18. Mr. Sanjeev Sagar, learned counsel appearing for MCD, stated that the measurement books also indicated that after accounting for VAT, interest and cess, a sum of ₹70,013/- was payable, out of which a sum of ₹10,000/- had been withheld. However, there is no evidence on record to establish the reasons for withholding the sum of ₹10,000/- or for deducting interest or VAT. Since the appellant / plaintiff had established from the measurement books that he had executed the work

for a value of ₹83,349/-, for which he had not been paid, the appellant / plaintiff is entitled to the aforesaid amount.

19. Insofar as the appellant's / plaintiff's claim for escalation under Clause 10 CC of the Agreement is concerned, the same was rejected, *inter alia*, on the ground that the said clause was not applicable. The essential controversy in regard to the said claim is whether Clause 10 CC of the Agreement is applicable to the contract in question. The said Clause expressly provides that "*no such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule 'F'*". Admittedly, Section 33.10 (2) of the CPWD Manual indicates that Clause 10 CC would not be applicable where the stipulated period of completion is eighteen months or less.

20. According to the appellant / plaintiff, the CPWD Manual was not applicable. MCD's witness had also deposed in his cross-examination that the contract between the parties was an independent contract. However, the appellant / plaintiff was unable to establish that Clause 10 CC of the Agreement was applicable to the contract in question as the period stipulated under Schedule 'F' is blank. It is apparent that the copy of the Agreement placed on record is a proforma agreement and not a signed copy of the Agreement entered into between the parties. All variables are left blank.

21. It was contended by Mr. Moni Cinmoy, learned counsel appearing for the appellant / plaintiff, that an adverse inference must be drawn against MCD because the appellant / plaintiff had issued a

specific notice calling upon MCD to produce the Agreement, but it has not done so. On the contrary, MCD had asserted that the Agreement was already on record. However, what is on record is a proforma agreement placed by the appellant / plaintiff. This Court is unable to accept that since no period has been filled up in Schedule 'F', it automatically implies that Clause 10 CC of the Agreement is applicable. There is an express exclusion of Clause 10 CC of the Agreement for contracts where the stipulated period is less than that as specified in Schedule 'F'. It is not disputed that the format of the agreement entered into between the parties draws heavily on the standard format of the CPWD contracts. The parties were required to establish the stipulated period for completion of the Project under Schedule 'F' but there is no evidence to that effect. Thus, it would be reasonable to assume that the stipulation contained in the CPWD Manual would also be applicable to the contract in question. It is also important to observe that the onus to establish the stipulated period under Schedule 'F' rested on the appellant / plaintiff. Keeping the aforesaid in mind, this Court is unable to accept that the appellant / plaintiff has established that Clause 10 CC of the Agreement is applicable to the contract in question. We find no infirmity with the decision of the learned Single Judge to reject the appellant's / plaintiff's claim for escalation under Clause 10 CC of the Agreement.

22. The appellant / plaintiff had claimed a sum of ₹17,60,000/- towards expenses during the prolongation of the work. According to the appellant / plaintiff, he had deployed two technically qualified persons, one holding an engineering degree and the other holding a

diploma in engineering, during the extended period of thirty-two months. The appellant / plaintiff claimed that he had paid a salary of ₹30,000/- per month to the person holding a degree in engineering and ₹25,000/- per month to the person holding a diploma in engineering. The said claim was rejected by the learned Single Judge on the ground that the appellant / plaintiff had not proved that the two persons were deployed by him at the site. Mr. Cinmoy contended that, in terms of the contract, the appellant was obliged to deploy the two engineers at the site, and there is no allegation that the appellant / plaintiff had not complied with the said requirement. He submitted that the appellant / plaintiff was thus entitled to the payment of the said amount.

23. This Court is not persuaded to accept the said contention that the appellant / plaintiff had proved its entitlement to the amount as claimed. There is no evidence as to the essential facts as required to be proved. There is insufficient evidence to prove that the appellant / plaintiff had paid salaries to the two engineers, as claimed by him. There is also no material to show that the two engineers were fully deployed at the site in question. The learned Single Judge had also noted that the plaint was silent as to the names of the two engineers who were deployed at site by the appellant / plaintiff. In view of the above, we concur with the view of the learned Single Judge that the appellant / plaintiff has failed to establish its claim for additional expenses incurred during the prolongation of the work.

24. Insofar as the appellant's / plaintiff's claim for refund of the security deposit is concerned, it was admitted that MCD had deducted

a sum of ₹27,88,530/- from the amounts payable under the RA Bills furnished by the appellant / plaintiff. The amounts retained by MCD are admittedly refundable to the appellant / plaintiff. It was MCD's case that the appellant / plaintiff was required to complete certain formalities including production of certain certificates regarding clearance of labour dues for claiming a refund of the said amount. The learned Single Judge held that since the appellant / plaintiff had not completed the requisite formalities, he was not entitled to a refund of the said amount.

25. This Court is unable to concur with the said decision of the learned Single Judge. There is no dispute that the security deposit is refundable to the appellant / plaintiff and the same could be withheld only to secure MCD against any claims due to non-performance of the statutory obligations on the part of the appellant / plaintiff. There is no material to indicate that the appellant / plaintiff has not cleared its dues towards labour or any other statutory levy. A considerable amount of time has lapsed since the contract was completed. Admittedly, no claim has been made against MCD on account of any acts of commission or omission on the part of the appellant / plaintiff. Denying the appellant's / plaintiff's claim in this context would amount to permitting MCD to appropriate the security amount. Admittedly, there are no grounds for MCD to appropriate the security deposit. Thus, the same is required to be refunded to the appellant / plaintiff.

26. Insofar as the claim of interest is concerned, undisputedly, the appellant / plaintiff would be entitled to interest for the delay in release of the funds due to him. There is no justification for MCD to have

withheld the amount of ₹83,349/-, which was the balance amount against the works executed by the appellant / plaintiff. MCD has also failed to refund the security deposit due to the appellant / plaintiff. Accordingly, the appellant / plaintiff is also entitled to a reasonable rate of interest on the amounts due. We are of the view that simple interest at the rate of 9% per annum would be reasonable in the facts of the present case.

27. In view of the above, a decree in the sum of ₹28,71,879/- [₹83,349/- + ₹27,88,530/-] is passed in favour of the appellant / plaintiff and against MCD. The said amount be paid along with interest at the rate of 9% per annum from the date of completion of the work till the date of payment.

28. Decree sheet be drawn up in the aforesaid terms.

VIBHU BAKHRU, J

PURUSHAINDRA KUMAR KAURAV, J

JANUARY 10, 2023

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