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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)
ORIGINAL SIDE

IA NO. GA/1/2023
APD/9/2023
WITH
CS/242/2018
NORTHERN EXPRESS INFRA DEVELOPERS PVT. LTD.
VS.
DREDGING AND DESILTATION COMPANY PRIVATE LIMITED AND ORS.

AND

APD/12/2023
MACKINTOSH BURN AND NORTHERN EXPRESS CONSORTIUM AND ANR.
VS.
DREDGING AND DESILTATION CO PVT LTD AND ORS.

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date: 2nd December, 2024.

Appearance:
Mr. Ratul Das, Adv.
Mr. Md. Dilawar Khan, Adv.
Mr. Kamran Husain, Adv.
...for the Appellant in APD/9/2023.

Mr. JayantaMitra, Sr. Adv.
Mr. ArnabChakrabarty, Adv.
Mr. PragyaBhowmick, Adv.
...for the appellant in APD/12/2023.

Mr. SakyaSen, Sr. Adv.
Mr. SankarsanSarkar, Adv.
Mr. Sunil Kr. Singhanian, Adv.
...for the Respondent No. 1.

The Court :Both the appeals are heard together as they are arising out
of a common order dated 23.02.2023 in connection with an application

under Order XIII A of the Code of Civil Procedure, 1908 as amended by the Commercial Courts Act, 2015 praying for summary judgment for a sum of Rs.1,93,12,425/- alleged to have been admitted by the defendant no. 1 in his letter dated 16th August, 2017. The facts have been accurately stated in the judgment impugned. However, for the sake of brevity, we may briefly indicate the facts.

In or about November, 2017 in view of ensuing Ganga Sagar Mela, 2017 and to improve the navigability of certain channels in river Muriganga for smooth movement of cargo and passenger vessels for transportation of cargo, vehicles and pilgrims, Inland Water Authority of India on behalf of the Government of West Bengal invited online tender bids in which the plaintiff for dredging in Muriganga and also passenger vessel, Jetty No. 2 near Lot 8 and Benuban to Mohana in Chemaguri Creek/Khal to approximately quantity to be dredged was 3.15 lakh cubic meters in schedule "A" and 1.10 lakh cubic meters in Schedule "B" at a estimated cost of Rs.7,24,50,000.00/- and Rs.2,53,00,000.00/- respectively at a tender rate of Rs.230.00/- per cubic meter.

The plaintiff and one M/s RDL IDS PL JV were the only two contractors who submitted their tenders. Thereafter, the Inland Waterways Authority of India by a letter dated 7th December, 2016 addressed to Mackintosh Burn Ltd. requested the said defendant to make an offer for carrying out dredging at the aforesaid jetties at Lot- 8 and Chemaguri Khal on emergent basis by deploying cutter suction dredgers capable of dredging at least 250 cubic meters of solids per hour within the aforesaid tender rate of Rs.230.00/- per cubic meters.

Following the discussions between the parties and the offers submitted by the plaintiff to the defendant no. 2, i.e., Mackintosh Burn Ltd., contract was awarded to the defendant no. 2 and the plaintiff was assigned with the work of, inter alia, dredging and other related works in terms of the aforesaid two contracts. The work assigned for dredging for Ganga Sagar Mela, 2017 vide Memo No. 311 (2)/CON/G dated 14th December, 2016 after giving description of the work laid down various conditions which, inter alia, include;

“Work completion/progress is to be certified by the competent authority KOPT/Others nominated by the administration.”

The defendant in its communication dated 15th December, 2016 while requesting the plaintiff to take a project work has, inter alia, indicated certain terms and conditions which, inter alia, include;

“1. Payment will be made at Rs.202.50 per Cubic Meter of actual quantity silt dredged, as approved by the State Government.

3. Work completion/progress is to be certified by the competent authority: KOPT/Others nominated by the administration.

8. Payment will be disbursed immediately as receive from client.”

The plaintiff alleged that inspite of completing the work, the funds released in favour of the defendant no.1 by the defendant No.5 has not been released by the defendant no.1 in favour of the plaintiff. The defendant no. 1 is a consortium of defendant nos. 2 and 3 constituted for the purpose of executing the said project. The learned Single Judge in relying upon the aforesaid clauses and the letter dated 27th January, 2017 and the certificate dated 27th February, 2017 issued by the competent authority allowed the application for summary judgment to the extent of Rs.1,93,12,425/- and

directed the defendant no. 1 to pay the aforesaid sum. The said order was passed on the basis of an admission by the defendant no. 1 in its letter dated 16th August, 2017.

This order is under challenge.

Mr. Jayanta Mitra, learned senior counsel appearing on behalf of the appellant has submitted that the plaintiff cleverly has made KOPT proforma defendant although the main claim is against the said defendant. Payment, if any, in relation to the dredging work is subjected to a confirmation and certification by KOPT and in absence of any substantive relief claimed against KOPT the claim against the appellant/s cannot survive. The claim on account of the rest of the work is subject to the certificate to be issued by KOPT and the appellant/s is/are responsible for release of such funds. The plaintiff's claim to have completed 389,480 per cubic meters of job under the contract is inadmissible in absence of certificate by KOPT. Mr. Mitra has referred to the particulars of claims in which the plaintiff has referred to the quantum of work executed by the plaintiff under the work orders. It is further submitted that initially KOPT was a party. However, subsequently, KOPT was deleted and has now been relegated as a proforma defendant. Moreover, the plaintiff has not served the writ of summons of the amended plaint upon the appellant prior to filing of the application for summary judgment as mandated under Order XIII A Rule 2 of the Commercial Courts Act, 2015.

Mr. Ratul Das, learned advocate appearing on behalf of defendant no.3 submits that the bills are not in accordance with the contract and unless corrected, payment, if any, could not be released based on the certification of the competent authority.

Mr. Sakya Sen, learned senior counsel appearing on behalf of the plaintiff has submitted that the claim in the application is based on the communication made by the defendant nos. 1, 2 and 3 to the Additional District Magistrate (General) communicating the quantum of work carried out by the plaintiff and on the basis of the certification of the work approved by the competent authority, admittedly, the defendant no.1 has received a sum of Rs.2,14,58,250/- out of which the plaintiff is entitled to a sum of Rs.1,93,12,425/- based on the agreement entered into by and between the parties and reflected from the letter dated 15th December, 2016.

Considering the merits of the matter, it appears that the present appellants have forwarded the invoices raised by the plaintiff for the works executed to the competent authority for certification and verification and based on such communication, admittedly the authority has certified that the plaintiff has executed quantity of work of 95,370 cubic meter and on the basis of such certification, admittedly, the defendant no.1 has received a sum of Rs.2,14,58,250/-. Whether the plaintiff would succeed for the remaining claim in the suit is not a matter to be considered at this stage although we find substance in the submission of Mr. Jayanta Kumar Mitra, learned senior counsel submits that the suit may not succeed in absence of a specific claim being made against KoPT being the certifying authority and the entire edifice of the remaining claim is dependent upon an adjudication by KoPT which the present suit does not take care of and the balance claim may fail for lack of such adjudication being carried out at the trial.

However, as we observe that it is undisputed that the defendant no.1 has received a sum of Rs.2,14,58,250/- on the basis of a certification of the quantity of work of 95,370 cubic meter and on the basis of the letter dated

15th December, 2016, the plaintiff is entitled to the disbursement on the basis of calculation to be made at Rs.202.50 per cubic meter of actual quantity of silt dredged. It needs approval of the State Government. In the instant case, it has been approved by the State Government.

We make it clear that the observations made in this order shall not be interpreted out of context and shall not influence trial of the suit with regard to the remaining claim of the plaintiff. The judgment under appeal is affirmed.

Both the appeals and the applications are disposed of.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J)

KB/s.pal/R.Bhar