

(2020) 02 DEL CK 0429

In the Delhi High Court

Case No : Civil Suit (COMM) No. 235 Of 2017

M/S.Tirupati Cement Products

APPELLANT

Vs

Delhi Jal Board & Anr

RESPONDENT

Date of Decision : 20-02-2020

Acts Referred:

Limitation Act, 1963 — Article 55
Indian Partnership Act, 1932 — Section 69
Indian Contract Act, 1872 — Section 73, 74

Citation : (2020) 02 DEL CK 0429

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : S.K. Sharma, Sadaf Iliyas Khan, Sangeeta Bharti, Ashish Kumar

Final Decision : Dismissed

Judgement

”

Mukta Gupta, J”,,

1. By the present suit, the plaintiff seeks decree against defendant for recovery of ₹ 6,16,33,177/- with interest @ 12% per annum both pendente lite”,,

and future interest till realization of the whole of the decretal amount be passed in favour of the plaintiff.,,

2. Summons in the present suit were issued to defendants on 2nd May 2017 and after the defendants filed the written statement following issues were,,

framed on 8th May 2018:,,

i. Whether the delay- beyond 30th September, 2010 and till 23rd July, 2012 in completion of the works contracted by the defendants to the”,,

plaintiff is on account of the inability of the defendants, to provide necessary cooperation vis-a-vis seeking permissions/ grants from”,,

various other government authorities, that is, NHAI, DIAL, Delhi Traffic Police etc.? OPP",,

ii. Whether under the terms/of the contract, particularly Clause 5.55 of Section (V) of Special, Conditions of contract, the exclusive",,

obligation to take all necessary approvals from, the authorities and from anyone else required to give permission to complete the works was",,

of the plaintiff and the role of the defendants was only of assisting in Writing letters? OPD,,

iii. If the above issues are decided, in favour of the plaintiff, whether the plaintiff had deployed any tools, plants and manpower for any",,

additional days and if so, what additional amount was incurred by the plaintiff on this account and to what amount is the plaintiff entitled to",,

from the defendants therefor? OPP,,

iv. If the issues No.(i) and (ii) are decided in favour of the plaintiff, whether there was any price variation in commodities required for the",,

works between the said dates and what additional amount was incurred by the plaintiff on this act and to what amount is the plaintiff,,

entitled from the defendants on the said account? OPP,,

v. If the issues No.(i) and (ii) are decided in favour of the plaintiff, then whether there was any price variation of Rs. 134649.75 paise for",,

petrol and lubricants and whether the plaintiff has incurred the said expenditure? OPP,,

vi. Whether the plaintiff has incurred price variation in the sum of Rs.2,56,46,776.62 paise on account of delay and if so whether the",,

plaintiff is entitled to recover, the same from the defendants? OPP",,

vii. Whether the defendants have, admitted the delay to be on their part by not claiming compensation for the delay from the plaintiff under",,

Clauses 2.1, 2.2., 5.1, and 5.2 of-Section III of the Contract? OPP",,

viii. Whether the suit claim is within time? OPP,,

ix. If the plaintiff is' found entitled to any monies from the defendants, whether the plaintiff is entitled, to any interest thereon and if so at",,

what rate and for what period? OPP,,

x. Relief,,

3. The plaintiff is a partnership firm and is a registered contractor with Delhi Jal

Board (Defendant No. 1 herein). The Executive Engineer (Defendant,, No. 2 herein) of Delhi Jal Board invited the tender through public notice for execution of the work of P/L/J Internal Sewage System in rural villages of,, Khera, Paprawat, Roshanpura and Deendarpur along with peripheral sewer by trenchless method in Najafgarh area. The plaintiff submitted the tender",,, for completion of the assignment/tender work in response to the public notice and pursuant to the acceptance of the bid submitted by the plaintiff he,, entered into an agreement for the execution of the said work for the approved tendered amount of ₹ 20,26,88,567/- which was 11.05% below the",,, estimated cost of ₹ 22,78.67,979/- put to tender vide work order no. DJB/EE(C)/DR.XIV/2009/404 dated 16th March 2009.",,,

4. As per the tender agreement, the stipulated period for completion of the work was eighteen months from the commencement of the work that is 1st",,,

April 2009 and was to be completed on 30th September 2010. As per the award letter the time stipulated to complete the work was 18 months which,,

was to be calculated fifteen days from the date of the work order dated 16th March 2009. The work was completed by the plaintiff to the satisfaction,,

of the defendants and the completion was recorded on 23rd July 2012.,,,

5. Case of the plaintiff is that it performed all the formalities and technicalities well in time but the tender work was delayed because the defendants,,

were unable to provide the necessary cooperation vis-a-vis seeking permissions/ grants from NHAI, DIAL, Delhi Traffic Police and various other",,,

government agencies/authorities. Due to the delays the time for completion of work was further extended on various occasions by the defendants.,,,

The project manager of the Plaintiff, Madanjit Singh, power of attorney in the present case got the tender work executed under his own supervision",,,

with a delay of 22 months beyond the period of 18 months. He approached the defendant time to time for seeking cooperation and assistance for,,

necessary permissions from the appropriate authorities.,,,

6. The delay of 22 months in completion of work was completely and entirely attributed to the defendants, which delay further overburdened the",,,

plaintiff causing escalation of cost of labour, minimum wages of clerical and non - technical supervisory staff and increase in all commodities prices",,,

which were to be paid by the plaintiff. As the delay was on part of the defendants, the plaintiff did not make any formal request for extension of time.",,,

The defendants granted extension to the plaintiff without levying any compensation upon plaintiff. Therefore, the plaintiff was entitled to damages on",,, account of delay in execution of the tendered work as per the contract agreement beyond the stipulated date of completion, due to which the actual",,, cost of work done came to ₹ 21,75,68,592/- as against the original tendered amount of ₹ 20,26,88,567/-.",,

7. It is further averred in the plaint that the reasons for delay in execution of the work were duly recorded by the officials of defendant no. 2 in the,, register/book maintained by them. The defendants also failed to provide the clear site and further failed to remove the hindrances from the site which,, also resulted in the prolongation of work and further affected the working of the plaintiff and resulted in the idle losses.,,

8. In July 2012, after the completion of work the plaintiff approached the defendant and took up the issue of escalation of charges/amount and also the",,, damages due to delay and requested for payment of the escalation of costs of material, labour and other incidental affairs and damages.",,

9. According to the plaintiff the defendants admitted their fault and assured the Plaintiff that the escalation as well as the damages amount would be,, paid to the plaintiff at the time of making of the final payment of the bill. On this assurance plaintiff did not initiate any proceeding for recovery against,,

S.No.,Purpose,Amount

, "Expenses per day due to delay against the tools and plants and manpower including engineering, technical and other staff (for 1143 days delay)", "₹ 2,25,74,250/-

, Price variation for all commodities, ₹ 13277500.73/-

, Price variation for Petrol and Lubricants, ₹ 134649.75/-

, Price variation for Labour, "₹ 256,46,776.62/-

, TOTAL, "₹ 6,16,33,177/-

20. Sh. U.K. Sinha (PW-2), Deputy Labour Commissioner, Labour Department, Government of NCT, produced the photostat copy of order bearing",,,

No. F.12 (142)/02/MW/Lab/7283 dated 19th February 2009 issued by the Joint Secretary (Labour) and the Photostat copy of order bearing No. F.12,,

(142)/02/MW/Lab/1850 dated 08th September 2009 issued by the Joint Secretary (Labour). The copy of the order dated 19th February 2009 is Ex.,,

PW.2/A. The copy of the order dated 08th September 2009 is Ex.PW-2/B.Sh.,,

21. Anil Bharti (PW-3), Executive Engineer produced following documents i.e. Original Contract Agreement No: 03/2008-09 dated 30th March 2009",,

between the DJB and Sh. Sri Bhagwan Aggarwal, Smt. Sushma Aggarwal and Sh. Mukesh Aggarwal. Copies of the aforesaid documents were",,

proved as Ex.PW-3/1 (colly.). Copy of the letter dated 15th April 2011 written by the plaintiff to defendant No. 2 was proved as Ex.PW-3/2. Copy of,,

the letter dated 25th May 2011 written by the plaintiff to defendant no.2 was proved as Ex.PW-3/3. Original Letter of intent bearing, No.",,

DJB/EE/(C)DRXIV/2009/116 to 122 dated 6th February 2009 issued by the Executive Engineer to the plaintiff was proved as Ex.PW-3/4. Original,,

Work Order bearing No. DJB/EE/(C)DR.XIV/2009/404 dated 16th March 2009 issued by the Executive Engineer (C) Dr. XIV, to the plaintiff was",,

proved as Ex.PW-3/5. Copy of the Letter bearing Ref. No. 635 (1) TCP/2008-2009 dated 16/2/2008 issued by the plaintiff to the defendant was proved,,

as Ex.PW-3/6. Copy of the letter No. F-1(19)/DJB/EE (C) Dr. XIV/2010/1513 dated 25th November 2010 issued by the Executive Engineer (C) Dr.,,

XIV, to the plaintiff was proved as Ex.PW-3/7. Copy of the letter bearing Ref. No. 635 (33) TCP/2010-2011 dated 30th March 2011 issued by the",,

plaintiff to the defendant was proved as Ex.PW-3/8. Copy of the letter NO. F-/DJB/EE (C) DR.XIV/2011/484 dated 26th April 2011 issued by the,,

Executive Engineer (C) Dr. XIV, to the DCP Traffic Western Range was proved as Ex.PW-3/9. Copy of the letter No. F-/DJB/EE (C)",,

DR.XIV/2011/715 dated 20.06.2011 issued by the Executive Engineer (C) Dr. XIV to the plaintiff was proved as Ex.PW-3/10. Copy of the letter No.,,

F-/DJB/EE (C) DR.XIV/2011/1021 dated 24th August 2011 issued by the Assistant Engineer (C) DR. XIV to the plaintiff was proved as Ex.PW-,,

3/11. Copy of the letter No. DJB/EE (C) DR.XIV/2011/1095 dated 06th September 2011 issued by the Executive Engineer (C) DR. XIV to the,,

plaintiff was proved as Ex.PW-3/12. Copy of the letter No. DJB/EE (C) DR.XIV/2012/1462 dated 03.01.2012 issued by the Executive Engineer (C),,

DR. XIV, to the plaintiff was proved as Ex.PW-3/13. Copy of the Performance Report of completed Work bearing No. DJB/EE (C)",,

DR.XIV/2013/1484 dated 17th September 2013 issued by the Executive Engineer (C) DR. XIV was proved as Ex.PW- 3/14. Copy of the letter,,

bearing Ref. No. 635 (72) TCP/2015-2016 dated 17th November 2015 issued by the plaintiff to the defendant, along with this letter, the plaintiff had",,,

attached the calculations etc. (containing 21 pages) which was proved as Ex.PW 3/15. He failed to produce the hinderance register which was,,

summoned even after making repeated efforts to trace out the same.,,,

22. It would be in the first instance appropriate to deal with issue No.(viii) which relates to whether the suit claim was within the period of limitation.,,,

From the own showing of the plaintiff though the work was to be completed on 30th September, 2010, the work was completed actually on 23rd July",,,

2012 which fact is acknowledged by both the plaintiff and the defendant. The plaintiff for the first time raised the claim of the escalation/damages for,,

a sum of ₹ 6,16,33,177/- vide its letter dated 17th November, 2015 i.e. beyond the period of limitation of three years.",,,

23. Supreme Court in the decision reported as (2016) 14 SCC 761 State of Gujarat Vs. M/s. Kothari and Associates, dealing with the period of",,,

limitation, in the case of breach of contract under Article 55 of Limitation Act held as under:-",,,

11. It also appears to us that the contract was clearly not broken as the Respondents chose to keep it alive despite its repeated breaches,,

by the Appellant State. The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as",,,

each delay in handing over the canal/site by the Appellant State constituted to a breach that was distinct and complete in itself and gave rise,,

to a separate cause of action for which the Respondent could have rescinded the contract or possibly claimed compensation due to,,

prolongation of time and resultant escalation of costs. Of course the Respondent is enabled to combine all these causes of action in one,,

suit, as postulated in the C.P.C provided each claim is itself justiciable. Even the Respondent has argued before the High Court that the",,,

suit was based on successive breaches committed by the Appellant State. In our opinion, the suit was required to be filed within three years",,,

of the happening of each breach, which would constitute a distinct cause of action. Article 55 specifically states that in respect of successive",,,

breaches, the period begins to run when the breach in respect of which the suit is instituted, occurs. In this vein, Rohtas Industries Ltd vs.",,,

Maharaja of Kasimbazar China Clay Mines ILR (1951) 1 Cal 420 is apposite as it has held that when a party agrees to deliver certain,,

goods every month for a duration spanning certain years, the cause of action for breach for failure to deliver in a particular month arises",,,

at the end of that month and not at the end of the period of the contract. The situation before us is similar in that the cause of action had,,

arisen on each occasion when the Appellant State failed to hand over the site at the contractually stipulated time. Specifically, the limitation",,,

periods arose on 15.11.1976, 15.11.1977, 15.11.1978 and 15.11.1979, i.e. on the first day of each season, when the Respondent State",,,

committed a breach by failing to hand over the site. Thus the period of limitation did not commence at the termination of the contract period,,

or the date of final payment. The High Court's conclusion that the last date of breach and last date of payment were relevant, not each",,,

cause of action, was thus patently erroneous. For each breach, a corresponding amount of damages for additional costs could have been",,,

sought. The suit, however, was filed on 25.1.1985, well after the limitation period of three years for even the final breach, as the various",,,

causes of action became time barred on 15.11.1979, 15.11.1980, 15.11.1981 and 15.11.1982 respectively.",,,

12. There is another perspective on the method or manner in which limitation is to be computed. We have already narrated that the,,

Respondent, on every occasion when the extension was sought by it, had requested to be compensated for delay. The Appellant State had",,,

granted the extensions but had repudiated and rejected the Respondent's claims for damages. The effect of these events would be that,,

the cause of action for making the claim for damages indubitably arose on each of those occasions. It is certainly arguable that the,,

Appellant State may have also been aggrieved by the delay, although the facts of the case appear to be unfavourable to this prediction",,,

since delay can reasonably be laid at the door of the Appellant. The Respondent, however, could prima facie be presumed to have accepted",,,

a renewal or extension in the period of performance but with the rider that the claim for damages had been abandoned by it. If this,,

assumption was not to be made against the Respondent, it would reasonably be expected that the Respondent should have filed a suit for",,,

damages on each of these occasions. In a sense, a fresh contract would be deemed to have been entered into between the parties on the",,,

grant of each of the extensions. It is therefore not legally possible for the Respondent to contend that there was a continuous breach which,,

could have been litigated upon when the contract was finally concluded. In other words, contemporaneous with the extensions granted, it",,,

was essential for the Respondent to have initiated legal action. Since this was not done, there would be a reasonable presumption that the",,,

claim for damages had been abandoned and given a go-by by the Respondentâ??.,,,

24. In the present case, work was admittedly completed on 23rd July, 2012 and thus, the compensation for the alleged breach of contract by the",,,

defendants accrued to the plaintiff before 23rd July, 2012. The plaintiff in respect of the present claims, for the first time raised the claim by writing a",,,

letter to the defendants on 17th November, 2015 which was clearly beyond the period of limitation as by the said date, the claim had been time barred.",,,

The claim being time barred, raising the claim on 17th November, 2015 would not extend the period of limitation by filing the suit beyond the period of",,,

three years when the claim actually arose. Though the plaintiff states about oral assurance, however in the absence of any written acknowledgement",,,

of the liability the period of limitation cannot be extended.,,,

25. Though this Court is not required to go any further into the remaining issues having held that the claim in the suit is barred by limitation, however",,,

this Court is also proceeding to decide the claim of the plaintiff on merits to show that there is no merits in the claim sought in the present suit.,,,

26. Considering a claim under Section 73 of the Indian Contract Act Supreme Court in ONGC Ltd. vs. Saw Pipes Ltd., 2003 (5) SCC 705 held as",,,

under:,,

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the,,

stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took",,,

place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that,,

the witness has stated that redeployment plan was made keeping in mind several

constraints including shortage of casing pipes. The Arbitral,,
Tribunal, therefore, took into consideration the aforesaid statement volunteered
by the witness that shortage of casing pipes was only one",,
of the several reasons and not the only reason which led to change in
deployment of plan or redeployment of rigs Trident II platform B-121.,,
In our view, in such a contract, it would be difficult to prove exact loss or
damage which the parties suffer because of the breach thereof. In",,
such a situation, if the parties have pre-estimated such loss after clear
understanding, it would be totally unjustified to arrive at the",,
conclusion that the party who has committed breach of the contract is not liable
to pay compensation. It would be against the specific,,
provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing
on record that compensation contemplated by the parties,,
was in any way unreasonable. It has been specifically mentioned that it was an
agreed genuine pre-estimate of damages duly agreed by the,,
parties. It was also mentioned that the liquidated damages are not by way of
penalty. It was also provided in the contract that such damages,,
are to be recovered by the purchaser from the bills for payment of the cost of
material submitted by the contractor. No evidence is led by the,,
claimant to establish that the stipulated condition was by way of penalty or the
compensation contemplated was, in any way, unreasonable.",,
There was no reason for the Tribunal not to rely upon the clear and unambiguous
terms of agreement stipulating pre-estimate damages,,
because of delay in supply of goods. Further, while extending the time for
delivery of the goods, the respondent was informed that it would",,
be required to pay stipulated damages.,,

68. From the aforesaid discussions, it can be held that:",,

(1) Terms of the contract are required to be taken into consideration before
arriving at the conclusion whether the party claiming damages,,
is entitled to the same.,,

(2) If the terms are clear and unambiguous stipulating the liquidated damages in
case of the breach of the contract unless it is held that,,

such estimate of damages/compensation is unreasonable or is by way of penalty,
party who has committed the breach is required to pay",,

such compensation and that is what is provided in Section 73 of the Contract

Act.,,

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is",,

not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable,,

compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.,,

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation",,

contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the",,

measure of reasonable compensation.,,

27. Vide letter dated 17th November, 2015 to the defendant, the claim of the plaintiff is two folds, firstly payment due under Clause-10CC and",,

secondly payment due for losses on account of idle labour .,,

28. A perusal of the agreement between the parties reveals that Clause-10CC was deleted from the contract agreement between the parties and thus,,

the claim of the plaintiff under the said clause holds no ground and is liable to be rejected.,,

29. Considering the second claim of the plaintiff on the ground of labour and machinery sitting idle, it is pertinent to mention that though the work under",,

the contract was to be completed till 30th September, 2010 but through letters dated 28th November, 2010 and 3rd January, 2012 extensions were",,

granted to the plaintiff to complete work under the Contract Agreement without prejudice to the rights of the defendants to recover liquidated,,

damages/ taking appropriate action in accordance with the provisions of the relevant clauses of contract agreement for the work. Till 30th September",,

2010 that is the actual date of conclusion of the contract there was no communication between the parties regarding any claim whatsoever. Further,,

the first letter of plaintiff sent to the defendant is dated 15th April, 2011 intimating that the MCD staff were harassing the plaintiff and also took away",,

their equipments which led the labour and staff to sit idle as the Road Restoration charges were not paid by the defendants to the MCD. The,,

defendant vide letter dated 26th April 2011 made a request to the DCP Traffic for road cutting to lay sewer line from Delhi Gate crossing to Chawla,,

Stand, Najafgarh and also requested to carry out the work as the same was being delayed and it would have been difficult to carry out work in",,,

monsoon. Plaintiff vide letter dated 25th May 2011 to defendant made a reference to the earlier letters wherein attention was drawn to the department,,

for slow progress of work for want of permission from MCD. The tender in favour of the plaintiff was as per the trenchless technology which is also,,

reiterated by the letter dated 20th June 2011 of the defendant to the plaintiff granting the approval for the work of P/L Internal sewerage system,,

in rural villages Khera, Papravat, Roshanpura & Deendarpur along with peripheral sewer by trenchless method as due to site constraints and",,,

inability of the traffic department, the permission by open cut method could not be granted. Therefore, considering the communications between the",,,

defendants and MCD on 16th October 2008 whereby permission was sought by the defendant from MCD for road cutting and request was also made,,

to intimate the Road Restoration charges, further vide letters dated 9th April 2009, 22nd May 2009, 30th September 2009 , 21st December 2009, 31st",,,

May 2010, 27th July 2010, 24th October 2011 and 1st December 2011 it is evident that the Road Restoration charges were mostly settled by the",,,

defendants prior to 15th April, 2011 and only the revised Road Restoration charges of village Paprawat were paid after the said date. It cannot be said",,,

that there was any delay on the part of the defendant particularly in light of clause 5.55 of Special Conditions of the Contract, which reads as under:-",,,

5.55 The contractor should arrange the necessary permissions from road (However RR Charges shall be deposit by the department),",,,

traffic department, electricity deptt., and other services department required for execution of work. The department will access only in",,,

writing of letters. No extra claim should be entrained on account of delay in permissions",,,

30. During the said period various letters dated 9th March 2009 (Ex. D-2), 5th November 2009(Ex. D-6), 17th December 2009(Ex. D-7), 8th April",,,

2010(Ex. D-9), 5th January 2011 (Ex. D-13), 26th April 2011 (Ex. D-14) and 15th February 2012(Ex. D-17) were addressed to DCP Traffic by the",,,

defendant seeking permission for Traffic diversion and road cutting in Najafgarh Area. The fact of non-payment of Road Restoration charges by the,,

defendant to MCD does not arise as most of the charges were settled by the defendant hence the claim of the plaintiff on the said ground is not,,

justified as also in terms of Clause 5.55 of the Special Conditions of Contract as noted above.,,

31. In view of the discussion aforesaid, the claim in the suit being time barred as also being devoid of merit as noted above, the present suit is",,

dismissed subject to cost of ₹ 25,000/- in favour of the defendant.",,