P.T. Munshi Ram and Associates Vs. Delhi Development Authority

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Court : Delhi

Decided On : May-31-2010

Judge : S. Ravindra Bhat, J.

Acts : Indian Contract Act, 1872 - Section 73

Appeal No. : C.S. (OS) 1288/1997

Appellant : P.T. Munshi Ram and Associates

Respondent : Delhi Development Authority

Advocate for Def. : Anusuya Salwan and; Anil Garg, Advs.

Advocate for Pet/Ap. : Devashim Moitra, Adv.

Judgement :

S. Ravindra Bhat, J.

1. The suit claims permanent and mandatory injunction. By virtue of an amendment permitted during the pendency of proceedings, a decree for damages/compensation to the tune of Rs. 66,43,087.5/- with interest @ 24% per annum from 13.07.1994 till realization has also been sought.

2. The defendants (hereafter referred to collectively as 'the DDA') invited tenders for construction of houses at Sarita Vihar, New Delhi, in terms of a 'Self-Financing

Scheme', sometime in 1992; the estimated cost of the work was Rs. 1,48,34,098/-. The plaintiff submitted his tender on 14.08.1992, offering to execute the works @ 61.75% of the estimated costs, or Rs. 2,39,94,150/-. He was the successful bidder; and the contract was awarded to him, by the defendants, through their communication dated 04.12.1992. It is submitted that a formal letter of acceptance was communicated on 10.12.1992, and a binding contract was concluded on 18.12.1992. The suit contends that on receipt of the work order in terms of the stipulated date of start of the work, i.e. 22.12.1992, the plaintiff mobilized his labor force at the site earmarked by the defendants.

3. The suit alleges that on 23.12.1992, when the plaintiff's work force was about to start the work in question, one Sh. Moti Goel, with certain other individuals visited the site and threatened the plaintiff's work force with dire consequences if they commenced construction. It is alleged that Sh. Moti Goel stated that he was owner of the land and was beneficiary of an injunction order of the Court. The plaintiff mentions about intimating the DDA as to this fact immediately on 24.12.1992, by a letter. The plaintiff in that letter further requested DDA as follows:

XXXXXX XXXXXX XXXXXXIn view of above, you are requested to hand-over exclusive possession of the entire site without further loss of time, as we are stranded with men and machinery at site of work.XXXXXX XXXXXX XXXXXX

4. The plaintiff also states about a further attempt to have exclusive possession of the site secured, and refers to a letter dated 03.02.1993 issued to the DDA. That letter talks about the previous letter dated 24.12.1992, and reiterates the request to hand-over the site or an alternative site in the same locality or in Jasola within fifteen days (of the letter), failing which loss of profitability at 5% damages and other charges was threatened (against DDA). The suit mentions that on 23.03.1993, the DDA wrote a letter intimating that efforts were being made by it to have the said order vacated as early as possible and also about efforts to hand-over an alternative site in Jasola Village. The letter of DDA reads as follows:

XXXXXX XXXXXX XXXXXXDear Sir,

With ref. to your letter No. F.19/PMRA/SFS/Pkt.A/Gr.IV/92-93/301, dt. 24.12.92, it is to intimate you that the efforts are being made by this office to get the stay vacated as early as possible and efforts are also being made to offer you the alternative site in Jasola Village. The final decision shall be intimated within a fortnight.XXXXXX XXXXXX XXXXXX

5. The plaintiff in the suit refers further to his letter dated 20.05.1993, which narrates the contents of the previous letter and thereafter states that since no final decision was communicated by the DDA, and that if it was not in a position to provide an alternative site or able to secure vacation of the interim order, the contract 'may kindly be closed.' The suit avers that despite these developments, letters and reminders, the DDA remained uncommunicative and finally on 16.06.1994, issued a letter to the following effect:

XXXXXX XXXXXX XXXXXXDear Sir,

Whereas, the above mentioned work was awarded to you and agreement No. 31/EE/SED-4/DDA/92-93, was also made.

And whereas, the work cannot be started due to stay of the land.

Therefore, I, Haseeb Hassan, EE/SED-4, for and on behalf of the DDA by way of this notice inform you under the clause-13 of the agreement ibid that the contract stands closed & no further correspondence will be made in this regard.XXXXXX XXXXXX XXXXXX

6. The plaintiff mentions about a Press Note in the 'Times of India', inviting fresh tenders in respect of construction of SFS houses at Jasola, which was the promised alternative site instead of the contracted work. It is submitted that after the DDA intimated about closure of contract, the plaintiff caused a legal notice dated 13.07.1994 to be issued to the DDA mentioning about this event and narrating all the facts pertaining to award of contract to it, obstructions faced at the site, problems in the hand-over of the alternative site at Jasola and the DDA's subsequent inaction in this regard. The legal notice claimed a sum of Rs. 66,43,047/- as damages.

7. The DDA, in its written statement, disputes the maintainability of the suit, claiming that it is barred by res judicata since the Suit No. 946/1995 had been filed earlier, and was pending consideration. In para 3 of the written statement, the DDA concedes that Sh. Moti Goel claimed that the land which is the site in question belonged to him and was subject to an injunction order issued by this Court. However, the DDA disputes that the plaintiff had ever mobilized men, material or machinery or any other resources at site since it became aware of the obstruction at the very inception, i.e. 24.12.1992.

8. The DDA admits to receiving the plaintiff's letter dated 24.12.1992, and also asserts that every effort to secure vacation of the stay order was made. It also admits to issuing letter dated 23.03.1993 and reiterates that the plaintiff had never mobilized any resources as to have incurred prejudice or damage, as claimed in the suit. The DDA states that the contract was closed by a letter dated 16.06.1994 at the plaintiff's request. As far as the Press Notice inviting tenders for construction in Jasola is concerned, the DDA admits that such advertisement was in fact issued. It also concedes to having considered the question of allotting that site to the plaintiff, as alternative, in lieu of the awarded site (at Sarita Vihar) but decided against it as the plaintiff's rates were higher than the rates of tenders received for work at Jasola. The DDA here submits that it was obliged in law or contractually, to award an alternative site.

9. On the basis of the pleadings and the materials on record the documentary record being part of the previous suit, the following issues were framed on 05.05.2003:

1. Whether the suit is not properly valued for the purpose of court fees and jurisdiction? OPD;

2. Whether the plaint has been signed and verified or suit is filed by the plaintiff through a properly authorized person? OPP

3. Whether the land in question was in possession of the defendant and available for carrying out the work at the time when the tender was invited and contract of work awarded to the plaintiff? OPD

4. Whether the site in question was not available for carrying out the work during the currency of the contract entered into between the parties? OPP

5. Whether the plaintiff is entitled to the damages and if so to what extent? OPP

6. Relief

Issue Nos. 1 & 2

10. The first issue, pertaining to valuation, was struck, at the behest of the defendant DDA. Yet, it did not address any arguments on the question, during the hearing of the suit. Moreover, the court notices that the plaintiff had initially paid Rs. 7,300/- when the relief was confined to injunction; after the amendment was permitted, further court fees of Rs. 69,000/- were deposited. In these circumstances, the first issue is answered in the plaintiff's favour, and against the defendant.

11. So far as the second issue is concerned, it was struck at the behest of the defendant, though the onus of proving it was cast on the plaintiff. The latter has relied on the deposition of PW-1 Vinod Sharma, who filed his affidavit deposition, dated 22-3-2004 and tendered it as examination-in-chief, on 20th October, 2005. He deposed to being a director of the plaintiff, a private limited company, and also being authorized by a Board resolution to institute, and conduct the proceeding. He conceded that when the suit was filed, it was verified by S.K. Sharma, another director, but also stated - in the cross examination that he was carrying on correspondence with DDA, on behalf of the plaintiff, in regard to the disputed contract. He did not produce the extract of the Board resolution, but stated that he could do so, if he were asked to do it.

12. On an overall conspectus of the materials on record, and the deposition of the witness, who was cross examined by DDA, this Court is of the opinion that the plaintiff has been able to establish that the suit was duly instituted, and conducted by an authorized person, competent to do so. The issue is answered accordingly, in the plaintiff's favour, and against the defendant.

Issue Nos. 3 and 4

13. These two issues are inter-related, and would be discussed together. Shri Anil Kumar Kashyap, Executive Engineer of DDA, deposed as DW-1. He stated that the land in question (at Sarita Vihar) was available at the time the bids were invited, for construction by interested parties. He conceded that after the contract was awarded, one Moti Goel visited the site, and prevented construction activity, on the basis of an injunction order secured by him. He deposed in cross examination that the land belonged to DDA, but expressed unawareness whether possession was with it (the DDA) when the plaintiff was awarded the contract.

14. The written statement of DDA clearly states in more than one place that Moti Goel had secured an injunction; even the letter written to the plaintiff mentions about such order, and the efforts to have it vacated, and in the alternative, offer another site. Having regard to these admitted facts, the Court is of the opinion that these issues have to be answered against DDA, and in favour of the plaintiff.

Issue No. 5

15. The documentary evidence would disclose that the plaintiff was the highest tenderer, having offered to execute the works @ 61.75% of the estimated cost, or Rs. 2,39,94,150/-. The estimated cost of the work was Rs. 1,48,34,098/-. The work was to be completed within a specified period. However, the pleadings and documents reveal that the plaintiff was never able to start the construction work, at site, because right from inception there was obstruction by Moti Goel. DDA's letter of 23rd March, 1993, admits as much, stating, inter alia, that:.it is to intimate you that the efforts are being made by this office to get the stay vacated as early as possible and efforts are also being made to offer you the alternative site in Jasola Village. The final decision shall be intimated within a fortnight.

The DDA has not placed any document or material on record to show that such stay or interim order was vacated. Undeniably, the plaintiff wrote a letter dated 20.05.1993, narrating contents of the previous letters and further stating that since no final decision was communicated by the DDA, and as it was not in a position to provide an alternative site or able to secure vacation of the interim order, the contract 'may kindly be closed.' The evidence and pleadings also disclose that DDA wrote only on 16th July, 1994, stating that the contract was to be treated as

closed.

16. It is thus clear from an overall consideration of the facts that the plaintiff was not even able to start the work; from the inception the site awarded for construction was not free from obstruction.

17. The DDA's letter of 23.03.1993, even the termination letter dated 16.06.1994 show that despite its efforts, the interim orders which Sh. Moti Goel secured in his favor could not be vacated. It is thus clear that despite being awarded the contract, after being declared the highest bidder, the plaintiff was unable to execute the work for no fault on its part. The question which arises is whether the plaintiff would be entitled to any damages and if so, to what extent.

18. The plaintiff relies upon the judgments reported as Mohd. Salamatullah and Ors. v. Govt. of Andhra Pradesh : (1977) 3 SCC 590; Ms. A.T. Brij Paul Singh and Ors. v. State of Gujarat : (1984) 4 SCC 59; DDA v. Polo Singh and Co. : 101 (2002) DLT 401 (DB) and Dwaraka Das v. State of M.P. and Anr. : AIR 1999 SC 1031. It is urged in addition that the plaintiff is entitled to reasonable damages, also having regard to the circumstance that had the material time till the recession or cancellation in June 1994, it was under an obligation to keep itself in readiness to discharge the contractual obligations in the eventuality of the said order being vacated and the site being handed over to it for construction. It is submitted that to achieve this end, the plaintiff had kept men, material and resources in readiness to commence work and that aspect also should be taken into consideration while calculating the damages.

19. In M/s. A.T. Brij Paul Singh (supra), the Supreme Court, while considering Section 73 of the Indian Contract Act, 1872 held that when in a case, the party awarding the work is in breach of contract, and improperly rescinds it, the other party or contractor is entitled to claim damages for loss of expected profit, which he could have reasonably earned by performance of the contract. The Court held, speaking about the measure to be adopted while calculating the damages that

what would be the measure of profit would be dependant on facts and circumstances of each case but there shall be a reasonable exception of profit

which is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract, cannot be gainsaid.

In Mohd. Salamatullah and Ors. (supra), the High Court, in an appeal, reduced the quantum of damages awarded, from 15% of the contract value to 10%, without rendering any findings in support. The Supreme Court, restoring the trial Court findings, held that such quantification cannot be upset even if it were to be based on guesswork. In M/s. A.T. Brij Paul Singh (supra), the Court upheld award of damages towards compensation, cancellation and breach of contract on the head of loss of profit based on a calculation that the reasonable profit would be 10% of the contract value. In Sita Construction Co. v. Union of India : 69 (1997) DLT 697, this Court upheld the award of damages on the basis of calculation of damages at 10% of the estimated value. In that case too, the contractor could not even begin construction on account of impediments which ultimately led to rescission/cancellation of the contract. The Union of India had, in that case invoked an identically phrased clause in the contract, i.e. Clause 13.

20. The factual matrix in this case is that right from day one, the plaintiff contractor could not start work and take charge of the site. The problem persisted right through 1993; ultimately, ending on 16.06.1994 when the contract was terminated, by DDA. There is some indication from the material that the DDA considered giving an alternative construction site at Jasola to the plaintiff but nothing materialized on that front. The plaintiff, in the opinion of this Court, cannot claim any right in that regard since there is nothing in the contractual terms entitling it to award of an alternative site in the contingency of the awarded site not being made available. This position was also not seriously disputed by the plaintiff during the hearing. Under the circumstances, the Court has to decide whether there was a breach of contract premised upon which damages are to be quantified, on the basis of principles underlying Section 73 of the Indian Contract Act.

21. This Court has no doubt that the plaintiff could not proceed to take charge of the site due to an obstruction which was also undisputed by the DDA though it could have been reasonably considered or in any event was not addressed within

reasonable time after the award of contract. In these circumstances, there can be only one finding that the DDA was in breach of contract. The materials on record also suggest that till May 1993, the plaintiff was in active and regular correspondence with the DDA, complaining about existence of the obstruction that prevented start of the work. The DDA even acknowledged this in March 1993, but was unable to do anything. Eventually on 20.05.1993, the plaintiff addressed a letter stating that if an alternative site were not given, and the interim order were not vacated, the contract should be treated as closed. The plaintiff also reserved the right to claim damages.

22. Now the finding that the DDA was in breach of its obligation, to this Court's mind, does not automatically lead to the next step that the plaintiff should be awarded damages to the extent it claims. Section 73 suggests that the measure of damages for the breach of any contract should be the difference between market price of the goods or services in question at the date of the breach, as compared with what was contracted for. In the event of such assessment not being possible, the Court is free to adopt any other reasonable criteria. Side by side with this standard is the further requirement that the plaintiff/aggrieved party has to mitigate its damages. This is an important aspect which the Courts are to give effect to. Further, in the absence of any clause or condition entitling the aggrieved party to a quantified amount or an amount that can be earned on the basis of an agreed formula, as liquidated damages, the plaintiff must invariably prove the measure of loss in order to claim damages.

23. In the present case, aside from the letters which disclose that the plaintiff had intimated DDA from time to time till May 1993 about deployment of resources, manpower and material at the site and that they were kept in readiness, there is no other evidence by way of muster roll payments, higher charges for equipment, salaries paid to staff, supervisors or engineers etc. In these circumstances, it would be difficult to adopt a linear approach based on decided cases, which depended on the facts and circumstances proved.

24. To this Court's mind, the breach of contract in this case, commenced from the inception, i.e. 24.12.1992, when the obstruction was first noticed and intimated to

the DDA. Thereafter, till the formal closure of the contract on 16.06.1994 (by the DDA), there are two distinct periods. The first would end sometime in the end of May 1993 when the plaintiff had intimated by the letter dated 20.05.1993 that the contract should be treated as closed in the event the said order was not vacated or an alternative site was not given. If one were to add some grace period, that period would be up to 30.06.1993. The second period would between 01.07.1993 and 16.06.1994, i.e. approximately one year. If the rule indicated in by in the authorities is applied, the reasonable expectation for damages in such circumstances would be 10% of the entire contract value - awarded to the plaintiff. If one gave effect to the plaintiff's duty to mitigate its losses, it can be reasonably assumed that after 30.06.1993, no deployment of staff or equipment of the kind which took place earlier had been made. This is a reasonable assumption since the plaintiff had clearly intimated that the contract should be treated as closed on 20.05.1993. 10% of the contract value (Rs. 2,39,94,150/-) in this case would work-out to Rs. 23,99,415/-. In this Court's opinion, the most appropriate and adequate measure of damages, in the circumstances, would be the plaintiff's entitlement to a proportionate amount for the period 01.12.1992 to 30.06.1993, i.e. roughly a period of 7 months out of the total contractual period of 19 months. The plaintiff would, therefore, be entitled to about 36.84% (rounded off to 37%) of the said 10% amount (Rs. 23,99,415/-) towards loss of profit. This works-out to Rs. 8,87,783.55/-. It is, therefore, held that the plaintiff is entitled to damages for breach of contract by the DDA and that such damages would be to the extent of Rs. Rs. 8,87,783.55/-.

Issue No. 6:

25. In view of the findings rendered above, the plaintiff is held entitled to damages. The suit is accordingly decreed for the sum of Rs. 8,87,783.55/- (Rupees eight lakhs, eighty seven thousand seven hundred and eighty three, and paise fifty five only) with costs; counsel's fee is quantified at Rs. 75,000/-.