North Delhi Municipal Corporation Vs M/S. Barahi Construction

Regular First Appeal (COMM) No. 5, 6 Of 2021, Civil Miscellaneous Application No. 10181-10184, 10185-10188 Of 2021

Court: Delhi High Court

Date of Decision: March 15, 2021

Acts Referred:
Constitution Of India, 1950 â€" Article 12#Code Of Civil Procedure, 1908 â€" Order 12 Rule 6, Order 7 Rule 11#Indian Contract Act, 1872 â€" Section 25, 46

Hon'ble Judges: Manmohan, J; Asha Menon, J

Bench: Division Bench

Advocate: Sanjay Poddar, Namrata Mukim, Garima Jindal, Govind Kumar, Harshvardhan Sharma, Pratish Goel, Ashok

Final Decision: Dismissed

Judgement

Manmohan, J

1. Present appeal has been filed challenging order dated 7th January, 2021 passed by learned District Judge (Commercial court-05), Central Delhi, Tis

Hazari in CS(COMM) 683/2020, whereby the respondentÃ¢â‚¬â„¢s application under Order XII Rule 6 has been allowed and the suit has been decreed

against the appellant.

2. Briefly stated, the facts of the present case are that Respondent-Plaintiff was awarded five work orders on 1/4/2016 and it completed the same

within stipulated time, to the satisfaction of the appellant. The final bills for all work orders amounting to Rs. 38,34,799/- were approved by the

appellant. However, the payment was not released within prescribed time. Thereafter, the respondent-plaintiff sent a legal notice to the appellant to

which the appellant replied stating that the payments would be made after the amount is released by the SDM/Delhi Government. The respondent-

plaintiff then filed the suit for recovery before the District Court.

3. Appellant contested the suit and admitted its liability to pay the amount of passed bills but stated that work orders were placed at the request of

SDM/Delhi Govt. and due to non receipt of payment from them, the payment to the respondent-plaintiff could not be released. During the pendency of

the suit, respondent-plaintiff had made an offer to the appellant to pay the principal amount by 31st December, 2020 upon which the interest and costs

would be waived off. However, the appellant refused the said offer and filed an application under Order VII Rule 11. Subsequently, the respondent-

plaintiff filed an application under Order XII Rule 6 in which the impugned order has been passed.

4. Learned senior counsel for the appellant submits that learned District Judge failed to appreciate that the relief sought for by the respondent under

the garb of application under Order XII Rule 6 CPC was beyond the scope of the terms and conditions of the contract.

5. He states that learned District Judge failed to appreciate that the work orders were placed at the request of SDM/Delhi Government and due to

non-receipt of payment from them, the payment to the contractor cannot be released.

6. He further states that there was a condition in the NIT that the payment of the Bills will depend upon availability of funds in a particular head of

account and even the payments will be made on queue basis i.e. first and past liabilities to be given priorities and after those clearance, the payment to

the contractor will be released after the demand of the bills is received from the concerned SDM and that no interest shall be paid on the bill amount.

7. He emphasizes that there are judgments passed by the learned Single Judge of this Court wherein the queue basis payment had been approved. In

support of his contention, he relies upon the judgments of the learned Single Judges in RFA 786/2016, RFA 818/2017 and RFA 835/2017. According to

him, these judgments take a contrary view to the one taken in RFA 160/2017 decided on 22nd March, 2018 by a different learned Single Judge of this

Court.

8. This Court is of the view that the present appeal is liable to be dismissed inasmuch as a learned Single Judge of this Court in Ã¢â‚¬Ëœ North Delhi

Municipal Corporation Vs. Vipin GuptaÃ¢â‚¬â„¢ RFA 160/2017 has dealt with all the grounds urged herein and the same are no longer res integra. It is

relevant to point out that the appellant herein had preferred an SLP against the aforesaid order of the learned Single Judge, which came to be

dismissed vide order dated 03rd January, 2019.

9. The learned Judge in North Delhi Municipal Corporation Vs. Vipin Gupta (supra) was dealing with a batch of appeals passed in similar suits

wherein the appellant-corporations were relying on clause 7 and clause 9 to delay payment to contractors who had executed the work as per their

respective work orders. The relevant portion of the judgment dated 22nd March, 2018 in RFA 160/2017 is reproduced hereinbelow:-

Ã¢â‚¬Å“Conclusions and Findings

Ã¢â‚¬Å“56. The General Conditions of Contract i.e., clauses 7 and 9 which are admittedly part of the work orders issued by both the NrDMC

and the EDMC are being tested in these batch of cases. A contract which stipulates that the consideration would be paid in an unforeseen

time in the future based on certain factors which are indeterminable, would in effect be a contract without consideration. Even if the

contract is held to be a valid contract, then the concept of `reasonableness' has to be read into the same. Section 46 of the Contract Act and

the explanation thereto is clear that Ã¢â‚¬Å“what is a reasonable time is a question of fact in each case.Ã¢â‚¬ A Corporation which gets works

executed cannot therefore include terms in the contract which are per se unconscionable and unreasonable as Ã¢â‚¬

a) There is no fixed time period as to when the funds would be available;

b) There is also no fixed mechanism to determine as to when and in what manner the head of account is to be determined and as to how the

Contractor would acquire knowledge of these two facts;

c) There is also no certainty as to how many persons are in the queue prior to the Contractor and for what amounts;

d) There is enormous ambiguity in the receipt under the particular heads of accounts.

57. These clauses in effect say that the Contractor is left with no remedy if the Corporation does not pay for the work that has been

executed. Such a Clause would be illegal and contrary to law. Such clauses, even in commercial contracts, would be contrary to Section 25

read with Section 46 of the Contract Act.

58. The clauses do not specify an outer time limit for payment. The expression reasonable time has to be `a time'. The concept of time itself is

ensconced with specificity and precision. Clause 9 is the opposite of being precise. It is as vague and ambiguous as it could be because it

depends on factors which are totally extraneous to the contract, namely

Ã‚Â· Allotment of funds to the Corporation by the Government;

Ã‚Â· Allotment of funds in a particular head;

Ã‚Â· Allotment of funds for payments who are in queue prior to the contractor;

59. Thus, these factors, which are beyond the control of the Contractor and which would govern the payment of consideration, make the

said clauses of the contract completely unreasonable. The clauses have to thus, be read or interpreted in a manner so as to instill

reasonableness in them.

60. By applying the above said principles, in respect of final bills raised by Contractors for works executed, that have been approved by the

Engineer-in-Charge, the Clauses have to be read in the following manner:

a) Reasonable time for making of payments of final bills in respect of work orders up to Rs.5 lakhs shall be 6 months and work orders

exceeding Rs.5 lakhs shall be 9 months from the date when the bill is passed by the Engineer-in-Charge.

b) The queue basis can be applicable for the payments to be made in chronology. However, the outer limit of 6 months and 9 months cannot

be exceeded, while applying the queue system.

c) The payments are held to become due and payable immediately upon the expiry of 6 months and 9 months and any non-payment would

attract payment of interest for the delayed periods.

d) A conjoint reading of Clauses 7 & 9 along with the amendment dated 19th May, 2006, clearly shows that for the payment of bills, the

contractors have to follow the queue basis and as and when the amount is available under the particular head of account, the amount

would be payable. The amendment does not, however, have a condition that no interest is payable for delayed payment. Such a condition

exists only in Clause 7. Clause 9, therefore, when read with the amendment has to mean that the Corporation itself considers 50 months and

9 months to be the reasonable periods for which the payments of the final bills can be held back.

e) To the extent that queue basis is applied only for clearing of payments which do not extend beyond the period of 6 months and 9 months

period, it is reasonable. However, if the queue basis is applied in order to make Contractors wait for indefinite periods for receiving

payments, then the same would be unreasonable and would have to therefore be read down.

10. The appellant has sought to distinguish the aforesaid judgment on the ground that the clause 9 has subsequently been amended and the Learned

Single Judge had dealt with pre-amendment clause 9. It is pertinent to note that pre-amendment clause 9 prescribed a time period for making

payments i.e. payment of bills of upto Rs. 5 Lac had to be made within a period of Six months from the date of passing of bill and in case of bills of

more than Rs. 5 Lac, the payment had to be made within a period of 9 months. The same has been amended by office order dated 10th June, 2014.

The amended clause 9 now reads as under:-

Ã¢â‚¬Å“The contractor will get payment of his passed bills depending upon on availability of funds in particular heads of account. Payment will

be made strictly on queue basis. No interest will be payable to contractor in case if delay in payment on account of non-availability of funds

in particular head of accounts of MCD.Ã¢â‚¬â€‹

11. Perusal of the amended clause 9 shows that the appellants have deliberately removed the time period prescribed for making payments in order to

Ã¢â‚¬Ëœovercome Ã¢â‚¬â„¢ the directions issued by the learned Single Judge of this Court in RFA 160/2017. In fact, this is not the first time the appellant has

adopted this mechanism inasmuch as they had previously amended clause 9 to include the Ã¢â‚¬Å“queue basis paymentÃ¢â‚¬ to neutralize judgment of

another learned Single Judge of this Court in Jagbir Singh Sharma v. Municipal Corporation of Delhi in CS(OS) 1797/2007. The learned Single Judge

of this Court in North Delhi Municipal Corporation Vs. Vipin Gupta (supra) took note of this fact and observed as under:-

Ã¢â‚¬Å“33. It is slightly unfathomable as to how the Corporation can postpone the payment to the Contractor, indefinitely. The issuance of the

tender and the work order in favour of the Contractor has to be on the pre-condition that funds are available with the Corporation. To ask

the Contractor to wait endlessly for his payment is wholly arbitrary. The Corporation which hands over the works contract to the

Contractor cannot say Ã¢â‚¬Å“Do the work now, I will pay when I have the moneyÃ¢â‚¬. Even if such a clause has been signed and accepted by

the Contractor, it does not make the clause valid inasmuch as it would render a fundamental condition of contract being hit by provisions of

the Indian Contract Act, 1872 (hereinafter, Ã¢â‚¬Å“Contract ActÃ¢â‚¬). Every contract, to be valid, has to have consideration and the indefinite

postponement of consideration would be wholly unconscionable. In fact a Single Judge of this Court in Jagbir Singh Sharma v. Municipal

Corporation of Delhi [order dated 15th July, 2007 in CS(OS) 1797/2007] (hereinafter, Ã¢â‚¬Å“Jagbir SinghÃ¢â‚¬), while dealing with Clause 9 of

the General Conditions of Contract (as it then stood) has held as under:Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦

xxx xxx xxx

35. A perusal of the old Clause 9 reveals that there was an actual limit for making of payment i.e. 3 months and 6 months and in the context

of the said Clause, it was held in Jagbir Singh (supra) that Ã¢â‚¬Å“every endeavor should be made by MCD to make payment with the time

period stipulated in Clause 9Ã¢â‚¬. In the case of Jagbir Singh (supra), the Corporation, in its leave to defend application had submitted that

payment would be made as and when funds in a particular budget head are available with it. This Court categorically rejected this stand of

the Corporation by holding Ã¢â‚¬Å“Ex facie, the stand taken in the leave to defend applications cannot be accepted and has to be rejectedÃ¢â‚¬.

This Court held that the Contractors have no role to play in the internal affairs of the Corporation. But a perusal of the present Clause i.e.,

the new Clause 9 of the General Conditions of Contract shows that what was expressly rejected by this Court, even as a defense in the leave

to defend application in Jagbir Singh (supra), has now come to be added in the Clause itself along with a second element of a queue basis,

which were not part of the earlier Clause and has now been made part of the new Clause. It is, however, completely incongruous that the

addition of conditions of availability of funds and queue basis has been made, while at the same time retaining an upper limit of 6 months

and 9 months as against the earlier 3 months and 6 months in Clause 9 of the General Conditions of Contract. Clause 9 is, therefore, in the

teeth of the judgment of this court in Jagbir Singh (supra) and is nothing but an attempt to neutralize the said judgment. A Corporation

which gets works executed cannot therefore include a term in the contract which is per se unconscionable and unreasonable as Ã¢â‚¬

a) There is no fixed time period as to when the funds would be available;

b) There is also no fixed mechanism to determine as to when and in what manner the head of account is to be determined and as to how the

contractor would acquire knowledge of these two facts;

c) There is also no certainty as to how many persons are in the queue prior to the Contractor and for what amounts;

d) There is enormous ambiguity in the receipt under the particular heads of accounts.

36. These clauses in effect say that the Contractor is left with no remedy if the Corporation does not pay for the work that has been

executed. Such a Clause would be illegal and contrary to law.

37. Corporations which form a part of the State as envisaged under Article 12 of the Constitution have to conduct their activities in

accordance with law and public policy. Instrumentalities of States ought to be saddled with a higher responsibility to behave reasonably

and not arbitrarily. It can be no justification for a Corporation to claim that it would float the tender, it would issue the works contract, it

would get the work executed, its Engineer would supervise the work, the Engineers would pass the bills, but yet no payment would be made.

Such a luxury ought not to be available to anyone, even a private individual/corporation who enters into a contract, let alone a State

Corporation.Ã¢â‚¬â€‹

12. The learned Single Judge in North Delhi Municipal Corporation Vs. Vipin Gupta (supra) has further categorically held that the conditions being

imposed on the contractors by the appellant are Ã¢â‚¬Å“so vague and ambiguous into the future that at no point would a Contractor, who had executed the

work order, be able to demand payment.Ã¢â‚¬â€‹ The relevant observation on this aspect is reproduced hereinbelow: -

Ã¢â‚¬Å“48. The learned counsel for the Corporation also relies upon Cauvery Coffee Traders, Mangalore v. Hornor Resources (International)

Co. Ltd. (2011) 10 SCC 420 (hereinafter, Ã¢â‚¬Å“Cauvery Coffee TradersÃ¢â‚¬) to argue that Contractors cannot approbate and reprobate. Since

Contractors wanted to obtain benefits under the work order and the terms of the work order (including the General Conditions of Contract)

were well known to them, they cannot then argue that Ã¢â‚¬Å“I want the work order but without clause 7 & 9Ã¢â‚¬. This argument would have

been acceptable and appealing if the Clause under the contract had some reasonable time limit fixed for the payment to be made, while

following a queue system. However, the Corporation argues that there is no time limit fixed at all. There are too many contingencies and

conditions that are stipulated in order to make payment, namely:

(i) funds should be available with the Corporation;

(ii) funds should be available under specific head;

(iii) the ContractorsÃ¢â‚¬â„¢ turn to be paid should arise;

and

(iv) Interest would not be paid for the delayed period.

49. These four conditions are so vague and ambiguous into the future that at no point would a Contractor, who had executed the work

order, be able to demand payment. On the one hand, the Contractor is expected to obtain all the construction material at his own expenses,

employ labour at his own expenses and execute the work order. Thereafter, he has to submit his bills to the Corporation and the Engineer-

in-Charge has to pass the said bills. So far, the conditions are reasonable. However, to say that even after the bills are passed the payment

would be made if and when the funds are available, if and when ContractorÃ¢â‚¬â„¢s turn comes, is in effect to say that it would make the

payment in 1 year, 5 years, 10 years or not pay at all. Such a condition in any contract would be illegal, unconscionable and unreasonable.

There is no question of estoppel by election in such a case. In Cauvery Coffee Traders (supra) the Supreme Court's observation on

approbate and reprobate was in the context of a transaction that stood concluded `after extensive and exhaustive bilateral deliberations'.

The position in the present cases is the opposite. Here it is a standard form contract which is to be accepted without much choice. The only

choice before a Contractor is simply to not to apply for or accept the work order itself. Thus, the authority cited on this proposition would

not apply.Ã¢â‚¬â€‹

13. In view of the aforesaid, this Court is of the view that the amended clause 9 is in the teeth of the judgment of the learned Single Judge of this

Court in North Delhi Municipal Corporation Vs. Vipin Gupta (supra) and yet another attempt of the appellant to indefinitely and arbitrarily delay

payment to contractors.

14. This Court is in agreement with the findings of the learned District Judge that despite there being clear directions by this Court in similar cases, the

appellant has continued to flout the directions of this Court and unnecessarily delayed the payments to the contractors. The appellant has continued to

contest suits and file appeals on similar grounds that have been dismissed by this Court.

15. This Court is of the opinion that there are no contradictory orders of different learned Single Judges of this Court as contended by the appellant

inasmuch as the other order dated 01st December, 2016 in RFA 786/2016 and RFA 192/2016 passed by another learned Single Judge was in terms of

a previous consent order dated 17th November, 2016 after the appellant and respondent had arrived at a comprehensive settlement. The same was

followed by another learned Single Judge in RFA 818/2017 decided on 25th September, 2017 as well as RFA 835/2017 decided on 27th September,

2017.

16. It is pertinent to mention that the legality of Clause 7 and 9 was not adjudicated upon in any of these cases. It was only in the judgment dated 22nd

March, 2018 passed in RFA 160/2017 whereby a learned Single Judge of this Court considered the matter in detail on merits and passed a

comprehensive order.

17. This Court is also of the view that if the appellant has any remedy against the SDM/Delhi Government, it shall be free to invoke the same in

accordance with law.

18. Keeping in view the aforesaid, this Court finds no reason to interfere with the impugned order or differ from the view expressed by the learned

Single Judge in North Delhi Municipal Corporation Vs. Vipin Gupta (supra).

19. Consequently, present appeal along with pending applications, being bereft of merits, is dismissed.