

(2014) 12 CAL CK 0075

Calcutta High Court

Case No: C.S. No. 370A of 1997

Geeteecee Engineers and
Constructors

APPELLANT

Vs

Alstom Power Boilers Services
Limited

RESPONDENT

Date of Decision: Dec. 11, 2014

Hon'ble Judges: Debangsu Basak, J

Bench: Single Bench

Advocate: Sabyasachi Chowdhury, Rajarshi Dutta, Uday Goswami and S. Das, Advocate for the Appellant; Nairita Datta Chowdhury and Surajit Sen, Advocate for the Respondent

Judgement

Debangsu Basak, J.

The plaintiff claims compensation on account of breach of contract by the defendant. This is the Second suit between the parties. In the previous suit being C.S. No. 317 of 1997 the plaintiff claimed compensation on a conduct of breach of a different contract.

2. The parties entered into a contract in which the plaintiff agreed to provide assistance to the defendant for commissioning of electrostatic precipitator unit No. 2 at Madhya Pradesh. The parties agreed that the work will be completed within 180 days from the date of handing over site. The defendant agreed to provide all contract materials free of cost as also other provisions. The plaintiff claims that the defendant did not provide the materials within hundred and 80 days. The plaintiff claims that due to the defaults of the defendant, the plaintiff was made to expend nearly four years to execute a contract which was to be completed within 180 days. The plaintiff claims compensation on account of the delay caused by the defendant.

3. The plaintiff applied for examination of its witness on commission. The application was moved upon notice and was allowed by an Order dated July 31, 2014. The plaintiff duly adduced evidence before the Commissioner. In spite of notice, the defendant did not appear before the Commissioner. The witness of the plaintiff was

not cross-examined by the defendant. The defendant did not produce any witness at the hearing of the suit.

4. On the date of hearing of the suit, the learned Advocate for the defendant submitted that, the defendant was yet to execute any Vakalatnama in her favour. The suit was heard finally. On the conclusion of the hearing I posted the suit to allow the plaintiff to file a written notes on arguments. On such date an Advocate claiming to appear for the defendant wanted to file a written notes on arguments. The same was not allowed in absence of the Court being apprised as to the filing of the Vakalatnama on behalf of the defendant. In any event, no argument was advanced at the hearing on behalf of the defendant for the defendant to file any written notes on argument.

5. The parties went to trial on six issues which are as follows:--

"1. What that the terms and conditions of the contract in great by and between the plaintiff and the defendant?

2. Whether the defendant failed to perform obligations under the contract?

3. Whether the defendant was responsible for the delay in execution of the work by the plaintiff beyond the stipulated period?

4. Is the plaintiff entitled to a decree for a sum of Rs. 26,03,389/- as per particulars set out in paragraph 22 of the plaint?

5. Is the plaintiff entitled to interest?

6. What other reliefs is the plaintiff entitled to?"

6. The first issue is taken up for consideration. The parties entered into a contract in which the plaintiff was to erect and provide assistance to the defendant for commissioning of electrostatic precipitator unit No. 2 and its accessories at Madhya Pradesh. The plaintiff enumerates the terms and conditions of the contract between the parties in paragraphs 2 and 3 of the plaint. The plaintiff claims that the terms and conditions enumerated in paragraphs 2 and 3 of the plaint will appear from the correspondence exchanged between the parties namely the letter dated November 4, 1989, November 10, 1989, two letters dated March 31, 1990, June 22, 1990 and December 8, 1990. The existence of the contract, as well as, the terms and conditions thereof as stated by the plaintiff in the plaint is not denied by the defendant in the written statement. The defendant has not produced any evidence to contradict the claim of the plaintiff.

7. The plaintiff refers to Exhibits "A", "B" and "C" and claims that, the terms and conditions of the contract can be had from these exhibits. The letter dated December 8, 1990 been Exhibit "C" is a letter of intent and this specifies that the terms and conditions of the present contract will be in line with the contract for unit No. 1. The work order for unit No. 1 dated June 22, 1990 is a part of Exhibit "B".

8. The first issue, therefore, is answered by holding that, the terms and conditions of the contract agreed to by and between the parties will appear from Exhibits "A" to "E" and that the essential features of such contract is summarised in paragraphs 2 and 3 of the plaint. Time was the essence of the contract. This will appear from the fact that the defendant required completion of the election within 180 days from the date of handing over of site.

9. The second and third issues are taken up together for the sake of convenience.

10. The contract between the parties is not in dispute. I find that time is the essence of the contract. The contract stipulates that, the erection has to be completed by the plaintiff within 180 days from the date of handing over of site by the defendant. It would appear from Exhibit "D" that the defendant handed over site to the plaintiff on January 10, 1991. The period of 180 days from January 10, 1991 would therefore expire on July 9, 1991. The plaintiff, however, took time till September 30, 1994 to complete the erection. The commissioning was done in December 1994.

11. The plaintiff claims that, the delay was on account of the defendant failing to provide critical erection materials to the plaintiff from time to time. By the contract, the defendant had agreed to provide the erection materials. The defendant admitted in its letter dated May 25, 1991 being Exhibit "G" and by the letter dated August 19, 1991 being a part of Exhibit "G" that, the defendant was unable to provide critical erection materials. This position continued till May 1994 as will appear from Exhibit "H" and "I". By a letter dated June 24, 1994 being a part of Exhibit "I" the defendant acknowledged that materials were not made available fully to the plaintiff up to June 1994.

12. In such circumstances the second issue is answered in the affirmative and against the defendant. Similarly the third issue is also answered in the affirmative and against the defendant.

13. The fourth issue is taken up for consideration. The plaintiff claims a sum of Rs. 26,03,389/- on various heads. The first of such head of claim is on account of revision in wages. The plaintiff claims that, there were frequent revision of minimum wages by the state of Madhya Pradesh and therefore the plaintiff was required to pay the minimum wages as fixed by the Government. The plaintiff claims compensation in respect of the increase in the minimum wages.

14. The plaintiff has established by Exhibit "J" being the circulars issued by the Madhya Pradesh Government from time to time that, the minimum wages was increased by the Madhya Pradesh government. The plaintiff through its witness established by Exhibit "G" the quantum of increase in minimum wages. Exhibit "J" is a calculation of the minimum wages in tabular form. The payment of wages by the plaintiff has also been proved by Exhibits "K" and "L". Exhibit "L" is the vouchers and payment receipts. The wage register is also produced in evidence. Consequently the plaintiff has been able to prove its claim of Rs. 3,71,631/- on this account. The

plaintiff is entitled to realise the said sum from the defendant.

15. The next head of claim is on account of increase in the cost of consumables. The plaintiff claims a sum of Rs. 4,55,756/- on such increase. The plaintiff proceeds on the basis that 30% of the cost of erection would cover the cost of consumables. The plaintiff took into account costs of three major consumables for the purpose of calculating the increase in the cost. The plaintiff has proved by oral as well as documentary evidence that, there were upward price revision in the three major consumables. This would appear from Exhibit "NN". The percentage calculated is in Exhibit "M". Reading Exhibits "NN", "H", "Q" and "P" together along with the oral evidence given by the witness of the plaintiff, it can be fairly said that, the plaintiff is entitled to the sum of Rs. 4,55,756/- from the defendant on this account. The plaintiff is therefore entitled to realise such sum from the defendants.

16. The third head of claim is on account of extra expenditure for staff salary, establishment costs and overheads. Due to the delay in the execution of the contract, the plaintiff incurred overhead expenses. The plaintiff claims a sum of Rs. 7,85,387/- on account of payment towards staff salary, vehicle hire, house rent and travelling expenses. The calculation in this respect is given by the witness of the plaintiff and appears from Exhibit "R". The plaintiff through its witness explains that, in view of the overlapping of the expenses with the other project, the plaintiff's claim is reduced in this suit. The entries in Exhibit "R" are supported by bills and payment vouchers forming Exhibit "S". The plaintiff having established its claim is entitled to the sum of Rs. 7,85,387/- from the defendant.

17. The fourth head of claim is on account of letting out the value of tools and tackles. The plaintiff claims that, the defendant did not permit the tools and tackles to be taken out by the defendant when requested. The defendant was allowed to remove the tools and tackles only on June 13, 1995. The tools, tackles and equipment of the plaintiff remained at site lying idle between February 9, 1992 and June 3, 1995. The hiring out charges are shown in exhibit NN. By oral evidence of the plaintiff witness proved the same. The plaintiff is entitled to a sum of Rs. 1,12,000/- on this account.

18. The next claim of the plaintiff is on account of loss of man hours due to power failure. The defendant was to provide free electricity, compressed air and drinking water at a convenient point for erection purpose. This will appear from the work order dated June 22, 1890 being part of Exhibit "B". The witness of the plaintiff established that, by reason of the failure on the part of the defendant to provide uninterrupted supply of electricity, 1,989 man hours were lost resulting in the loss of Rs. 32,888/- to the plaintiff. The witness of the plaintiff in reference to the daily progress report being Exhibit "W" and the schedule of rate of man hours being Exhibit "X" established the claim of the plaintiff. The plaintiff is entitled to recover the sum of Rs. 32,888/- from the defendant.

19. The next claim of the plaintiff is on account of hire charges of winches. The defendant was required to provide electric winches and pneumatic winches as will appear from the letter dated November 10, 1989 being Exhibit "B". The defendant did not provide the same. The defendant deducted a sum of Rs. 27,961/- from the bill of the plaintiff on account of hire charges of winches. The plaintiff by its letter dated June 28, 1993 being a part of Exhibit "X" protested as to the same. The witness of the plaintiff from Exhibit "Y" established that the plaintiff is entitled to Rs. 26,735.60p. However, since the claim of the plaintiff for Rs. 26,400/- such claim on this account is allowed.

20. The plaintiff claims a sum of Rs. 34,398/- on account of recovery of overhead charges. Under the contract, the defendant was required to make payment of 70% of the running account bill of the plaintiff as advance. The defendant failed to do so. This led to financial crisis of the plaintiff, resulting in the plaintiff becoming dependent upon the defendant for supply of consumables. The defendant deducted excess value for the consumables. The defendant recovered a sum of Rs. 34,398/- on account of overhead charges against supply of consumables. The defendant having failed to make timely payments, is not entitled to deduct overhead charges at such rate. The plaintiff refers to a letter dated February 25, 1992 which shows that the advance was not been released against pending running account bills. The witness of the plaintiff established a sum in excess of the amount claim on this account. The plaintiff will therefore be entitled to recover the sum of Rs. 34,398/- from the defendant on this account.

21. The plaintiff claims interest on retention money. There is no agreement as to interest. I am therefore not inclined to grant this claim.

22. The next claim of the plaintiff is on account of loss due to reduction in scope or work. The value of the contract was Rs. 30,50,000/-. The plaintiff would execute work for Rs. 25,86,903/- resulting in a short fall Rs. 4,63,097/-. The plaintiff claims 7% of Rs. 4,63,097/- as the loss of profit. Such claim being reasonable is allowed. The plaintiff will be entitled to recover a sum of Rs. 32,417/-being 7% of Rs. 4,63,097/- from the defendant.

23. The plaintiff claims a sum of Rs. 41,800/- on account of mobilisation and re-mobilisation. The witness of the plaintiff in reference to Exhibit "HH" has established that, the plaintiff was required to undertake mobilisation and the mobilisation at various stretches of the contract. The additional expenses incurred by the plaintiff forms part of Exhibit "VV" in the other suit. The particulars of wages paid are also forming part of Exhibit "VV" in the other suit. The plaintiff is entitled to the sum of Rs. 41,800/- as claimed from the defendant on this account.

24. The next claim of the plaintiff is on account of additional house rent expenses. The defendant was required to provide quarters for the residence of the employees. The defendant did not provide the same. The plaintiff incurred expenses on this

account. From exhibit HH it will appear that the defendant did not provide the necessary quarters. The witness of the plaintiff has established by oral evidence as well as by Exhibit "NN" that the plaintiff incurred average monthly rental of Rs. 2,000/- and average expenses for a vehicle at the rate of Rs. 3,000/- per month. The claim of Rs. 13,800/- of the plaintiff on this account is allowed.

25. The plaintiff claims compensation on account of extra man hours spent. The plaintiff through its witness established that 13,620 man hours were spent for rectification and modification by reason of defective materials supplied by the defendant. The terms of the contract required the plaintiff to spend 10,000 man hours for rectification. The plaintiff was therefore made to spend 3,620 man hours extra. The plaintiff therefore claims a sum of Rs. 58,710/- as compensation in respect thereof. The witness of the plaintiff established this claim. Therefore this claim of the plaintiff for the sum of Rs. 58,710/- is allowed.

26. The next claim of the plaintiff is on account of compensation for extra work. The plaintiff executed extra work. The witness of the plaintiff established a sum of Rs. 42,036/- on this account and therefore the same is allowed.

27. The plaintiff claims a sum of Rs. 45,556/- on account of compensation for electrodes. The plaintiff undertook the contract on the representation that the weight of each electrode would be Rs. 70/- per Kg. The plaintiff found the electrodes to be Rs. 75.74p. per Kg. The plaintiff installed 391.5758 Metric Tons of collecting electrode and has raised a bill for 361.90 Metric Tons only. The plaintiff claims the difference of 29.6768 Metric Tons at the rate of Rs. 1,525/- per Metric Ton only aggregating to Rs. 45,256/-. By letters dated January 30, 1995 and January 8, 1996 being part of Exhibit "NN" the plaintiff raised this issue with the defendant. The defendant did not reply thereto. The claim of the plaintiff on this account being reasonable is allowed. The plaintiff is entitled to realize a sum of Rs. 45,256/- from the defendant.

28. The aggregate of the thirteen heads of claims allowed is Rs. 19,89,072/-.

29. The plaintiff however admits to have received a sum of Rs. 3,58,403/- on account of escalation from the defendant. The plaintiff has offered to give credit to the defendant for such sum. Therefore, after giving credit for the sum of Rs. 3,58,403/- to the aggregate sum of Rs. 19,89,072/-, a sum of Rs. 16,30,669/- is due and payable by the defendant to the plaintiff. In view of the discussion herein above, issue No. 4 is answered by holding that the plaintiff will be entitled to a decree for the sum of Rs. 16,30,669/- against the defendant.

30. The next issue is of interest payable by the defendant to the plaintiff. The question is the quantum of interest to be awarded in favour of the plaintiff. The plaintiff claims interest at the rate of 18% per annum till the date of filing of the suit and at the same rate till realization. There is no agreement as to interest between the parties. The nature of transactions between the parties is commercial. The

plaintiff has relied upon a certificate from a bank stating that interest at the rate of 20 to 23 per cent was charged in respect of commercial transactions.

31. Since there is no agreement as to interest and since the nature of transaction is commercial the plaintiff is entitled to reasonable interest on the sum outstanding. The plaintiff is entitled to interest at the rate of 12% per annum on and from October 1, 1994 being the date next to the date of actual completion of the work until realization on the sum of Rs. 16,30,669/-. Issue No. 5 is, therefore, answered in the manner as provided herein and in favour of the plaintiff.

32. With regard to issue No. 6, I find that the plaintiff has incurred court fees of Rs. 10,000/-. The plaintiff has also incurred Rs. 34,000/- as the costs of commission. The plaintiff will, therefore, be entitled to Rs. 50,000/- as costs from the defendant. Issue No. 6 is answered accordingly.

33. C.S. No. 370A of 1997 is decreed accordingly. The department will draw up and complete the decree as expeditiously as possible.