

IN THE COURT OF SH. ARUN SUKHIJA,
ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)
TIS HAZARI COURTS, DELHI.

SUIT NO.:- 484/2017

UNIQUE CASE ID NO.:- 3375/2017

IN THE MATTER OF :-

Sh. Shyam Sunder
Sole Proprietor
M/s. Shyam Sunder
WZ-121, Om Vihar, Phase-II,
Uttam Nagar, Delhi-110059.

....Plaintiff

VERSUS

1. South Delhi Municipal Corporation,
Through its Commissioner,
10th Floor, Civic Centre,
Minto Road, New Delhi-110001.

2. The Executive Engineer (M-III)
West Zone,
South Delhi Municipal Corporation,
M.C.D. Office, C-Block,
Vishal Enclave, Opp. H. No. C-15,
New Delhi-110027.

....Defendants

SUIT FOR RECOVERY OF RS.18,45,241/- (RUPEES EIGHTEEN
LAKHS FORTY FIVE THOUSAND TWO HUNDRED FORTY ONE

ONLY) I.E. RS.15,19,417/- TOWARDS PRINCIPAL AMOUNT OF PASSED BILLS AS WELL AS SECURITY AMOUNT AND RS.3,25,824/- TOWARDS INTEREST.

Date of institution of the Suit : 17/10/2017
Date on which Judgment was reserved : 09/06/2020
Date of Judgment : 20/06/2020

::- J U D G M E N T -::

By way of present judgment, this Court shall adjudicate upon suit for recovery of Rs.18,45,241/- (Rupees Eighteen Lakhs Forty Five Thousand Two Hundred Forty One Only) filed by the plaintiff against the defendants.

CASE OF THE PLAINTIFF AS PER PLAINT

Succinctly, the necessary facts for just adjudication of the present suit, as stated in the plaint, are as under:-

- (1) The plaintiff is the sole proprietor of M/s. Shyam Sunder, a firm duly enrolled as Municipal Contractor with the defendants (erstwhile M.C.D.). The plaintiff is engaged in the civil constructions and supply of building materials. The plaintiff has been executing the work of civil nature for the erstwhile MCD and now, the South Delhi Municipal Corporation, since long.
- (2) The defendant no. 1 i.e. South Delhi Municipal Corporation (part of erstwhile Municipal Corporation of Delhi), is a body corporate of state of Delhi, established and governed under the M.C.D. Act. The suit is being filed against the defendants through its Commissioner, who is in-charge of

all the acts and day-to-day business of the defendants. The defendants are engaged in taking care of all the civil amenities, developments etc. of South Delhi.

- (3) The plaintiff being Govt. Contractor approached for the work orders through tenders, which were invited by the defendant no.2. The defendant no.2, after the satisfaction of the completion of the required conditions at the stage of pre-work orders, for the nature of works, as mentioned in the respective work orders, awarded work orders nos. 794, 795, both dated 09.12.2013 and 863, dated 24.12.2013 to the plaintiff for and on behalf of defendant no.1.
- (4) The plaintiff, after the award of respective work orders, entered into agreement with the addressee no.2 pertaining to respective work orders as a pre-condition of the award of work orders. The plaintiff completed the said work orders before the stipulated time. The works were completed by the plaintiff to the satisfaction of Engineer-in-Charge/defendant no.2 and the period prescribed for defect liability also passed-over without any negative remark and to the satisfaction of defendant no.2.
- (5) The defendant no.2 completed the final measurement of the aforesaid works and bills (first and final) pertaining to the aforesaid work orders were passed and recorded in the measurement books of the respective work orders. Further, as a pre-condition of the award of work orders, the plaintiff had also deposited the security/ earnest money towards the respective work orders. The details of amount of bills, date of passing and amount of security/ earnest money are tabulated below:-

Sr. No.	Work Order No.	Amount of passed	Date of passing	Amount of Security deposit/
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Shyam Sunder V. South Delhi Municipal Corporation & Anr.

		bill in Rs.	of bill	earnest money in Rs.
1.	794	451028.00	13.07.2015	76980.00
2.	795	457642.00	13.07.2015	74549.00
3.	863	409366.00	21.08.2014	49852.00
	Total	1318036.00		201381.00
Grand Total of passed bills and security amounts		1318036 + 201381		1519417.00

- (6) Despite passing of the aforesaid bills, neither the aforesaid payments were neither released to the plaintiff nor was informed about the reason for withholding the aforesaid payments. The plaintiff made several requests for release of the amount of the passed bills and the security amount but no heed was paid to the request of the plaintiff. As per Clause-9 of General Terms and Conditions of the defendants, the defendants are liable to release the payment of the passed bills within a period of 6/9 months.
- (7) Since the aforesaid sum of Rs.15,19,417/- is an admitted amount and the plaintiff also did not raise any objection, the defendants were under obligation to release the payments of the aforesaid amounts to the plaintiff within a reasonable time, but the defendants failed to release the payment of the passed bills' amount as well as the security amount in favour of the plaintiff till date. Since the aforesaid amount has not been paid by the defendants to the plaintiff till date, therefore the plaintiff has been put to loss of investment and interest further accrued thereon. Therefore, the defendants are liable to pay interest @ 12% p.a. on entire outstanding amount of Rs.15,19,417/-.

- (8) The plaintiff being aggrieved from callous and irresponsible attitude of the defendants, got issued a legal notice dated 12.07.2017 through his counsel under Section 477/478 of the M.C.D. Act thereby calling upon the defendants to release the aforesaid sum of Rs.15,19,417/- of the plaintiff in respect of aforesaid work orders and release the payments of the same along-with interest @ 12% per annum from the date of passing of the respective bills within 60 days from the receipt of the notice. The legal notice was duly served upon the defendants. However, the defendants neither replied the same in any manner whatsoever nor complied with the same.
- (9) The mode of business transaction between the plaintiff and defendants was commercial and the plaintiff had undertaken the works for making profit, therefore, the plaintiff is entitled to charge interest as per norms of charging of interest on unsecured loan i.e. rate of 12% per annum. The first and final bill in respect of work order nos. 794 and 795 were passed on 13.07.2015. Therefore, as per Clause-9 of the general conditions of the defendants, the plaintiff is entitled for interest after a period of 9 months on the amount of the aforesaid passed bills of work order no. 794 and 795. The amount of interest on the said passed bills in terms of clause 9 comes to Rs.2,11,202/-. Further, the first and final bills in respect of work order no. 863 were passed on 21.08.2014. Therefore, as per clause 9 of the general conditions of the defendants, the plaintiff is entitled for interest for a period of 29 months on the amount of the aforesaid passed bill of work order no. 863. The amount of interest on the said passed bills in terms of clause 9 comes to Rs.1,14,622/-. The total interest comes to Rs.3,25,824/-. The plaintiff is

entitled for pendent-lite and future interest over the principal amounts (of all the passed bills) from the date of filing of the suit until remission of the entire amount by the defendants. The plaintiff has also suffered losses in terms of money and further investment, therefore, the defendants are liable for costs and further interest thereon.

CASE OF DEFENDANTS AS PER WRITTEN STATEMENT

Succinctly, the case of defendants is as under:-

- (1) The suit of the plaintiff is barred by the provisions contained under Sec.477 and 478 of the DMC Act for want of service of statutory notice.
- (2) No legal, valid or justiciable cause of action has ever arisen in favour of the plaintiff and against the defendants for filing the present suit.
- (3) The suit is bad for misjoinder of cause of action. There are different agreements and work orders and had been joined in the suit wrongly. The suit has been filed to evade the court fee joining several work orders.
- (4) The suit of the plaintiff is premature. There is a specific condition in the agreement entered into between the parties that the payment of bills will depend on availability of funds in particular head of account from time to time in South DMC, thus, the delay in making the payment does not attract any liability and the plaintiff is not entitled to any interest on account of delay in payment as per amended rules incorporated by Circular dated 19.05.2006 in **N.I.T./ and Tender conditions**. The plaintiff, after going through & understanding the terms and conditions of NIT as well as tender documents, had participated in the Tender and executed the work.
- (5) On merits, the contents of the plaint have been denied and it has been submitted that no particulars have been mentioned in the plaint. Bills were

not submitted by the plaintiff and the details of bills for the work orders are as under:-

Work Order No.	Date of work order	Date of passing of bill	Gross amt. of passed bill	Net amt. of passed bills	Amount of Security i/c Earnest money	Demand no./date for the bill passed
794	09.12.13	13.07.2015	551198/-	451028.00	76983/-	224/15
795	09.12.13	13.07.2015	556215/-	457642.00	74549/-	224/15
863	24.12.13	21.08.2014	483062/-	409366.00	49852/-	232/14

- (6) The total amount, as claimed, is wrong and denied. The said bills for the said amount were sent to the Head Quarter for making payment against the aforesaid bills. The earnest money/ security amount can only be paid after payment of the final bills that too, when the Contractor applied for refund of earnest money/ security amount and make necessary formalities in this regard, including submission of clearance certificate from the labour officer, as per Clause-45 of the General terms and conditions of the tender documents. The plaintiff is not entitled for refund of security for non-compliance of Clause-45 of the General Terms and Conditions and as per clause 17 of the said conditions. The earnest money/ security amount shall not be refunded before expiry of six months from the date of completion.
- (7) The payment was to be made on the availability of funds, as per terms and conditions, hence, the question of interest does not arise. The plaintiff after going through and understanding the terms and conditions of the NIT as well as tender documents had participated the tender.

REPLICATION AND ISSUES

The plaintiff has not filed any replication to the Written Statement of the defendants.

The Ld. Counsel for the plaintiff submitted that the plaintiff has already received the entire principal amount of Rs.15,19,450/- but the defendants have not paid the interest on the said amount and for this reason the plaintiff submits the issue of interest is required to be framed.

From the pleadings of the parties, following issues were framed vide order dated 01.11.2018:-

ISSUES

- (1) *Whether the plaintiff is entitled to any interest on the principal amount of Rs.15,19,450/- at what rate and for which period? OPP*
- (2) *Relief.*

EVIDENCE OF THE PLAINTIFF AND DEFENDANTS AND DOCUMENTS RELIED UPON BY THEM

The plaintiff, in order to prove his case, led his evidence and got examined himself as PW-1. PW-1 has filed his evidence by way of affidavit, wherein, he reiterated and reaffirmed the contents of the plaint. PW-1 in his testimony has relied upon photocopy of the relevant page of the general rules and directions of the defendants containing clause 9 – payment of final bill is marked as Mark-A (Colly.).

On the other hand, despite opportunity, the defendants did not adduce any evidence and accordingly, vide order dated 17.02.2020, defendants were proceeded ex-parte.

This Court heard final arguments, as advanced by Ld. counsel for the plaintiff through video conferencing. I have perused the material available on record.

ISSUE WISE FINDINGS & CONCLUSIONS

ISSUE NO.1

1. *Whether the plaintiff is entitled to any interest on the principal amount of Rs.15,19,450/- at what rate and for which period? OPP*

FINDINGS AND CONCLUSIONS OF THE COURT

The only defence, which is raised, is that under the terms and conditions of the Contract, the suit of the plaintiff is pre-mature as the plaintiff is entitled to amount on queue basis and further, no interest is payable in terms of the contract between the parties. The said aspect has been discussed in detail by the Hon'ble High Court in number of cases and I have profit to refer the conclusions and findings of the Judgment passed by the Hon'ble High Court in the *RFA 434/2017 titled as North Delhi Municipal Corporation Versus Varinderjeet Singh decided on 22.03.2017:-*

“Conclusions and Findings

77. The General Conditions of Contract i.e., clauses 7 and 9 which are admittedly part of the work orders issued by both the NDMC 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 “what is a reasonable time is a question of fact in each case.” A Corporation which gets works executed cannot therefore include terms in the contract which are per se unconscionable and unreasonable as –

- 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.

78. 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.

79. 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 -

Allotment of funds to the Corporation by the Government;

Allotment of funds in a particular head;

Allotment of funds for payments who are in queue prior to the contractor;

80. 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.

81. 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 6 months and 9 months to be the reasonable periods for which the payments of the final bills can be held back. Obviously, therefore, if payments are made, whether on a queue basis or otherwise, beyond the period of 6 months and 9 months, interest is payable.

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.

f) The Security amount/Earnest money deposited would be refundable upon the fulfilment of the conditions contained in Clauses 17 and 45 of the General Conditions of Contract. Interest would be payable on delayed payments.

(Portions bolded in order to highlight)

There is no dispute that the principal amount and security amount were already paid during the pendency of this case. The only aspect, which remains to be adjudicated, is the amount of interest of the said amount. The plaintiff has claimed that Work Orders no.794 and 795 were passed on 13.07.2015. It is submitted by the plaintiff that, as per clause 9 of the general conditions of the defendants, the defendants were required to make the payment after nine months, as the Work Order was more than the sum of Rs.5,00,000/-. The Plaintiff had claimed interest at the rate of 12% per annum on the said Work Orders and submitted that on the said work orders the plaintiff is entitled to Rs.2,11,202/- till the filing of the case. Similarly, against the Work Order no.863, the plaintiff had claimed an interest of Rs.1,14,622/-. The total interest of Rs.3,25,824/- is claimed by the plaintiff till filing of the case. The defendants have also claimed pendent-lite and future interest @ 12% per annum. The evidence by way of Affidavit of PW-1 reveals that principal amount for the Work Orders nos. 794 & 795 was received by the plaintiff on 24.07.2018 and for Work Order no. 863 it was received by the plaintiff on 10.08.2018. The said Affidavit further reveals that the security amount was also released on 13.09.2018 and 24.09.2018 towards the aforesaid Work Orders. The plaintiff himself is not claiming the principal amount and security amount, as the plaintiff has already received the entire principal amount and security amount, therefore, the plaintiff is entitled to interest upto the date of 10.08.2018, when the final payment of the principal amount was paid. The interest

of justice would be served, if the plaintiff is granted the interest @ 9% p.a. annum from elapse of nine months from 21.08.2014, which was the date of passing of the Work Order no.863 as the plaintiff has combined the three Work Orders in one suit. Accordingly, the plaintiff is entitled to simple rate of interest @ 9% per annum on the amount of Rs.15,19,450/- from 22.05.2015 till last date of payment i.e. 10.08.2018. Accordingly, the total amount of Rs.4,39,880/- is due and payable by defendant no.1. The defendant no.2 is not personally liable for the acts of the Corporation i.e. defendant no.1 and therefore, the decree is required to be satisfied only by defendant no.1. The defendant no.1 is liable to pay the said amount within a period of sixty days from the service of this Judgment by the plaintiff. The plaintiff is directed to serve the internet downloaded copy of this Judgment on defendant no.1 and if the defendant no.1 fails to pay the said amount within a period of sixty days from the service of said judgment, then the plaintiff will be entitled to future simple interest @ 9% per annum from the elapse of said sixty days. The future simple interest would be required to be paid till its realization, however, it is clarified that the same would be required to be calculated only after the lapse of sixty days from the service of internet downloaded copy of this Judgment on the defendant no.1.

Accordingly, the Issue no.1 is decided in the aforesaid terms, in favour of the plaintiff and against defendant no.1

RELIEF

In view of the findings, as administrated above, I hereby pass the following

FINAL ORDER

1. A decree of Rs.4,39,880/- is passed in favour of the plaintiff and against defendant no.1. The plaintiff is directed to serve the internet downloaded

copy of this Judgment on defendant no.1 and if defendant no.1 fails to pay the said amount within a period of sixty days from the service of said judgment, then the plaintiff will also be entitled to future simple interest @ 9% per annum from the elapse of said sixty days. The future simple interest would be required to be paid till its realization, however, it is clarified that the same would be required to be calculated only after the lapse of sixty days from the service of internet downloaded copy of this Judgment on the defendant no.1.

2. The parties shall bear their respective costs.

Decree-sheet be prepared accordingly.

File be consigned to Record Room after due compliance.

**Announced through Video Conferencing on
this 20th day of June, 2020.**

**(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi**