

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No.1262 of 1999**

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<u>Date</u>	<u>Order with Signature of Judge</u>
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Present: **Mr. Justice Nazar Akbar**

Plaintiff : M/s. Development Construction Services  
through Mr. Ravi R. Pinjani, Advocate.

Defendant No.1 : Civil Aviation Authority  
Through Mr. Farooq Rasheed, Advocate.

Date of hearing : 13.12.2017

Decided on : 19.01.2018

**JUDGMENT**

**NAZAR AKBAR, J.** The Plaintiff had filed this suit in 1999 for Recovery of Rs.47,29,934/- from the defendant on account of non-payment of final bills submitted after completing two construction projects at D.G Khan Airport.

2. Brief facts of the case are that the plaintiff is a registered partnership firm carrying on business of construction and general order suppliers. In December, 1994 the defendant issued tenders to the prequalified contractors for submitting their bids on **7.2.1995** for construction work at D.G. Khan Airport. The plaintiff and five other prequalified contractors submitted their bids and the lowest bid offered by the plaintiff's was accepted. On **15.2.1995** the work for the construction of Runway, Taxiway and Apron was entrusted to the plaintiff under an **agreement No.HQCAA/DW&CE/32/94-95 for Rs.66,864,711/-** stipulated to be completed within 9 months. The work commenced on **19.3.1995** and completed on **3.6.1996** and the required extension

of time was granted by the competent authority. Completion cost of the work done by the plaintiff as per final bill was to the tune of **Rs.72,283,554/-** against agreed cost of **Rs.66,864,711/-**. The extra cost involved was duly approved by the competent authority in the shape of 'deviation statement' and subsequent a revised administrative approval was also issued. The plaintiff during the pendency of the said work was also awarded work for construction of Car-Park, Drive-way and Approach Road under another agreement No.HQ/DW & CE/43 at the cost of **Rs.2,207,765/-** for said Airport. The time for completion of contract was 02 months. The plaintiff commenced the work on **23.10.1995** and completed the same on **25.5.1996**. The extension of time involved was granted by General Manager Works (Punjab). The gross amount of work done by second and final bill recorded in Measurement Books (M.B) was **Rs.2,621,181.75/-** as per relevant M.B duly signed by Sub-Engineer, Sub-Divisional officer Incharge and representative of the plaintiff but the payment was delayed as the approval of the "deviation statement" was awaited by that time and later on due to dispute of payment to Airport Construction Machinery Pool (ACMP). However, during the intervening period 50% of the security deposit by the plaintiff was also released. Later on "deviation statement" was approved and after issuance of Revised Admin Approval, the plaintiff approached the defendant (CAA officials at Lahore) for release of payment and the managing partner of the plaintiff was called at Lahore where he had a meeting with Deputy Manager (Mechanical) Successor and Work Superintendent wherein it was mutually agreed that on account of ACMP only **Rs.597,015/-** were outstanding against the plaintiff. As a result of said settlement between ACMP and the plaintiff, the

Divisional Engineer on **20.2.1997** released remaining 50% balance of the security deposit amounting to **Rs.3,343,236/-**. After eight and half months from the date of the completion of work, the same Divisional Engineer who had accepted the certificates and released the security amount, raised certain claims of recoveries amounting to **Rs.1,73,000/-** against the plaintiff. The plaintiff through letter dated **24.9.1997** disputed the claim so raised and the defendant constituted a Board of Officers under the Chairmanship of their G.M (Planning) Mr. Y.A Bhutto for inquiry to finalize the payment. The Board of officers, submitted their report dated **12.8.1998** to the defendant. It was settled in the enquiry report that after adjustment of the amount of **Rs.553,005/-** the defendant was liable to pay a sum of **Rs.47,29,934/-** to the plaintiff but surprisingly the plaintiff after almost after another period of eight months on **30.4.1999** received a letter dated **29.4.1999** from **Mr. Mohammad Rafiq Shad**, Sr. Civil Engineer, Lahore that now a sum of **Rs.71,363/-** were due and payable by the plaintiff to CAA, the defendant. Therefore, the plaintiff filed the instant suit and prayed for the following relief(s):-

- i) *A decree for the recovery of the sum of Rs.47,29,934/- be passed against the defendants.*
- ii) *Mark-up at the rate of 10% be also recovered from the defendant.*
- iii) *Any other relief to which the plaintiff be deemed entitled be granted to the plaintiff.*

4. The defendant filed their written statement wherein they took preliminary legal objections that the suit is not maintainable and denied the claim of the plaintiff but at the same time it submitted that the plaintiff is entitled for only **Rs.23597/-**. The defendant averred that excessive earth work done by the plaintiff

costing **Rs.26,34,793/-** was included in the final bill. Furthermore, reduced rate of Rs.6300/- for P.Q.C of the Apron was allowed instead of Rs.6700/- on the pretext of physical condition of Apron showing major/minor cracks as per defendant Laboratory report. Even otherwise recovery of **Rs.1224205/-** was made on account of hire charges claimed by M/S A.C.M.P, CAA Rawalpindi and **Rs.404015/-** against payment made by the defendant to M/s ACMP on behalf of the plaintiff. Recovery of Rs.829217/- as cost of empty bitumen drums and Rs.3,79,742/- for the cost of bitumen involved due to increased rates of bitumen by National Refinery Ltd. Karachi on audit objections. It was further averred that date of completion mentioned as **3.6.1996** is not correct as the work is still incomplete according to requirement of agreement/design and drawings.

5. On **18.12.2000** this court from pleadings of the parties had framed the following issues:-

1. *Whether the suit as framed and filed is maintainable?*
2. *Whether any cause of action has accrued to the plaintiff to file instant proceedings?*
3. *Whether the extension of time was granted by the defendant to the plaintiff, for execution of the work?*
4. *Whether the plaintiff is entitled to get Rs.5419843/- as claimed by him?*
5. *Whether extra cost was approved by the defendant to the plaintiff?*
6. *Whether the plaintiff is entitled for additional work of Rs.2207765/- and extension of the time was granted to the plaintiff?*
7. *Whether the security deposit amounting to Rs.3343236/- was released by the defendant to the plaintiff?*
8. *Whether plaintiff is liable to pay a sum of Rs.1,73,000/- to the defendant?*

9. *Whether as per report of board of officers after enquiry an amount of Rs.553005/- was to be recovered from the plaintiff?*

10. *What should the decree be?*

6. On **18.12.2003**, Mr. Muhammad Jameel, Advocate was appointed as Commissioner for recording evidence of the parties. The plaintiff examined one Zahid Hussain. He filed his affidavit in evidence as Ex.P/1 and other documents. He was cross examined by defence counsel and learned counsel for the plaintiffs closed their side for evidence. From the side of the Defendant, Muhammad Rafiq Shad, Corporate Manger Works and Masood Alam Siddiqui, Deputy Manager (Works Directorate) Headquarters, Karachi, filed their affidavits in evidence as Ex.DW/1 and DW/2. They produced various letters and documents in support of their contentions. The plaintiffs' counsel cross examined both the witnesses and their counsel closed the side of defendants for evidence.

7. On **05.12.2015** by consent of both the parties all the above issues were dropped and only one issue was reframed, which is as follows:-

1. *Whether the plaintiff is entitled for Rs.47,29,934/- alongwith markup, if yes, to what extent?*

2. *What should the decree be?*

I have heard learned counsel for the parties at length and perused the record. My findings on the above issue are as under:-

8. Learned counsel for the plaintiff has contended that the execution of agreement between the parties is not disputed. The plaintiff was required to construct Runway, Taxiway and Apron at D.G. Khan Airport in terms of the agreement

No.HQCAA/DW&CE/32/94-95 and the plaintiff was also awarded contract for construction of Car-Park, Drive-way and Approach Road under another agreement No.HQ/DW & CE/43 at the said Airport. Both the projects were completed within the stipulated time extended by the competent authority in writing. The entire work done was duly recorded in the Measurement Book (MB) in possession of the defendant and every entry in the Measurement Book was countersigned by the representatives of either side. The plaintiff's final bill as per Measurement Book entries filed by the plaintiff as Ex. "D" & Ex. "E" in respect of two projects were amounting to **Rs.4649184/-** and **Rs.633755/-** respectively. These entries were countersigned by the field staff of the defendants in the Measurement Book and at the end of the entries it was certified that the work has been done as per specification and nothing is outstanding against the contractors. He referred to Ex.D page 71 and Ex.E page 85 of Evidence File. However, some disputes were raised in clearance of the final bills and the defendants by letter dated **08.10.1997** was informed that to finalize the bill, a committee of Board of Officers has been constituted under the chairmanship of **Mr. M.Y.A Bhutto** G.M (Planning) with two other members. The terms of reference of the inquiry regarding construction of D.G Khan Airport for final payment were as follows:-

- (a) Examine agreements / documents between CAA & M/s. DCS & between M/s. BCS & ACMP and point out short comings, if any.
- (b) Ascertain whether any dues of the contractors, M/s. DCS still remains to be cleared if so, reasons for withholding the same.
- (c) Ascertain total dues of ACMP which were to be paid by M/s. DCS. Have they been fully paid. If not what is the balance yet to be paid.

- (d) Has a 'Non dues' certificate issues by ACMP if not the same be obtained and placed on record.
- (e) Have all defects particularly that pertaining to apron work attended.
- (f) Determine undisputed payments of M/s. DCS which can be paid immediately with holding unverified/disputed payments.
- (g) Identify persons responsible for delay in finalization of Accounts of the Projects, if any.
- (h) Make recommendations for avoiding recurrence of such lapses and delays in future.

The findings of committee on relevant terms (b), (f) and (g) are relevant are as under:-

#### **Terms of Reference 2(b)**

The "Final Bills" of M/s. DCS pertaining to the works completed by them and duly recorded in Measurement Books by the concerned CCA Officials remain to be cleared / paid. The details are given below:-

- |   |                       |
|---|-----------------------|
| (a) Net amount of 24 <sup>th</sup> & Final Bill<br>for the work of runway, taxiway,<br>& apron, vide pages 63 to 67,<br>M.B. No.490. (Exhibit-E). | Rs.4,649,184/-        |
| (b) 2 <sup>nd</sup> & Final Bill for the work<br>of car park road, driveway, etc.,<br>vide pages 38 to 43, MB No.475,<br>(Exhibit-F).             | <u>Rs. 633,755/-</u>  |
| (c) Total amount.   | <u>Rs.5,282,939/-</u> |

#### **Terms of Reference 2(f)**

18. The amount payable to M/s. DCS against their two contract agreements/works after deduction of contractual recoveries on account of income tax, bitumen supplied, etc., has been ascertained in para-05 above. **This figure amounting to Rs.5,828,939/- is based on quantum of work done and as recorded in measurement books by CAA officials/engineers and is acceptable/agreed upon by both the parties, i.e., CAA and M/s.DCS.** A bone of contention, however, is extra contractual recoveries raised by CAA engineers much after the completion of work, even after issuance of "No dues" certificate by ACMP on 28<sup>th</sup> January, 1997, and by civil side on 20<sup>th</sup> February, 1997.

**Terms of Reference 2(g)**

50. In the light of record made available to BOI, the statements and subsequent examination of witnesses, BOI finds that following officials responsible for delay in finalization of accounts of the projects: \_

- (i) Mr. Muhammad Rafiq Shad,  
Senior, Works Engineer (Civil),  
(the then engineer incharge)  
CAA No.1577.
- (ii) Mr. Parvez A. Khawaja,  
Corporate Manager Works (Civil)  
(present engineer incharge)  
CAA No.1595.
- (iii) Mr. Sajjad Hussain,  
Deputy Manager (E&M)  
(the then A/Corporate Manager ACMP)  
CAA No.1615.

In view of the above findings, the failure of the defendants to clear bill is clear malafide and therefore, plaintiff had filed this suit for recovery.

9. Learned counsel for the defendant in rebuttal submitted that inquiry report filed by the plaintiffs was not found satisfactory and therefore, subsequently the defendants have been constrained to hold another inquiry. He has referred to the subsequent inquiry conducted by the defendants in which it was held that the security deposited released by the defendants was in fact paid before completion of the work. He contended that the work has not been completed by the plaintiff and therefore, he was not entitled for refund of the security deposit and of course the bill submitted by them were in respect of incomplete work. He further contended that the plaintiff has refused to attend and participate in the subsequent inquiry which has superseded the earlier inquiry. He has also contended that the entries in the measurement books (M.B) were also fictitious and unauthorized and therefore, subsequently the entries in the MBs had been rectified. The



defendant has relied on Inquiry Report produced by them as **Exh.PW-1/14** which concluded that the person responsible for making fictitious entries in the measurement books should be dealt with at the departmental level and the legal department is directed to prepare the case against the plaintiff to get payment against fictitious entries of work in the measurement books in which the plaintiff has gone to High Court.

10. The defense is based amongst other on the inquiry conducted subsequent to the inquiry report submitted by the Committee of officers headed by Mr. M.Y.A Bhutto G.M (Planning). The defendant has not even filed the original copy of the so-called subsequent inquiry conducted by Additional Board of Inquire (**Exh.PW-1/14**) and no justification has been offered by the defendant for not producing the original of the said report. It is also conceded by the learned counsel for the defendant that the inquiry filed with the affidavit-in-evidence of defendant was 4<sup>th</sup> inquiry. The defendant have placed reliance on the 4<sup>th</sup> inquiry without showing rejection of the inquiry report submitted on **25.09.1997** by the Board of Officers, headed by M/s. M.Y.A Bhutto G.M (Planning) in respect of the final payments. In fact in the report of Board of Officers, the witness of defendant namely Mr. Muhammad Rafiq Shad (DW-1) was identified as a person responsible for unnecessarily delay in final payment and as a witness after filing photocopy of so-called subsequent inquiry dated **29.12.2011** he badly exposed himself when in his cross-examination he stated as below;-

“No enquiry was pending against the Plaintiff at the time of filing of written statement. In all four enquiries were held against the plaintiff but I have filed only the copy of fourth enquiry report”

“It is correct that this enquiry has started on 21<sup>st</sup> May 2001 and had concluded on 29.12.2001, as per Ex.DW-1/4. This Enquiry had started after 15<sup>th</sup> month of filing of the written statement....I cannot say as to why those three enquiries could not be finalized by other officers different than the other present enquiry officers. I do not remember the terms of earlier three enquiries conducted. It is correct that in the very first enquiry Mr. Y.A Bhutto was the Chairman of the enquiry officers. Perhaps that enquiry had started in September 1997 and concluded in August 1998....It is correct that we have not made any application for amended of the written statement on the result of 4<sup>th</sup> enquiry.”

11. In view of the above facts and evidence, the sole issue is decided in the affirmative, therefore, suit of the plaintiff is decreed as prayed with 10% simple markup from the date of filing of the suit till its realization.

J U D G E

Karachi,  
Dated:19.01.2018

*SM*

