

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1590 of 1997

Dates of hearing	04.9.2013 and 17.9.2013
Plaintiffs	Messrs. M&J Engineering (Pvt) Ltd., through Syed Abdul Waheed, advocate.
Defendants	Messrs. Noell LGA through Mr. Manzar Bashir, advocate.

JUDGMENT

NAZAR AKBAR, J., Briefly stated the facts of the case are that the plaintiffs-Messrs M&J Engineering (Pvt) Limited entered into a contract with the defendants on 25.3.1997 for supply of men-power and services for mechanical and piping installation etc. at the site known as Engro Paktank Chemical Terminal, Integrated Liquid Chemical and Storage Farm, at Port Qasim, Karachi. The contract dated 25.3.1997 was further amended on 04.4.1997 and the total fixed price was settled at Rs.31,270,900/- (US \$ 788,275.75). During the performance of the contract the dispute arose between the parties and ultimately the instant suit was filed by plaintiffs against defendants for specific performance of contract, declaration, injunction and recovery of Rs.20,820,015/- equivalent to US \$ 462,667/-, with the following prayers:-

- A) Declare that the Contract dated 25.3.1997 as amended dated 04.4.1997 entered into between the plaintiffs and defendants is valid, enforceable and binding on the defendants and the defendants are bound to implement the terms and conditions contained in the said Contract.

- B) Direct the defendants not to interfere with the operation and working of the Contract dated 25.3.1997 as amended dated 04.4.1997 and restrain their officers, agents, servants and those acting under them in any manner from interfering with the work carried out by the plaintiffs at the site office, under the said Contract.
 - C) Direct the defendants to specifically perform the terms and conditions of the Contract dated 2.3.1997 as amended dated 04.4.1997.
 - D) To grant permanent injunction restraining the defendants and/or their officers, attorneys, agents, servants and those acting through or under them in any manner from preventing the plaintiffs from entering into the site office situated at Engro Paktank Terminals Ltd., Integrated Liquid Chemical Terminal and Storage Form, Port Qasim, Karachi, Pakistan.
 - E) Direct the defendants to preserve in its original form the work done by the plaintiffs and approved by the defendants and the defendants be further directed not to cut, amend and/or replace the work done by the plaintiffs.
 - F) Direct the Executives and employees and or agents of the defendants who are foreigners, to deposit their passports with this Hon'ble Court and not to leave the jurisdiction of this Hon'ble Court without the prior permission of this Hon'ble Court while the suit is pending.
 - G) Grant a judgment and decree against the defendants in the sum of Rs.20,820,015/- (Equivalent to US \$ 462,667) together with such and other sums as may be claimed by the plaintiffs under the terms and conditions of the Contract together with mark-up @ 2% above the bank rate from the date when the amount is found due and payable till the payment and realization thereof.
 - H) Grant such reliefs which this Hon'ble Court may deem fit and proper in the interest and furtherance of justice and equity and under the circumstances of the case.
 - I) Award costs of the suit to the plaintiffs.
2. The record shows that the defendants vide order dated 26.12.1997 were directed to deposit a sum of US \$ 42,149.42 with the Nazir of this Court within a period of one week, being an alleged amount due and payable by the defendants to the plaintiffs towards the main contract and the plaintiffs were directed to issue necessary certificates and

documents under the contract within two (2) days of the deposit of the aforesaid amount. However, on 11.2.1998 the defendants were allowed to withdraw the amount of US \$ 42,149.42, deposited by them with the Nazir in the following terms:-

“5. With regard to the suggestion put forward by Mr. Muhammad Ali Sayeed, Mr. Shaiq Usmani insisted that in the first instance plaintiff should hand over the documents to the defendant as agreed and alternatively if they do not want to abide by the consent order he may be permitted to withdraw the amount deposited with the Nazir. In the above circumstances, it would be only just and fair that the defendant may be permitted to withdraw the amount deposited with the Nazir pending decision of the suit. Learned counsel for plaintiffs does not oppose this proposition. Nazir is accordingly directed to refund the amount to the defendant. This disposes of Nazir’s reference as well as CMA No.34/1998.”

3. The defendants filed their written statement in which execution of contract was admitted, however, the failure was alleged on the part of the plaintiffs as according to defendants the workmanship of plaintiffs was not upto the mark and several terms and conditions of contract were allegedly violated by the plaintiff. In the written statement it was also contended by defendants that the nature of contract is such that it was not specifically enforceable in terms of Sections 21(a) and 21(b) of The Specific Relief Act, 1877 (hereinafter called as “**Act, 1877**”).

4. The plaintiffs impliedly conceded the legal position emerging in view of the contract between the plaintiffs and defendants that the specific performance was hit by provisions of Section 21(a) and 21(b) of Act, 1877 and, therefore, by consent of the parties on 10.11.1998 the Court framed the following issues:-

- (i) What amount is outstanding and payable by the defendant to the plaintiff under the contracts?
- (ii) What amount is outstanding and payable by the defendant to the plaintiff on account of modification under the contracted works?
- (iii) What amount is outstanding and payable by defendant to the plaintiff for additional work carried by the plaintiff for defendant?
- (iv) What should the decree be?

5. The consent issues changed the complexion of suit from Specific Performance to a civil suit for recovery of money, due and payable by the defendants to the plaintiffs, therefore, detailed pleadings of the parties are not required to be reproduced in the judgment.

6. The burden of these issues was on the plaintiffs and in support of their case, plaintiffs examined its Chief Executive namely Syed Hamid Jameel, Zafar Hussain Khan, Dy. General Manager, Syed Qasir Naqvi, Technical Advisor and Muhammad Aamir Abdali, Mechanical and Piping Installation and Insulation.

7. The evidence was ordered to be recorded through Commission. The learned Commissioner submitted his report dated 12.8.1998, which was taken on record on 23.8.1998. The plaintiffs' evidence was recorded before the learned Commissioner and the defendants neither filed any list of witnesses nor appeared in the witness box.

8. I have perused the record and the evidence and examined their respective written arguments filed by the parties. My findings are as follows:-

9. The burden of proof of all the three Issues was on the plaintiff. The plaintiff has produced four witnesses through whom they have placed on record several documents including contracts, correspondence and vouchers etc. When put to the test of cross-examination none of the witness was able to satisfactorily discharge the burden of proof by referring to documents that how much work was done by the plaintiff and when and how any sum has remained unpaid by the defendants. The main witness PW-1 Syed Qaiser Naqvi did not appear in the witness box for cross-examination and, therefore, his examination-in-chief cannot be considered. PW-2, Zafar Hassan Khan produced several documents, but in the cross-examination admitted that none of these documents were prepared by him and particularly he admitted that not a single invoice was signed by him. He further admitted that no details have been attached to the invoice. Same was the quality of evidence of the PW-3 namely Muhammad Amir Abdali. He in his cross-examination has conceded that the documents produced by him were not signed by him and his evidence lost its evidentiary value when at the end of cross-examination he admitted that he has not produced any letter of authority by the plaintiff for giving evidence. The fourth witness namely PW-4 Syed Hamid Jameel also admitted in the cross-examination that no details were attached with the invoice. All the three issues are decided in negative.

10. Consequently, the suit is dismissed with no order as to costs.

Karachi:-
Dated 07.03.2014

JUDGE