HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Civil Misc. Appeal No. 539/2020

M/s Mewar Associates, through its Proprietor Shri Rajeshwar Singh son of Shri Ram Singh Chundawat, aged 47 years, resident of Village and Post Thada Tehsil Salumbar, District Udaipur (Rajasthan)

----Appellant

Versus

1. The State of Rajasthan, through the District Collector, Dungarpur, Rajasthan
2. The Water Resources Department, Udaipur through its Additional Chief Engineer
3. The Water Resources, Division Dungarpur, through its Executive Engineer.

----Respondents

For Appellant(s)	:	Mr. Manoj Bhandari, Sr. Advocate assisted by Mr. Aniket Tater
For Respondent(s)	:	Mr. S.S. Rathore, AAG

HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MR. JUSTICE MADAN GOPAL VYAS

Order

09/01/2025

Per, S.Chandrashekhar,J:

The challenge laid by M/s. Mewar Associates through its Proprietor is to the judgment dated 18th September 2019 passed in Case No.144/2018 (Original Suit).

2. On the basis of the pleadings of the parties, the following issues were framed by the Commercial Court: (1) whether the claimant is entitled for damages to the tune of Rs.16,02,249/- with interest due to delay and failure on the part of the opposite party, (2) whether the decision of the Empowered Standing Committee dated 7th December 2012 is liable to be interfered with on the ground that the claimant was not provided an opportunity of

hearing, (3) whether the suit is barred by limitation, (4) whether the Court has jurisdiction and power to entertain the suit and (5) whether relief can be granted to the claimant. On the issue of loss caused to the M/s. Mewar Associates (hereinafter referred to as the appellant-firm) to the tune of Rs.16,02,249/-, the Commercial Court held that no supporting evidence was produced by it except some letters relating to acquisition of land. As regards the decision of the Empowered Standing Committee dated 07th December 2012, the Commercial Court came to a conclusion that the appellant-firm was given an opportunity of hearing and that is the reason it had the knowledge about the said decision. The issues of limitation and jurisdiction were decided by the Commercial Court in favor of the appellant-firm.

3. Mr. Manoj Bhandari, the learned Senior Counsel appearing for the appellant-firm has raised manifold contentions to criticize the judgment dated 18th September 2019. One of the submissions made on behalf of the appellant-firm is that the Administrative Engineer (in short, "Employer") did not provide full stretch of the land on which irrigation canal was to be constructed. Another substantial ground urged on behalf of the appellant-firm is that there is no discussion about the documentary evidence laid on behalf of the appellant-firm as to acquisition of a part of the subject land and that has, therefore, resulted in an erroneous decision by the Commercial Court at Udaipur. Mr. Manoj Bhandari, the learned Senior Counsel for the appellant-firm has also referred to various documents concerning land acquisition, investigation report dated 14th December 2007 and communication from the Executive Engineer dated 19th March 2007 to challenge the

decision of the Commercial Court rendered in Case No.144/2018 (Original Suit).

4. On the other hand, Mr. Sajjan Singh Rathore, the learned Additional Advocate General submits that it is not a fact that the possession of the land was not given to the appellant-firm rather there was some dispute as to payment of compensation to the land holders which had nothing to do with the execution of work by the appellant-firm. The learned Additional Advocate General would further submit that the appellant-firm had not carried any construction over Chain 0 to Chain 40 which was unhindered and the possession thereof was already handed over to the appellant-firm. The learned Additional Advocate General has referred to clauses 2 and 3 of the conditions of contract to support the decision rendered by the Commercial Court.

5. Briefly stated, the Canal work from 0.0 km to 1.9 km and CD works at Amarpura projects were awarded to the appellant-firm the total contract value of which was Rs. 98,67,614/-. Pursuant to work order dated 16th December 2004 issued in favour of the appellant-firm, an agreement was executed under which the scheduled completion period for the work under contract was 24th December 2005. However, the subject Canal work was not completed by 24th December 2005 and an order extending the period for completion of the work till 30th June 2006 was issued on 31st March 2006. A second extension order extending the time for completing the work till 31st July was issued on 28th June 2006. Notwithstanding the extensions of time granted by the Employer, the appellant-firm could not complete the work and the appellant-firm was saddled with penalty and an order to this effect was

issued on 12th July 2006 directing it to deposit Rs.5,16,038.00/- under Clause 2. The appellant-firm was further informed that the remaining work shall be completed through another agency and the difference of amount shall be recovered from it under Clause 3 (C). But before that, the Superintending Engineer issued an order vide letter dated 5th July 2006 according approval for termination of the contract and recovery of damages under Clauses 2 and 3 (C). Later on, the appellant-firm was informed that it was required to deposit Rs.4,86,746.00/- under Clause 2 and that amount was adjusted against the security deposit. Additionally, damages to the tune of Rs.25,76,076.00/- under Clause 3 (C) was required to be deposited by it and an order to this effect was issued on 21st October 2007.

6. Before the Commercial Court, the case pleaded by the appellant-firm was that there were serious defaults and non-performance of its obligations by the Employer inasmuch as possession of the bed level cross-section of the land was not given to it and the Employer remained completely indifferent to the problems faced by the appellant-firm at the work site. According to the appellant-firm, possession of a part of the land was given on 20th January 2005 and it had mobilized essential items of the value of Rs.7,00,000/- and Tractor, JCB machines, Mixture machines, Vibrators, Tankers and other machinery were employed by it but the work could not progress at the desired pace on account of non-cooperation from the Employer and protest by the land holders who were not paid the compensation for the acquired land. The appellant-firm claimed loss of profit to it on account of direction issued by the Assistant Engineer, Siwalwara for stopping

the work through Letter No.419 and failure on the part of the Employer not to identify the place for disposal of waste materials during the digging of the canal and stone cutting between RD 29 to 40. For these reasons, the appellant-firm pleaded that it had to bear additional charge for carriage and disposal of the waste materials. The appellant-firm further pleaded that the enquiry report dated 5th March 2008 made favourable recommendations in its favour but the Employer unilaterally imposed penalty of Rs.25,62,806/- under Clauses 2 and 3 (C) of the contract. The appellant-firm also pleaded loss on account of idle man power and machinery for more than three months. The claims raised by the appellant-firm were to the following effect:(a) the order of the Empowered Standing Committee dated 7th December 2012 should not be accepted and the appellant-firm be given compensation, (b) the compensation to the tune of Rs.2,00,000/- on account of idle men and machinery between the period 19th April 2005 and 26th July 2005 be given to it, and (c) loss of profit to the tune of Rs.5,00,000/- on account of unfinished work to the tune of Rs.49,00,000/- be given to it. The appellant-firm also made further claims such as: (a) Refund of Rs.5,00,000/- with interest @ 18%, (b) Refund of Rs.1,55,249/- paid as advance, (c) Return of National Savings Documents worth Rs.4,00,000/-, (d) Payment of Rs.5,000/- with interest, (e) Payment of Rs.7,000/- with interest, (f) Return of demand draft of Rs.14,000/- with interest, and (g) Payment of Rs.20,000/- on account of expenses and legal fee.

7. On the other hand, the Employer contested the afore-mentioned claims pleading that lay-out was given to the

appellant-firm on 17th December 2004 and it had provided all cooperation and support to the appellant-firm but the total extent of work executed was only to the tune of Rs.50,00,154/-. The appellant-firm was given several notices between 18th January 2005 to 20th May 2005 and the last notice was given to it on 08th May 2006 but it failed to complete the work. Therefore, the Superintending Engineer vide letter dated 05th July 2006 granted permission to proceed against the appellant-firm under Clauses 2 and 3 (C) of the contract. The stand of the Employer is that it is entitled to recover the penalty/damages to the tune of Rs.36,62,822/-. The allegations of non-cooperation and loss caused to the appellant-firm were denied and it was specifically pleaded by the Employer that out of the total stretch of the canal the land holders had lands stretching to chain 23+1C meter and the rest of the land belonged to the Government. It was further pleaded that the appellant-firm had in fact completed the work between chain 40 to chain 60 which belonged to the land holders and the appellant-firm had failed to complete the work between chain 0 to chain 40 and that stretch consisted of the Government land.

8. During the trial, the proprietor of the appellant-firm tendered evidence as PW-1 and several documents were produced which were marked as Exhibit-1 to Exhibit 58. On behalf of the Employer, Ashok Regal who was the Assistant Engineer tendered evidence as DW-1 and proved the documents vide Exhibit-A-1 to Exhibit-A-11.

9. After having gone through the materials on record, we observe that the Commercial Court proceeded in the matter on such assumptions and presumptions that cannot have any

foundation in law. The decision of the Commercial Court on issue no.2 is clearly erroneous. Even if it is accepted that any representative of the appellant-firm, which is referred to as contractor in the decision dated 07th December 2012, was present during the hearing before the Committee, a glance at the said decision would reveal that as regards the stand of the appellant-firm not even a word has been recorded in the said order. Any administrative order which ensures civil consequence to a party must be taken after a proper consideration of stand taken by the rival parties. The decision of the Empowered Standing Committee dated 07th December 2012 is a unilateral order which only records the stand of the Employer and a cryptic conclusion of the Committee that the claims of the claimants are not tenable and, therefore, rejected. In "*Rajkishore Jha v. State of Bihar*" (2003) 11 SCC 519 the Hon'ble Supreme Court held that reason is the heartbeat of every conclusion and without the same it becomes lifeless. For a better appreciation of the decision of the Commercial Court on issue no.2, we would extract the said decision dated 07th December 2012 of the Committee which reads as under:-

> *"The meeting of Empowered Standing Committee was held on 07.12.12 at 06.00 PM under the Chairmanship of Principal Secretary, Water Resources Department, Rajathan, Jaipur to decide the claims/ disputes of Shri Rajeshwar Singh Chudawat (CLAIMANT) and respondent Department for the construction of RMC 0 to 1.90 Km including CD works of Amarpura Irrigation Project.*
>
> *The following were present in the meeting:*
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> *1. Shri PL Solanki Chief Engineer cum Addl. Secretary, Water Resources, Rajasthan, Jaipur.*
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> *2. Shri Prakash Tekwani, Joint Secretary (Exp-III) Finance Department*
>
> *3. Shri Ashok K. Vyas, Joint L.R., Law Department*
>
> *4. Shri AK Bhardwaj as authorised by Addl. Chief Engineer, WR*

Zone,Udaipur

Executive Engineer, Water Resoruces Division, Dungarpur was present as respondent and Contractor was present as claimant.

Committee heard the arguments of claimant in support of his claim and arguments of respondent in support of his reply. Executive Engineer, Water Resources Division, Dungarpur informed the Committee that work of RMC from 0-1.9 Km awarded to contractor. In this portion partial excavation was done under NREGP/Famine Relief works. From chain 0-26 and 29-38 (total 36 chain of 1080 m) canal alignment was in Government land and from chain 27-28 and 38-63 (total 27 chain or 810m) in private land. Timely layout was given to contractor and there was no hindrance due to land acquisition because most part of work site was Government land. Progress of contractor could not continue the work and in spite of notices he did not complete the work then action under Clause 2 and 3(C) was taken. The remaining work got completed from other contractor on risk and cost. As per request of the contractor Additional Chief Engineer, WR Zone, Udaipur also examined the case and submitted report to CE, Water Resources, Rajasthan, Jaipur according to which objections are not sustainable.

Committee perused the facts and record produced before Commitee and observed that claims of claimant is not tenable. Therefore committee decided to reject the claim."

10. Under Clause 2 which deals with compensation for delay, the appellant-firm is bound in all cases to complete 1/8th of whole of the work if the time allowed for any work was for one month except special jobs. There are further stipulations for completing the extension of time and if the appellant-firm fails to complete the work and the delay in execution of work is attributed to the appellant-firm it is provided that he shall be liable to pay compensation to the Government as prescribed thereunder. The stipulation under Clause 2 proceeds on a premise that the delay in execution of work is attributable to the appellant-firm. It is also

provided under Clause 2 that the entire amount of compensation to be levied shall not exceed 10 percent of the value of the contract. It is further provided thereunder that while granting extension of time on account of the delay attributable to the Government the reasons shall be recorded for each delay. It is therefore necessary that while granting extension of time the Employer should record reasons but that is completely absent in the letters dated 31st March 2006 and 26th June 2006. For easy reference, we would extract the letters dated 31st March 2006 and 28th June 2006:-

Government of Rajasthan

Irrigation Department

Serial No. Accts.-3/10826 *Date:- 31.03.06*

M/s Mewar Associates
Proprietor Shri Rajeshwar Singh Chundawat
Village and Post -Thada, Tehsil
Salumbar District Udaipur (Raj.)

Subject - Construction of R.M.C. 0 to 1.90 K.M. Including C.D. Works of Amarpura Minor Irrigation Project (Contract No. 24 Year 2004-05)
District Dungarpur (Contract No. 8 Year 2005-06)

Context - Your letter no. 106 dated 15.11.2005 and letter no. 7527 dated 24.12.2005 of this office.

Sir,

In the above context, it is submitted that while reserving the right to impose the interest and compensation of the State Government contained in clauses 2 and 3 of the contract of the said work and to get the work completed at your own expense, the time period of the said work is temporarily extended till 30.06.2006.

yours sincerely,

Executive Engineer.
Water Resources Divison, Dungarpur

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Government of Rajasthan
Irrigation Department

No.:- Account - 3 / *Date:- 28.06.2006*

M/s Mewar Associates,
Proprietor Shri Rajeshwar Singh Chundawat,
Village and Post-Thada,
Tehsil- Salumbar,
District- Udaipur (Rajasthan)

Subject- Construction of RMC 0 to 1.90 km. including C.D. Works of Amarpura Minor Irrigation Project (Contract No. - 24, Year 2004-05) District- Dungarpur (Contract No. 8, Year 2005-06)

Reference:- This office's letter no. 10826, Dated 31.03.2006

Sir,

> *Under the above subject it is submitted that keeping the interest of the State Government contained in clauses 2 and 3 of the contract and the right to impose compensation and get the work completed at your cost, the time period of the said work is temporarily extended till 31.07.2006.*

Sd.
Yours sincerely,
Executive Engineer,
Water Resources Division,
Dungarpur"

11. Clause 3 of the contract refers to "risk and cost clause" which provides under Sub-clause (C) that after giving notice to the appellant-firm the unexecuted work may be given to another contractor and in that case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, the said amount shall be recovered from the original contractor. The employer has undoubted power under Clauses 2 and 3(C) to resort to any punitive measure but existence of such power would not justify the unilateral action of the Employer. There should have been some meaningful consideration of the defence raised rather than to ritually reject them and proceed to take drastic measures against the appellant-firm. There cannot be

a golden scale but the administrative authority is obliged in law to weigh whether the defence version is a probable one, keeping in mind the rule of preponderance of probablity. The action taken by the Employer vide letters dated 5th July 2006, 12th July 2006 and 21st October 2007 are punitive actions which could not have been resorted to on mere assumption of a hypothetical situation without any supportive evidence. Even the principles of preponderance of probability does not give leverage to an authority to create a hypothesis by its own imagination without any evidence. In *"Miller v. Minister of Pensions"* (1947) 2 All ER 372, Lord Denning, J. defined the preponderance of probability in the following terms : (All ER p. 373 H)

> *"(1).... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

12. On the claim made by the appellant-firm on account of loss of profit, the Commercial Court completely shut its eyes to the documents laid in evidence by the appellant-firm. Vide Exhibit-45, the notification under Section 4 of the Land Acquisition Act, 1894 dated 15th September 2006, notification under Section 6 vide Exhibit-47 dated 09th March 2007, gazetted publication dated 17th March 2007 vide Exhibit-46 and objections of the agriculturist

vide Exhibits-4,5,6 and 7 were produced. The appellant-firm also brought on the record its objections given to the Employer from time to time and were marked as Exhibits-8, 10, 11, 36, 39, 40, 55 and 56 but all these documents were overlooked by the Commercial Court only for the reason that there appears signature of the appellant-firm on the measurement book. Whereas, the witness DW-1 examined by the Employer admitted in his cross-examination that the signature of the appellant-firm was not matching with his admitted signature. DW-1 was given suggestions with the reference to the documents laid in evidence by the appellant-firm to the effect that compensation was not paid to the land holders, the villagers had taken away machinery mobilized at the site and that the delay in execution of the work was caused due to non payment of compensation and disturbances created by the villagers. However, this witness denied such suggestions and he went to the extent of denying even the official documents pertaining to land acquisition.

13. The Employer took unilateral decisions and that can be easily ascertained on a glance at the contents of the letter dated 5th July 2006, 12th July 2006 and 21st October 2007. The orders granting extensions of time vide letters dated 31st March and 28th June 2006 do not indicate any reason for granting such extensions of time and simply record that the Employer has reserved its right to recover damages under Clauses 2 and 3 (C) of the contract. The letter dated 5th July 2006 by which the Superintending Engineer granted approval for termination of contract was issued with reference to the letter dated 1st July 2006

of the Administrative Engineer and the said letter was issued ignoring the fact that extension of time for completing the work 31st July 2006 was already granted to the appellant-firm. Mr. Sajjan Singh Rathore, the learned Additional Advocate General submits that noticing the failure of the appellant-firm to complete the work the contract was terminated as waiting for expiry of the extended period of time would have been a mere formality. In our opinion, the termination of contract during subsistence of the period for completion of the work was illegal. The letter dated 5th July 2006 records that the appellant-firm was able to complete the work to the tune of Rs.47,07,236.00/- but without referring to the reasons put forth by the appellant-firm simply records the appellant-firm did not take any effort to complete the work. The letter dated 12th July 2006 is also a unilateral decision of the Employer and it simply refers to the provisions under Clauses 2 and 3 (C) of the contract and determines the quantum of damages to be recovered from the appellant-firm.

14. The Commercial Court was required to bestow its consideration to non-performance of its obligation by the Employer which goes to the root of the matter. Even if it is held that the appellant-firm was given possession over the stretch of land belonging to the agriculturist, the Employer had no right whatsoever as on 20th January 2005 to give possession of such land because as on that day even the Notification under section 4 of the Land Acquisition Act, 1894 was not published. The normal rule which governs the civil proceedings is that a fact is said to be shown if it is proved by preponderance of probability. Under

section 3 of the Indian Evidence Act, a fact is said to be proved when the Court either believes it to exist or considers its existence show probable that a prudent man under the circumstances would proceed on the supposition that such fact really exists. The Court should therefore try to find out whether a prudent man on weighing the valid probabilities would have found that the preponderance is in favour of existence of the fact in question. There may be varied types of probabilities but the Court is required to ultimately figure out where the preponderance of probability lies. Furthermore, the preponderance of probability regarding existence of a fact is examined with reference to the stand of the parties and the supporting materials thereof, and not by merely recording stand of the Employer which itself was the adjudicator. The various documents laid in evidence by the appellant-firm demonstrating protest by the agriculturist and difficulties faced by it in execution of subject works could not have been ignored on a specious plea that the possession of land was given to the appellant-firm.

15. In an administrative proceeding while strict rules of evidence are not applicable the general rules of fairness, justice and good conscience must be followed and a commonsensical approach should be adopted. This is also well settled that even in the contractual matters the Employer shall be under an obligation to act fairly and comply with the basic requirements of Article 14 of Constitution of India. In a commercial world, it does not satisfy the

reason that a contractor would submit bid and take a contract only to incur penalty and pay compensation to the Employer for so-called delay on its part to complete the work under contract. This is really beyond any comprehension that a contractor who was able to complete more than 50 percent of the work would leave the work midway and invite imposition of penalty and compensation etc. to the Employer. In our opinion, there was fundamental breach of the contract inasmuch as the Employer could not perform its essential obligations under the contract. In a situation like the present one, the written terms of contract for recovery of penalty, damages etc. cannot be enforced against the appellant-firm.

16. For the aforesaid reasons, the decision of the Commercial Court in Case No.144/2018 is set aside and the said suit is decreed. Consequently, the appellant-firm is held entitled for its claims recorded in paragraph nos.4 and 5 of the judgment dated 18th September 2009.

(MADAN GOPAL VYAS),J **(SHREE CHANDRASHEKHAR),J**

165-Ravi Khandelwal