

**SUPREME COURT OF INDIA**

Municipal Corp.of Greater Mumbai

Vs.

Bharat Construction

(Tarun Chatterjee and R. M. Lodha JJ.)

07.08.2009

**JUDGEMENT**

**R.M. Lodha, J.**

1. Leave granted.

2. The Municipal Corporation of Greater Mumbai- appellant (hereinafter referred to as, `Corporation'), awarded contract for reconstruction and concretization of the road being Contract No. C-2 to the Respondent No. 1, Bharat Construction (for short, `Contractor'). The contractor under the contract was required to carry out the work in a phased manner including completion of certain preliminaries under the special directions/special conditions of the contract before commencement of the work. That there was delay in completion of work by the contractor within stipulated time is not in dispute. However, the case of the contractor is that they were given option by the Corporation to complete the work after the monsoon of 1990 and they opted to complete the work but asked for 30% rise in the contract amount which was not granted by the Corporation, as a result of which the contract stood foreclosed under the terms and conditions of the contract. The contractor invoked Clause 97 of the general conditions of contract for resolution of the dispute that arose between the parties and lodged claim for compensation, loss etc. before the sole Arbitrator.

3. The Corporation disputed the claim of the contractor before the Arbitrator and, inter alia, set up the case that the contract was foreclosed by it and the contractor was informed that the Corporation would not make any payment for any loss on account of inability on the part of the contractor to complete the work. The Corporation relied upon Clause 94 of the general conditions of the contract in this regard and stated that the said clause was clearly attracted.

4. The Arbitrator by a non-speaking award dated June 22, 1993 awarded the contractor's claim in the sum of Rs. 30,51,565/-.

5. The Corporation challenged the award dated June 22, 1993 by way of a petition under Section 30 of the *Arbitration Act, 1940* before the High Court of Judicature at Bombay and prayed that the award be set aside. The Single Judge of the High Court was not persuaded by the objections raised by the Corporation and vide judgment dated August 18, 1997 made the

award, the rule of court with further interest @ 18% per annum from the date of decree till payment/realization.

6. The judgment of the Single Judge passed on August 18, 1997 was challenged by the Corporation in an intra court appeal. The Division Bench dismissed the appeal on July 19, 2007 as in its opinion the controversy was covered by an earlier decision of the Division Bench of that Court in Appeal No. 1148 of 1997 given on January 27, 2005 (Municipal Corporation of Greater Bombay v. Atul Raj Builders Pvt. Ltd.). This is what the Division Bench held:

“An identical issue has been considered by the Division Bench of this Court in Appeal No. 1148 of 1997 decided on 27.1.2009 (Municipal Corporation of Gr. Bombay V/s. 27.1.2005 (Municipal Corporation of Gr. Bombay V/s., Atul Raj Builders Pvt. Ltd.) and the Division Bench by its detailed judgment has held that in such a situation Clause 94 does not come into play to prevent the Arbitrator from making an award for loss of profit. The case is totally covered by the judgment of the Division Bench referred to above. Hence, there is no scope to interfere with the order impugned in the Appeal. Appeal, therefore, fails is dismissed.”

7. In our considered view, the appeal deserves to be allowed on a short ground as we find that the decision dated January 27, 2005 in the case of Atul Raj Builders Pvt. Ltd. relied upon in the impugned judgment has no application to the facts of the present case. In that case, the contract was foreclosed by the contractor and obviously in that fact situation, Clause 94 of the general conditions of the contract had no application. The present case is converse one in as much as the case of the Corporation is that it foreclosed the contract and contractor was intimated that the Corporation will not make any payment for any loss suffered on account of inability on the part of the contractor to complete the contract within stipulated time. Since the matter needs to be re-examined by the Division Bench afresh, we refrain from dealing with the diverse aspects raised by the Learned Senior Counsel for the parties.

8. We, accordingly, allow the appeal and set aside the impugned order dated July 19, 2007. Appeal No. 804 of 1999 is restored to the file of the High Court. Needless to say that all the contentions of the parties are kept open to be agitated before the Division Bench which obviously will be decided on their own merit. Since the matter is quite old, we request the High court to hear and decide the aforesaid appeal as expeditiously as may be possible and preferably within three months from the date of production of this order. We further direct that the respondent will keep the existing bank guarantee alive until the disposal of the appeal by the High Court and for a further period of one month thereafter. Parties will bear their own costs.