IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Yahya Afridi
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Irfan Saadat Khan

Civil Appeal No.296/2015
Against the judgment dated 10.12.2014 passed by the Lahore High Court, Lahore in RFA No.67 of 1998.

Islamic Republic of Pakistan through Secretary, Ministry of Defence and another …*Appellant(s)*

Versus

M/s Rashid Builders (Pvt) Limited …*Respondent(s)*

For the Appellant(s): Malik Javed Iqbal Wains, Addl. Attorney General for Pakistan

For the Respondent(s): Mr. Khawaja Hassan Riaz, ASC
a/w Respondent Muhammad Rashid

Assisted by: Ahsan Jehangir Khan, Law Clerk.

Date of Hearing: 10.7.2024

JUDGEMENT

Irfan Saadat Khan, J.- The Appellants challenged the judgement, dated 10.12.2014, rendered in RFA No. 67 of 1998 by the Lahore High Court, Lahore, ("**impugned judgement**"), before this Court, via CPLA No. 255 of 2015, and Leave to Appeal was granted by this Court, vide Order, dated 13.04.2015, in the following terms:

> "Contends *inter alia* that though the chart was drawn by the learned Division Bench of the High Court in the impugned judgment but entries in the relevant columns were not read carefully which clearly indicated that was suspended on account of inclement weather. The learned Deputy Attorney General next contended that letter Ex. D12 describing the relevant circumstances too has not been read altogether, therefore, the findings of both the courts below appear to have been based on misreading and non-reading of evidence and thus cannot be maintained.
>
> 2. Points raised need consideration. Leave to appeal is therefore, granted in this petition."

2. Brief facts giving rise to the *lis* before us are that the Respondent filed a Suit of Recovery for PKR 32,285,308/- before Civil Judge 1st Class, Rawalpindi, on 16.09.1991, claiming that it entered into a contract, No. CEA-125/87, for provision and installation of POL Cylindrical Steel Tanks at Quetta with the Appellants through DW&CE (Army) Branch Rawalpindi in December, 1986. The general conditions contained in PAFW-2249[1], when read with specification and conditions of the tender, the value of the contract was PKR 14,296,501/- comprising of PKR 13,475,801/- as lump sum for part of the works listed in Schedule A of the contract and PKR 1,450,700/- as lump sum for provisional works shown on page 10 of the contract. The time for completion of the contract was 12 months from the first written work order. The said work order was issued on 17.01.1987 but since allegedly neither the entire site was made available nor layout plans/drawings were ready, the Respondent remained unable to commence the work until 17.05.1987, when the site was partially handed over to it, vide GE's letter No. 6277-939/36/E6, dated17.05.1987. Since, allegedly, layout plans were not supplied to the Respondent simultaneously, therefore, a huge loss was sustained by the Respondent. The sites were then handed over in May 1987, where some work for underground tanks had been done but as far as the over-ground tanks were concerned, a decision on their location was made after a considerable amount of time. Eventually when the Respondent started working a new difficulty arose as the M.S. round bars of 5 inches/8 diameter required to be supplied by the Appellants were not available. Resultantly, the Respondent sought the Appellants' permission to make its own arrangements for the aforenoted round bars to avoid unnecessary delays. On 27.07.1987, vide letter No. 6309-/63/E-6, dated 22.07.1987, the Respondent was

[1] Available at pg. 205 of the Appellants' paper book in C.A No. 296/15.

required by the Appellants to revise and re-draw the foundations so as to make them earthquake proof, since the site of the erection of the tanks was located in Quetta, which is a seismic hazard zone. This requirement by the Appellants, which was not mentioned at the time of contracting, resulted in a disturbance of the Respondent's plans. Consequently, the contract, which was originally made for 12 months could not be completed and was delayed for 40 months. During this period, the Appellants made further changes in the contract on account of shortage of funds, therefore, to cover up the costs the work was partially suspended. The administrative approvals required to continue were ultimately received on 20.02.1990, 21.03.1990, and 31.03.1990 respectively; thereafter, work was resumed on 06.12.1990. However, since it was winter time and Quetta is known for its sub-zero temperature, the work was suspended on 31.01.1990 and finally resumed on 13.05.1991, which was then completed on 19.05.1991.

3. The suit for recovery proceeded in the regular manner: written statement filed, pro and contra evidence recorded, final arguments heard. After which, the trial Court decreed the suit in favour of the Respondent (who was the Plaintiff before the trial Court), vide judgement and decree, dated 22.01.1998, in the following terms:

> "In view of my above findings, the suit of the plaintiff is decreed to the extent of Rs. 99,35,373/- with costs. The plaintiff shall also be entitled to recover interest at the rate of 10% till the realization of decree. However, three months grace period is granted to the defendant for the satisfaction of decree and if he would satisfy the decree within stipulated period, the subsequent interest for the realization of the decree for this period shall not be recovered."

4. Aggrieved by the aforementioned judgement and decree, the present Appellants challenged it before the Lahore High Court,

Lahore, by way of RFA No. 67 of 1998, and prayed for the judgement and decree, dated 22.01.1998, to be set aside and the suit of the Respondent to be dismissed in totality, with costs. The High Court, vide impugned judgement, dated 10.12.2014, dismissed the Appellants' RFA, by observing:

> "…Since the non-provision of material and drawing in time has been proved and also admitted by the appellant/defendant, therefore, the respondent/plaintiff could not be held liable for causing delay and suspension of the contract.
> …
> 12. For what has been stated above, since the scanning of the evidence and after the appreciation of law no illegality or misreading of evidence is observed, therefore, this appeal is hereby dismissed."

5. The matter is now before us. Malik Javed Iqbal Wains, Additional Attorney General, tendered appearance on behalf of the Appellants, and stated that the impugned judgement is against the law and facts of the case, and has resulted in a grave miscarriage of justice. He contended that the Respondent filed a false and frivolous suit, which was barred by time and even otherwise was liable to be dismissed on merits, on the basis of the recorded evidence. He further stated that the original time for execution of contract agreed between the parties was 12 months from the placing of first written work order, which was extended to 14 months, but due to negligence and lapses on part of the Respondent the work was completed after a period of 40 months, which resulted in a great loss to the government. The learned Additional Attorney General stressed that the site was handed over to the Respondent, vide work order, dated 17.01.1987, in full, and according to the particulars, specifications, and conditions contained in para. 4(a), para. 4(b), on page 13 of the contract, it was clear that the drawings would be prepared by the Respondent and

these were to be submitted along with the tender documents, indicating all the note-worthy dimensions, specifications, details of construction, extent and general arrangements of the fuelling system, and installation of POL tanks. He stated that the tender was accepted on 02.12.1986 and the Respondent was required to submit 8 copies of the working drawings along with original tracings but this was not done so; rather the Respondent submitted the afore-noted material much later, vide letter No. 650/266/E-6, dated 13.07.1987. The Additional Attorney General stated that it was the contractual obligation of the Respondent to submit the drawings in totality after the acceptance of the contract but the Respondent failed to do so and that the Respondent submitted the last drawing regarding bowser filling points, vide letter No. 70/CEM/CEA-125/87, dated 18.04.1990. Furthermore, the Additional Attorney General apprised the Court that the layout plan was part and parcel of the contract documents and was supplied with the tender documents to enable the Respondent to quote its rates and yet the Respondent did not start the work on the site for construction of cylindrical tanks, when the site was changed, vide Log Area No. 411/2/2/Q dated 07.05.1987, and this change of site was easier than the one proposed to the Respondent before as all the tanks had to be constructed on one site rather than scattered places. The Additional Attorney General further stated that the Respondent even caused delays in submitting the drawings of the refuelling hydrant points, which were submitted on 06.06.1990, only after the Appellants had reminded the Respondent, vide letter dated 16.05.1990. However, despite these delays, the Appellants kept paying the Respondent for the assigned tasks, on time. The Additional Attorney General argued that the suit for recovery was only instituted because after the completion of work and payment of final bill to the Respondent, an audit objection was raised for recovery of more than

PKR 1,182,175/- from the Respondent on account of over payment and erroneous valuation/calculation, and it was after this objection that the Respondent filed the suit for recovery, just to avoid the refund of the overpayment received by it from the Appellants. The learned Additional Attorney General finally prayed that the impugned judgement, dated 10.12.2014, passed in RFA No. 67/1998, may be set aside, as it was the result of non-reading, misreading, and erroneous appreciation of evidence along with the record furnished before the two *fora* below.

6. Khawaja Hassan Riaz, ASC appeared on behalf of the Respondent and vehemently denied the contentions of the learned Additional Attorney General. The learned Counsel defended the trial Court's judgement and decree, dated 22.01.1998, and the impugned judgement, dated 10.12.2014, and termed the same as correct appreciation of evidence and in the best interest of justice. The learned Counsel read out certain portions of the judgement of the trial Court as well as that of the High Court to augment his submissions and stated that as the two Courts below had threshed out the facts in a proper manner therefore the present Appeal may be dismissed with costs and the impugned judgement be upheld.

7. We have heard the Additional Attorney General and the learned Counsel for the Respondent at considerable length and have perused the record with their assistance.

8. Since the facts involved and the contentions raised are numerous in number, it would only be expedient to deal with them step by step.

Limitation period

It is an admitted fact before the two *fora* below that the project, despite all its delays, was completed on 19.05.1991. The suit for recovery was instituted on 16.09.1991, wherein the Respondent made 8 claims of recovery, amounting to a total of PKR 32,285,308/-. The said suit was instituted 4-months after the completion of work and thus the question of limitation does not arise, therefore the contentions of the Appellants vis-à-vis limitation do not hold any weight and are hereby repelled.

Completion timeline and delays

The completion timeline of the works is clearly envisaged in the work order[2], dated 17 January 1987, wherein clause (e) of the work order states that the date of handing over of site was 17 January 1987, clause (f) of the work order states that the date of commencement of work was 18 January 1987, and clause (g) of the work order states that the date of completion of work was 17 January 1988. This leaves no ambiguity that the completion timeline was indeed 12 months. However, *prima facie*, it seems that the delays caused cannot be attributed to one party only as there have been admitted delays on the part of the Respondent as well (which will be discussed in detail in a later part of this judgment). The record shows letter No. 650-266/E-6[3], dated 02.12.1986, addressed to the Respondent, which states at para. 4:

> "4. You are requested to:-
> a. Report to GE (Army) West Quetta to take over the site and commence the work forthwith.
> b. Attend this HQ within SEVEN DAYS on receipt of this letter to complete the contract documents.
> c. Acknowledge receipt of this letter."

[2] Available on pg. 127 of the Appellants' paper book in C.A No. 296/15.
[3] Available on pg. 21 of the Respondent's paper book in C.M.A. No. 549/2017

It is an admitted fact that work did not begin until 17.05.1987. With regards to this a letter[4] of the Appellants addressed to the Respondent, dated 17.05.1987, is of prime importance, which states:

> "1. It is admitted that site for 4 Nos underground tanks has already been handed over to you but site for 3 Nos overhead have been changed by AD S&T Log Area. After approval of new site the same will be handed over to you. Remaining 2 Nos underground tanks will be constructed at Aviation Base but the site work has not been taken over by you so far."

The letter reveals that the Respondent's contention that the entirety of the site was not made available to them does hold weight; however, it also reveals that there was a change of plans with regards to some area of the work site and that whilst the change of plans was being confirmed, the Respondent was free to take over the other site (Aviation Base site), which was available. In this regard, another letter[5], dated 17.05.1987, is of relevance, which reads:

> "1. This is to inform you that site for 2 Nos remaining underground tanks has been handed over to you on 16 May 1987. Please execute the work accordingly."

The afore-noted letter shows that the Respondent had taken over whatever sites were made available at that point in time. Nevertheless, this delay seems to be mutual, as the Appellants did not provide the sites in a timely manner but the Respondent also did not take over the sites already provided in a timely manner. Be that as it may, this brings us to another hurdle in the works, the M.S. round bars of 5 inches/8 diameter. In two separate letters[6] addressed to the Appellants by the Respondent, dated 12.07.1987 and 23.07.1987, the Respondent informed the Appellants that the M.S. round bars were

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[4] Available at pg. 128 of the Appellants' paper book in C.A No. 296/15.
[5] Available at pg. 129 of the Appellants' paper book in C.A No. 296/15.
[6] Available at pgs. 76 and 77 of the Respondent's paper book in C.M.A. No. 549/2017.

not available and therefore requested work to be suspended partially. In reply, the Appellants, wrote a letter[7] to the Respondent, dated 08.08.1987, stating therein that the M.S. round bars were now being issued to the Respondent and therefore the work could not be partially suspended at this stage and this letter categorically informed the Respondent that these bars shall be deemed to be delivered as per clause 21 of PAFW-2249.

Drawings

The lumpsum tender and contract for works[8] in its particular specifications and conditions section has a subheading at para. 4 titled drawings.[9] Sub-paras. (a), (b), and (c) of para. 4 are of relevance to the claim of delay in drawings and are thus reproduced below:

> "a. Only main layout plan of the installations has been attached with the tender documents. One copy of drawings based on the details as described in their particular specifications/ conditions shall be prepared by the tenderer/bidder and submitted alongwith the tender documents. Drawings must indicate all import dimensions, specifications, details of construction, extent and general of the fueling system and installation of POL tanks, barrel/jerricane filling machines with capacity. The drawings supplied shall be compete in all respects bearing no doubt as regard the interpretation of the specifications of the unforeseen items. If any departure from the approved drawings are deemed necessary during execution by the contractor detail of such departure and the reasons therefore shall be submitted in writing immediately to the Engineer-in-Charge. No departure from the specifications/ drawings shall be made without prior approval of the Engineer-in-Charge.
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> b. On acceptance of the tenders the contracts shall supply 8 copies of the detailed working drawings along-with original tracings free of charge.

[7] Available at pg. 135 of the Appellants' paper book in C.A No. 296/15.
[8] Available at pg. 162 of the Appellants' paper book in C.A No. 296/15.
[9] Available at pg. 174 of the Appellants' paper book in C.A No. 296/15.

> c. The drawings submitted by the contractors shall form part of the CA and shall be entered in the Schedule 'H' before the CA is accepted. Such drawings shall be the property of the government."

The aforementioned language on drawings is quite clear that the drawings were the sole responsibility of the Respondent and formed an integral part of the lumpsum tender and contract for works. Furthermore, at Schedule 'H' of the said contract[10], which is dealt with by para. 4(c) as noted above, the only drawings listed were the site plans and not those required of the Respondent by virtue of para. 4 (a) of the lumpsum tender and contract for works. Thus, in our view, there is nothing on record to suggest that the Respondent submitted the drawings in a timely fashion or made any effort to remedy the situation; therefore, this delay is to be attributed to the Respondent. Moreover, it is a matter of record that the Appellants upon receipt of the drawings/maps specifically informed the Respondent that their maps do not cater for the specification and requirements of the seismic hazard zone of Quetta. This aspect is an admitted fact and was conveyed to the Respondent, vide letter[11], dated, 27.07.87, and is also evident from the cross-examination[12] of Mr. Abdul Hameed (Manager of the Respondent).

Refund and Suit for Recovery

The general conditions for contract, PAFW-2249[13], fourth chapter, which deals with valuations and payments, at clause 65[14], lays down the mechanism for recovery/refund, as follows:

> "a. Whenever under the contract any sum of money shall be recoverable from or payable by the contractor the same

[10] Available at pg. 191 of the Appellants' paper book in C.A No. 296/15.
[11] Available at pg. 130 of the Appellants' paper book in C.A No. 296/15.
[12] Available at pgs. 107 and 108 of the Appellants' paper book in C.A No. 296/15.
[13] Available at pg. 205 of the Appellants' paper book in C.A No. 296/15.
[14] Available at pg. 232 of the Appellants' paper book in C.A No. 296/15.

> may be deducted from any sum then due or which at any time thereafter may become due to the contractor under the contract or under any other contract with Government, or from his Security Bond, or he shall pay the claim on demand, provided that in case of recovery from a contract other than the one to which the recovery pertains, the mode of effecting the recovery shall be decided by the controlling officer of the former contract.
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> b. Notwithstanding anything to the contrary herein contained the Government reserve the right to carry out a post payment audit and technical examination of the final bill including all supporting vouchers and abstracts, etc.
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> c. If as a result of such audit and technical examination any over-payment is discovered in respect of any work done by the contractor, or alleged to have been done by him under the Contact, it shall be recovered by Government from the Contractor by any or all of the methods prescribed above or any under-payment is discovered the amount shall be duly paid to the contractor by Government."

In his submissions, the learned Additional Attorney General contended that an audit objection was raised for recovery of more than PKR 1,182,175/- from the Respondent on account of over payment and erroneous valuation and calculation, and it was after this audit objection that the Respondent filed the suit for recovery, just to avoid the refund of the overpayment received by it. By virtue of the aforementioned provision of the contract dealing with the refund/ recovery, the Appellants were very much within their rights to carry out a post payment audit and technical examination of the final bill. And since the final audit revealed an over payment of more than PKR 1,182,175/-, the Appellants were well within their right to recover the said amount from the Respondent. However, it seems that the Respondent chose to retaliate to the refund request by initiating the suit for recovery. In this regard, the learned Counsel for the Respondent was asked if the Respondent ever approached the

Appellants for the recovery of the amount of PKR 32,285,308/-, which it sought to recover via the suit for recovery, in reply the learned Counsel for the Respondent stated that a verbal request was made. When asked as to why a written request was never made considering such a huge sum, the learned Counsel could not furnish a plausible reply to the fact that no such claim was ever made by the Respondent. Moreover, this aspect is also evident from the admission made by Mr. Abdul Hameed in his cross-examination[15] that no objection was filed by the Respondent with regards to the payments made by the Appellants. There is nothing on the record either to suggest that the Respondent sought to directly recover the PKR 32,285,308/- sum from the Appellants rather initiated recovery proceedings, in stark contrast to the recovery mechanism provided under clause 65 of the PAFW-2249. This points towards a *mala fide* intention of the Respondent[16] and thus the legal maxim of equity, that he comes to equity must come with clean hands, squarely applies here.

Further delays and billing dispute

We are wary of the fact that a contract which was originally made for 12 months could not be completed within due time and was delayed for 40 months. Part of the reason for the delays was the sub-zero temperature in Quetta. In this regard there is a trail of communication comprising of various letters[17] between the Appellants and the Respondent, which show that the Respondent made the Appellants aware that continuing the work in sub-zero temperature was not possible and the Appellants agreed with the Respondent's assessment and suspended the work. It has also come on the record during the cross-examination of DW-2, Mr. Mansoor Muhammad Khilji, that at certain times the work was suspended on the request of

[15] Available at pg. 109 of the Appellants' paper book in C.A No. 296/15.
[16] The aspect of the matter, that is *mala fide* intent, has been dealt with again in para. 11 of this judgement.
[17] Available at pgs. 153-154 of the Appellants' paper book in C.A No. 296/15.

the Respondent. Be that as it may, during the cross-examination Mr. Abdul Hameed (Manager of the Respondent) duly admitted that the dispute between the parties arose when the third running bill was submitted. He further admitted that the rates of the item purchased by them, upon which they were entitled for a 10% profit, were based on enhanced rates as per the Finance Division Economic Survey Report 1990-1991 and at no point of time assigned receipts/bills of the item purchased, as agreed between the parties, were furnished by them to the Appellants, which was also one of the major causes of dispute between the parties. It is also a matter of record that there is no clause in the agreement with regards to markup which has duly been admitted by Mr. Abdul Hameed in his cross-examination.[18]

9. Having said that, it is now clear to us that the delays in the project were due to the Appellants and the Respondent both. In this regard a letter[19], dated 16.12.1990, addressed to the Respondent from the Appellants, further solidifies the aforenoted observations, and is reproduced below:

> "1. WHEREAS under the terms and conditions of the subject CA, you were bound to complete the job by 11 Aug'88, I hereby inform you that the performance of the said condition is remitted and in lieu of such performance, you are allowed to complete the job by 21 Feb'91 owing to the reason that work remained under partial suspension wef 27-7-88 to 05 Dec'90.
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> 2. In all other respects the CA shall remain in full force."

As has been established in the facts narrated herein above that work was suspended on account of bad weather on 31.01.1990 and finally resumed on 13.05.1991, which was then completed on 19.05.1991. The letter reproduced above shows that both parties had agreed that

[18] Available at pg. 113 of the Appellants' paper book in C.A No. 296/15.
[19] Available at pg. 159 of the Appellants' paper book in C.A No. 296/15.

work would be completed by 21.02.1991 but was eventually completed, about 3 months later, on 19.05.1991, and the delay was only due to bad weather. Therefore, to attribute the delays to any single party, especially in light of the letter reproduced above, would be unfair. It seems to us that the delays were mutual and were condoned by both parties at different points in time and the record very much reflects so.

10. It would be pertinent to call the delays as "concurrent delays" the definition of which was laid out by John Marrin, QC as:

> "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."[20]
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> **(EMPHASIS ADDED)**

11. The aforenoted concept of concurrent delays was also explained in the *Malmaison*[21] case by Dyson J:

> "... if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."
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> **(EMPHASIS ADDED)**

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[20] In a paper produced for the Society of Construction Law in 2002, and later confirmed in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm).
[21] Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited (1999) 70 Con LR 32

While discussing *Malmaison*, the High Court of Justice Queen's Bench Division Commercial Court, in *Adyard Abu Dhabi*[22] observed the following:

> "277. It is to be noted that this example [the example in Malmaison] involves a relevant event which caused a period of actual delay to the progress of the works – no work could be done for a week due to the weather. If that is established then the contractor is entitled to his extension of time even if there is another concurrent cause of that same delay…
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> 278. A similar approach was taken by HHJ Seymour QC in Royal Brompton Hospital NHS Trust v Hammond (No 7) (2001) 76 Con LR 148. Having accepted that the approach set out in Balfour Beatty and Malmaison was correct the Judge then dealt with a submission made to him as to "events operating concurrently." He said (at paragraph 31):
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> "[This] does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event,
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> 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date."
>
> The relevant event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is real concurrency of causes of the delay. It was circumstances such as these that Dyson J was concerned with in the passage from his judgment in Malmaison …(para 13)…"

[22] Adyard Abu Dhabi v. SD Marine Services [2011] EWHC 848 (Comm)

> 279. This makes it clear that there is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time."
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> **(EMPHASIS ADDED)**

Applying the dicta from the United Kingdom's jurisdiction to the present facts, we are of the considered view that the initial events such as delay in provision of complete site on part of the Appellants, delay in takeover of the available sites on part of the Respondent, delay in provision of the complete drawings on part of the Respondent, delay in provision of M.S. round bars on part of the Appellants, were all relevant events which delayed the project and thus were concurrent in nature. As has been highlighted by the dicta cited above, such nature of delays meant that the Respondent was eligible for multiple extensions of time, and the Appellants did grant these extensions. Then came the relevant event of inclement weather, which was beyond the control of the Appellants and the Respondent, this again meant that the Respondent be allowed an extension of time, and the Appellants once again granted the extension. Since, the extensions of time were granted, and the project was completed, it is quite puzzling to us that the Respondent, initiated recovery proceedings; therefore, as stated herein above, we are left with no other option then to agree with the learned Additional Attorney General's contention that the recovery proceedings were nothing but an effort to avoid paying the refund that the Appellants were rightfully owed by the Respondent.

12. Having said that, even if the Respondent did not have any *mala fide* intent in filing the suit for recovery, we believe that the Respondent's claims would fail the 'but-for' test of causation[23]. The question to ask in the 'but-for' test over here would be: would the

[23] As outlined in De Beers UK Ltd (formerly Diamond Trading Co Ltd) v. Atos Origin It Services UK Ltd [2010] EWHC 3276 (TCC)

Respondent still be delaying the project but for the Appellants' delays? The answer is yes. In simpler terms, the 'but-for' test, outlined above, is asking if the delays by the Respondent are independent of the delays by the Appellants. If the Respondent's delays are only happening because the Appellants caused delays first, then the Appellants' delays are the root cause. However, if the Respondent would still be causing delays regardless of the Appellants' actions, then the Respondent's delays are independent. Hence, applying the 'but-for' test to the matter at hand would mean that the Respondent's delays were independent and thus the Respondent was not entitled to recover the amount that it sought to recover through the suit of recovery.

13. At this juncture it would be pertinent to reproduce some literature regarding extension of time requests and compensation, in light of concurrent delays, as laid out in the Society of Construction Law Delay and Disruption Protocol[24]:

> "**10. Concurrent delay – effect on entitlement to extension of time (EOT)**: True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.
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> **14. Concurrent delay – effect on entitlement to compensation for prolongation**: Where Employer Delay to Completion and Contractor Delay to Completion are

[24] *Society of Construction Law Delay and Disruption Protocol*, 2nd Edition, Society of Construction Law (UK) <https://www.scl.org.uk/sites/default/files/documents/SCL_Delay_Protocol_2nd_Edition_Final.pdf>

> concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs."
>
> **(EMPHASIS SUPPLIED)**

In light of the above, yet again, we come to the same conclusion. The Respondent was owed extensions of time, and these were so granted, but the Respondent was not owed any compensation.

14. This bring us to the question of the concurrent findings by the two *fora* below. This Court, in *United Bank Limited (UBL)*[25] has held:

> "It is a well settled exposition of law that a right of appeal is a right of entering into a superior court and invoking its aid and interposition to redress the error of the forum below. It is essentially a continuation of the original proceedings as a vested right of the litigant to avail the remedy of an appeal provided for appraisal and testing the soundness of the decisions and proceedings of the courts below. It is always explicated and elucidated that the right of appeal is not a mere matter of procedure but is a substantive right. While considering matters in appeal, the appellate courts may affirm, modify, reverse or vacate the decision of lower courts."

Furthermore, in *Nazim-ud-Din*[26], this Court held:

> "The concurrent findings of fact being erroneous on account of misreading and non-reading of the evidence were not sacrosanct and did not preclude the learned High Court from interfering in its revisional jurisdiction to correct such factual error which arose on account of the amiss mentioned above."

Additionally, in *A. Rahim Foods*[27], this Court held:

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[25] United Bank Limited v. Jamil Ahmed (2024 SCMR 164)
[26] Nazim-ud-Din v. Sheikh Zia-ul-Qamar (2016 SCMR 24)
[27] A. Rahim Foods v. K&N's Foods (2023 CLD 1001)

> "In the exercise of its appellate jurisdiction in civil cases, this Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence."

Therefore, the upshot of the discussion of the facts narrated herein above, in light of the dictum of this Court, is that the High Court as well as the trial Court came to conclusions which were patently improbable and perverse, and the same are set aside; hence, Civil Appeal No. 296 of 2015 is hereby allowed. Resultantly, CMA No. 948 of 2015 is also disposed of. The parties are left to bear their own costs.

Judge

Judge

Judge

ISLAMABAD
10.7.2024
Arshed/AJK, L.C.
Approved for Reporting