

Present:
Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Mansur Alam

First Appeal No. 53 of 2015

In the Matter of:

Md. Shahidul Islam proprietor of M/s Islam
Engineering Works, Khulna
.....Plaintiff-appellant.

-Versus-

Chief Engineer (Mechanical and Electric),
Mongla Port Authority and another
.....Plaintiff-respondents.

Ms. Zobaida Parvin, Advocate
..... For the appellant.

Mr. Md. Yusuf Ali, D.A.G with
Ms. Ishrat Jahan, A.A.G with
Mr. Md. Siddik Ali, A.A.G with
Ms. Sabina Yasmin Nira, A.A.G
..... For the Government respondents

Heard on 05.05.2025, 14.05.2025,
19.05.2025, 22.05.2025 and Judgment on
26.05.2025.

Sheikh Abdul Awal, J:

This first appeal at the instance of the plaintiff-appellant is directed against the judgment and decree dated 23.02.2010 passed by the learned Joint District Judge, 2nd Court, Khulna in Title Suit No. 16 of 2007 decreeing the suit in part.

Material facts relevant for disposal of the appeal, briefly, are that appellant as plaintiff filed Money Suit No. 16 of 2007 in the Court of the learned Joint District Judge, 2nd Court, Khulna for recovery of money amounting to Taka 10,12,946.41 (Ten lakh

twelve thousand nine hundred forty six taka and forty one paisa) only.

The plaintiff's case in brief is that the plaintiff is the owner of Islam Engineering Works, who used to do business of various manufacturing spare parts and used to sell M.S, Plate, Rod, Angle and Flat-bar in various mills and factories. A circular was published under caption “৫ম পুনঃ সংক্ষিপ্ত নিলাম বিজ্ঞপ্তি” in the daily “Songram” on 19.06.2004 under the signature and seal of defendant No. 1 and according to said circular the defendants wanted to sell various spare parts. The tender of schedule reads as follows:

Ka) 4 pieces Joneboyed Docsite Crane 320 Metric ton, rate of per ton Tk. 20,050 in total 64,16,000/-; and

Kha) 4 pieces spare parts of said crane amount 4.14 ton (180 item) rate Tk. 1,09,694.00 Total price 65,25,694.00 (sixty five lac twenty five thousand six hundred ninety four) only and as per circular the plaintiff submitted tender along with 25% earnest money through bank draft on 04.07.2004 to Divisional Commissioner Office, Khulna.

That plaintiff as the highest bidder was selected by the defendant and according to circular plaintiff deposited 25% earnest money i.e. Tk. 16,50,000 (sixteen lac fifty thousand) through bank draft. Thereafter, defendant No. 1 gave work order on 16.10.2004. According to work order plaintiff deposited rest money amounting to Tk. 51,69,350.23 (fifty one lac sixty nine thousand three hundred fifty taka twenty three paisa) with 3% income tax on the total value amount of Tk. 1,95,770.82 and 5% vat amount of Tk. 97,885.41 through bank draft. The defendants admitted the same by sending a letter on 14.12.2004; that thereafter a delivery committee was formed with 5 persons. After receiving the total amount the delivery committee handed over 294.086 metric ton out of 320 metric ton of

goods through their joint signature by 28 challans between 14.01.2005-17.02.2005; that as per the terms of contract the defendant authority have not yet been handed over the remaining goods 25.94 metric ton of Ka schedule. The plaintiff has requested to defendants on several times verbally and written, but they regretted. As per terms of the tender schedule 25.96 metric ton Tk. 5,20,498, 3% income tax on the above money Tk. 15,614.94, vat 1.5% Tk. 7867.47, Woman charge Tk. 22080.00 and damage charge Tk. 1,28,502.00 and also bank interest Tk. 3,18,444.00 in total 10,12,946.41 (ten lac twelve thousand nine hundred forty six taka forty one paisa), being entitled to receive the said money the plaintiff send a legal notice on 09.07.2007, but defendant did not take any step within the stipulated time. Then plaintiff met with the defendants nos. 1-2 and demanded his money to the defendants in vain and hence, the suit.

The respondents as defendants contested the suit by filing written statement denying all the material allegations made in the plaint contending, inter-alia, that the defendant institution is an autonomous institution. The defendant authority called for tenders for sale of cranes and spare parts. The plaintiff mentioned the price of Tk. 65,25,694.00 and as the highest bidder it was decided to issue the work order to him, apart from the plaintiff deposited of Tk. 16.50 lac; that after deposited of rest amount of Tk. 48,75,695.00 income tax Tk. 1,95,770.00 and vat 97,885.41 to the fund of authority and the authority issued work order to the plaintiff; that the defendant authority embarked to disburse the goods on day time and serve a letter on 03.02.2024. But the plaintiff kept the goods in open place for long time. Thereafter, the defendant sent award notice on 16.02.2005. Thereafter, while the plaintiff has taken the goods he did not arise any complain. After 40 day on 29.03.2005 the demand of

25.96 ton goods is not tenable in law. Plaintiff's claim is not based on proper calculation, the suit is liable to be dismissed.

On the pleadings of the parties the learned Joint District Judge framed the following issues for determination:

- i. Whether the suit is maintainable in its present form and manner?
- ii. Whether the plaintiff is entitled to get Tk. 10,12,996.41 for the defendants?
- iii. Whether the suit is bad for defect of parties?
- iv. Whether the suit is barred by law?
- v. Whether the plaintiff is entitled to get any other relief,, as prayed for?

At the trial the plaintiff himself was examined as PW-1 and defendant side also examined 1 witness and both the parties produced some documents to prove their respective cases.

The learned Joint District Judge, 2nd Court, Khulna upon hearing the parties and on considering the evidence and materials on record by his judgment and decree dated 23.02.2010 decreed the suit in part holding that:

অত্র মানি মোকদ্দমাটি বিবাদীপক্ষের বিরুদ্ধে দোতরফা সূত্রে বিনা খরচায় আংশিক ডিক্রী হয়। বিবাদী পক্ষকে বাদীপক্ষের অনুকূলে ৫,২০,৪৯৮ (পাঁচ লক্ষ বিশ হাজার চারশত আটানব্ব্বই) টাকা আগামী ৬০ (ষাট) দিনের মধ্যে পরিশোধের জন্য নির্দেশ দেওয়া গেল।

Being aggrieved by the aforesaid impugned judgment and decree dated 23.02.2010 passed by the learned Joint District Judge, 2nd Court, Khulna the plaintiff preferred this First Appeal.

Ms. Zobaida Parvin, the learned advocate for the appellant in the course of argument takes us through the plaint, written statement, deposition of witnesses and other materials on record and then submits that the plaintiff as highest bidder got the work order and he

deposited entire amount as per terms and condition of work order but the defendants did not supply the goods 25.96 metric ton i.e. less than actual goods which causes damage of Tk. 10,12,946.41 but the trial Court without proper assessment of the evidence and materials on record abruptly decreed the suit in part instead non Tk. 10,12,946.41. The learned Advocate further submits that the plaintiff as per law, terms and contract paid all VAT, taxes which has been duly mentioned in the plaint of the suit as well as in the evidence of PW-1 and as such, he is entitled to get decree of Tk. 10,12,946.41 with interest.

Ms. Ishrat Jahan, the learned Assistant Attorney General appearing for the defendant-respondents, on the other hand, supports the impugned judgment and decree, which was according to her just, correct and proper. She submits that NBR has not been made party in the suit and VAT/taxes have been deposited in the fund of Government and it is not returnable in any way whatsoever and the trial Court rightly decreed the suit in part.

Having heard the learned counsels for the parties and perused the materials on record, now, only the material question calls for consideration in this appeal is that whether the learned Joint District Judge was justified in decreeing the suit in part.

On perusal of the record, it appears that the appellant as plaintiff filed Money Suit No. 16 of 2007 impleading the defendant respondents claiming Tk. 10,12,946.41 on the allegations that as per work order the defendants did not supply total 320 metric ton goods to the plaintiff which caused damage of Tk. 5,20,498/-. On the other hand, the defendants entered appearance in the suit and filed written statement, stating, that- “বাদীপক্ষ মালামাল সমূহ লইয়া যাওয়ার পর স্বাভাবিক ভাবে তাহার সাথে টেন্ডার বিজ্ঞপ্তি ও কার্যাদেশের শর্ত অনুযায়ী এই বিবাদী প্রতিষ্ঠানের সম্পর্ক সমাপ্ত হইয়া যায়। বাদীপক্ষ মালামাল সমূহ নেওয়ার সময় এই বিবাদী প্রতিষ্ঠানের নিকট কোনরূপ কোন

অভিযোগ উত্থাপন করেন নাই। সকল মালামাল সম্পূর্ণ বুঝিয়া নেওয়ার দীর্ঘ ৪০ দিন পর হঠাৎ করিয়া এই বাদীপক্ষ ২৯-৩-০৫ তারিখ ২৫.৯৬ টন মাল কম সরবরাহ করা হয়েছে মর্মে পত্রে জানান। যাহা আদৌ গ্রহণযোগ্য নহে।” It further appears that at the trial the plaintiff examined 1 witness and defendants also examined 1 witness and both the parties exhibited some documents to prove their respective cases.

PW-1 stated in his deposition that- “Work order এর শর্ত বহিভূতভাবে বিবাদী মালামাল ওজন বাবদ ২২০৮০/- টাকা আমার নিকট থেকে অতিঃ গ্রহন করে। এই টাকা দিতে আমি আইনত বাধ্য না হওয়ায় ফেরত পাবার অধিকারী।” This witness in his deposition also stated that- “আমি বিবাদী হইতে ৬৯৪৫৪১/- টাকা ও উক্ত টাকার উপর ১-১২-০৪ তারিখ হইতে ৩১-৮-০৭ তারিখ পর্যন্ত Lending সুদ বাবদ ৩১৮৪৪৪/- টাকা সর্বমোট ১০,১২,৯৪৬/৪১ টাকা বিবাদীর নিকট পেতে হকদার।” This witness exhibited all his documents to prove his case namely, “Ext. 1-11 series”.

DW-1 in his deposition stated that- “বিবাদী পক্ষ চারটি ক্রেন এবং ৪.১৪ টন যন্ত্রাংশ স্ক্রাপি বিক্রয়ের জন্য টেন্ডার দেওয়া হয়। বাদী ৬৫২৫৬৯৪/-টাকা সর্বমোট দরদাতা হিসাবে বাদীর অনুকূলে কার্যাদেশ দেওয়া হয়। বাদী তাহার লোকজন দিয়ে উক্ত ক্রেন সহ মালামাল খুলিয়া অরক্ষিত অবস্থায় ফেলিয়া রাখে। এ বিষয়ে বাদী কে সতর্ক করিয়া ১৬-২-০৫ ইং তারিখে পত্র প্রেরণ করা হয় পরে বাদীপক্ষ মালামাল সব নিয়ে যায়। মাল বুঝিয়া নেওয়ার পর ৪০ দিন পরে ২৫.৯৬ টন মাল কম পায় মর্মে জানায়। যাহা কোন ভাবেই গ্রহণযোগ্য বিবেচিত হয়না। বাদী টেন্ডারের যাবতীয় মাল বুঝিয়া নেয়।”

On scrutiny of the above quoted evidence of PW and DW together with plaint and written statement, it appears that at first the plaintiff received all the goods and after 40 days he raised objection as to weight of goods. It also appears that the plaintiff took delivery of goods and thereafter goods were lying uncared condition, resulting the defendant wrote a letter to the plaintiff on 16.02.2005 and thereafter the plaintiff took away the goods under his control.

On going through the impugned judgment it appears that the trial Court on due consideration of the entire materials on record factually believed the plaintiff's case and accordingly, decreed the suit in part in the following language that- “উপরক্ত ভ্যাট ও আয়কর ভিন্ন খাতে জমা দেওয়ার পর মংলা বন্দর কর্তৃপক্ষের উক্ত টাকা ফেরত দেওয়ার কোন সুযোগ থাকে না। মালামাল ইচ্ছাকৃত ভাবে মংলা বন্দর কর্তৃপক্ষ কম দিয়াছেন এইরূপ কোন প্রেক্ষাপট উল্লেখিত না হওয়ায় মালামাল কম হওয়ার কারনে বাদী ক্ষতিগ্রস্ত হইয়াছে, এই দাবী বিবেচনা করি. যা বাদী লাভ বা ক্ষতি দেওয়ার কোন সুযোগ নাই।”

This being purely a finding of fact based on proper appreciation of the evidence and materials on record and law as well. In the facts and circumstance of the case it appears that the trial Court justly decreed the suit in part. We find no flaw in the reasonings of the trial Court below or any ground to assail the same.

We have already noticed that the National Board of Revenue (NBR) has not been made party in the case and it is on record alleged VAT/taxes has been deposited to the Government treasury in accordance with law and after long days it is not returnable/refundable.

In view of our discussions made in the foregoing paragraphs it is by now clear that the instant appeal must fail.

In the result, the appeal is dismissed without any order as to costs.

Let a copy of this judgment along with lower Court's record be sent down at once.

Md. Mansur Alam, J:

I agree.