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IN THE HIGH COURT OF DELHI

Judgment reserved on : December 03, 2008

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Judgment delivered on : December 15, 2008

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RFA 648/2005

D.D.A

..... Appellant
Through: Mr.Yeeshu Jain, Advocate.

versus

M/S.PRIDE CONSTRUCTIONS

..... Respondent
Through: Mr.B.M.Sehgal, Advocate.

RFA 649/2005

D.D.A

..... Appellant
Through: Mr.Yeeshu Jain, Advocate.

versus

M/S.PRIDE CONSTRUCTIONS

..... Respondent
Through: Mr.B.M.Sehgal, Advocate.

RFA 651/2005

D.D.A

..... Appellant
Through: Mr.Yeeshu Jain, Advocate.

versus

M/S.PRIDE CONSTRUCTIONS

..... Respondent
Through: Mr.B.M.Sehgal, Advocate.

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. The above captioned appeals arise out of a common judgment and decree dated 5.5.2005 whereby three suits filed by the respondent; being Suit No.227/2004, Suit No.228/2004 and Suit No.229/2004 have been partially decreed.

2. The claim in the three suits was as under:-

(A) Suit No.227/2004

(I)	Watch and ward charges @Rs.6600/- p.m. for 18 months.	Rs.1,18,800/-
(II)	Amount deducted from the final bill.	Rs. 95,200/-
(III)	Refund of security deposit	Rs.1,06,000/-
(IV)	Interest @12% per annum on watch and ward charges for 23 months.	Rs. 27,334/-
(V)	Cost of legal notices dated 11.1.2001 and 31.1.2003	Rs. 6,600/-

		<u>Rs.3,53,934/-</u>

(B) Suit No.228/2004

(I)	Watch and ward charges @Rs.6,600/- p.m. for 18 months.	Rs.1,18,800/-
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(II)	Amount deducted from the final bill.	Rs.1,68,840/-
(III)	Refund of security deposit	Rs.1,50,000/-
(IV)	Interest @12% per annum on watch and ward charges for 23 months.	Rs. 27,334/-
(V)	Cost of legal notices dated 11.1.2001 and 31.1.2003	Rs. 6,600/-

		<u>Rs.4,71,574/-</u>

(C) Suit No.229/2004

(I)	Watch and ward charges @Rs.6,600/- p.m. for 18 months.	Rs.1,18,800/-
(II)	Amount deducted from the final bill.	Rs. 88,200/-
(III)	Refund of security deposit	Rs.1,00,000/-
(IV)	Interest @12% per annum on watch and ward charges for 23 months.	Rs. 27,334/-
(V)	Cost of legal notices dated 11.1.2001 and 31.1.2003	Rs. 6,600/-

		<u>Rs.3,40,934/-</u>

3. The three suits have been decreed awarding watch and ward charges @Rs.6,600/- per month for a period of only 12 months; amount deducted from the final bills(s) has also been decreed and so also the claim for security deposit in each suit. Cost incurred on account of sending legal notices have been declined. Pre suit interest has been declined. Pendente lite and future interest has been awarded @12% per annum. Thus, decree passed in suit No.227/04 is in sum of Rs.2,80,400/- with interest as afore-noted. Decree passed in

Suit No.228/04 is in sum of Rs.3,98,040/- with interest as afore-noted. Decree in suit No.229/04 is in sum of Rs.2,67,400/- with interest as afore-noted.

4. The three suits were consolidated vide order dated 20.1.2004 and evidence has been recorded in Suit No.229/2004. It may be noted that original documents filed by the plaintiff in the three suits have been separately exhibited with duplication of exhibit marks in the three suits. Documents filed by DDA in Suit No.229/2004 have been exhibited in said suit.

5. For clarity it may be recorded that in Suit No.228/2004, put in a tabular form, the status of the documents exhibited would be as under:-

EXHIBIT	DATE
EXH. PW1/1	AGREEMENT BETWEEN THE PARTIES DATED 9.8.1999
EXH PW 1/ 2	LETTER DATED 16.2.2001
EXH PW1/3	LETTER DATED 3.5.2001
EXH PW1/4	LETTER DATED 8.9.2000
EXH PW1/5	LETTER DATED 29.8.2000
EXH PW1/6	LETTER DATED 28.8.2000
EXH PW1/7	LETTER DATED 4.8.2000
EXH PW1/8	LETTER DATED 11.7.2000
EXH PW1/9	LETTER DATED 12.5.2000
EXH PW1/10	LETTER DATED 11.3.2000
EXH PW1/11 TO EXH PW1/15	POSTAL RECEIPTS DATED 12.11.2001
EXH PW1/16	NOTICE U/S 53(B) OF DELHI DEVELOPMENT ACT DATED 11.1.2001
EXH PW1/17	NOTICE DATED 31.1.2003 UNDER SECTION 53(B) OF DELHI DEVELOPMENT

EXH PW1/18
EXH PW1/19

ACT
POSTAL RECEIPT
POSTAL RECEIPT

6. In Suit No.227/2004, Exhibits PW-1/16 to Ex.PW-1/18, have not been filed and hence not proved. But, two documents, Ex.PW-1/20 and Ex.PW-1/21, have been proved. Nothing has turned on said documents and no submission were made pertaining thereto before the learned Trial Judge or in appeal. Hence, we need not note their contents.

7. In Suit No.229/2004 documents exhibited in Suit No.228/2004 have been proved as exhibits save and except Ex.PW-1/6 which has not been relied upon in said suit. Pertaining to DDA, documents exhibited are as under:-

EXHIBIT	LETTERS DATED
PW1/D1	14.9.2000
PW1/D2	29.4.2000
PW1/D3	2.9.2000
PW1/D4	4.2.2000
PW1/D5	20.1.2004
PW1/D6	3.11.1999
PW1/D7	29.4.2000
PW1/D8	5.11.1999
PW1/D9 (MARKED AS PW1/9)	29.4.2000

The said documents are common to all the suits.

8. The common case pleaded in all the complaints was that vide three work orders, DDA awarded plaintiff the work of constructing 126, 136 and 240 LIG flats in different sectors of the colony called Rohini in Delhi with date of completion of the

three works being 22.4.1994, 3.10.1994 and 5.1.1995. Alleging that the plaintiff held back certain works at the request of DDA on account of area not being developed and the allottees not willing to take possession of the flats, it was pleaded that a supplementary agreement, Ex.PW-1/1 was executed pertaining to the three contracts on 9.8.1999 between the plaintiff and DDA, inter alia, recording that the plaintiff has substantially completed the works and that works listed in schedule-B shall be held back and completed during the process of handing over the flats to the allottees.

9. Schedule-B reads as under:-

Name of Work:- M/O Completed scheme in Rohini Zone.

SH:- C/o 126, LIF Incremental houses in Pkt.8 & 9
Sector -25, Rohini Ph.III.

The following items or those part of items which may be executed under the supplementary agreement for the type of finishing items during the process of handing over the flats/built up spaces to the prospective allotted (sic prospective allottees) are as under:-

1. Final cost of white-wash/colour wash painting of doors, windows, water meter boxes SCI/GI pipes and shutters etc.
2. Providing and fixing of sanitary fittings and fixtures.
3. Testing of G.I. pipes and other fittings etc.
4. Easing of steel windows and wooden shutters etc.
5. Providing and fixing of door window fitting and providing and fixing glass panes to window.

6. Removal of mortar droppings paints and white wash splashes from walls and floors.

7. Cleaning gully traps house manholes and fixing of covers etc.

8. Rectification of defects and repair work, if any.

9. Watch and ward of whole housing pockets round the clock by providing the chowkidars/security guards. Agency will be full responsible for any type of theft and pilferage for completed houses and make good the same for which nothing extra would be paid.

10. The watch and ward charges will be paid Rs.6600/- per month for the abovesaid work (as per rates specified in Circular No.510 dated 2/5/97) issued by EMS Office.

Sd/-
Contractor

Sd/-
Executive Engineer
R.P.D. 10/DDA"

10. Pleading that the supplementary agreement dated 9.8.1999 was valid for a period of 18 months and that even thereafter the plaintiff was compelled to engage watch and ward staff to protect the flats because DDA did not hand over possession thereof to the allottees, claim was made for expenses incurred on account of continued deployment of watch and ward staff for another 18 months. Amounts deducted from the final bill(s) as afore-noted were claimed to be refundable on the ground that the works were completed. So was the basis to claim the refund of security deposit.

11. DDA opposed the claims in the three suits alleging that the plaintiff *did not communicate to the defendant that all*

items of work as stated in the supplementary agreement were completed/executed and the flats could be taken over from him by the DDA. In the absence of such a statement from the plaintiff, the defendant was/is not bound to make any payment whatsoever to the plaintiff till the work mentioned in the supplementary agreement was executed in full and proper spirit and manner. (Refer para 5.iii of the written statement). Pertaining to the claim for continued deployment of watch and ward it was pleaded *the plaintiff failed to provide security in the true sense and failed to execute the remaining work. The DDA was not thus bound to release any kind of payment even after the expiry of the said maintenance period. (Refer para 5.v of the written statement).* Same was the defence pleaded with respect to refund of security deposit.

12. Plaintiff examined Shri D.K.Nijhawan as PW-1 who proved various letters communicated by the plaintiff to DDA. The letters made a common reference to the 126, 136 and 240 flats which were constructed by the plaintiff in Sectors 25, 22 and 21 respectively in the colony Rohini. Briefly noted, the letters are reminders on various dates between March 2000 till May 2001 requesting DDA to take possession of the flats because thefts have started taking place with the thieves stealing sanitary fittings from a few flats. DDA was informed that since a theft insurance policy was obtained from New

India Assurance Company, claims should be lodged with the said company. The witness was confronted with the letters Ex.PW-1/D-1 to Ex.PW-1/D-9, receipt whereof was admitted by him. In sum and substance, the said letters referred to the flats to be constructed by the plaintiff; grievance of DDA being that fittings and fixtures are not being provided in the flats and that the allottees have been complaining about fittings and fixtures not being affixed in the flats. Ex.PW-1/D-1, dated 14.9.2000 is the complaint by DDA addressed to the plaintiff informing that pertaining to 136 flats, in more than 50 flats, possession whereof has been handed over to the allottee, fittings and fixtures have not been affixed. Similar is the complaint in Ex.PW-1/D-2 dated 29.4.2000. Ex.PW-1/D-4 is a letter dated 4.2.2000 addressed by DDA to the plaintiff; referring to the entire lot of flats in the three sectors of Rohini, DDA has requested the plaintiff to complete finishing work in the flats in respect whereof a list was prepared and sent to the plaintiff under cover of letter dated 5.11.1999 addressed by DDA. We note that other letters make similar request of affixing all fittings and fixtures in the flats as also completing the final coat of colour wash on the outer walls and white-wash on the inner walls. Vide Ex.PW-1/9, on 29.4.2000, DDA informed the plaintiff that Rs.700/- per flat retained as money withheld from the final bill would be paid when the flats were

completed in all respects i.e. all fittings and fixtures put in place.

13. Decreeing the three suits as afore-noted, learned Trial Judge has held that after 29.4.2000 no letter was written to the plaintiff and that DDA did not lodge any claim with respect to the goods which were stolen and that even the value of the stolen items was not given to the Court. Conclusion drawn is that the plaintiff would be entitled to watch and ward charges for a further period of 12 months pertaining to all three sites i.e. $\text{Rs.}6,600 \times 12 = \text{Rs.}79,200/-$ for each site. $\text{Rs.}700/-$ per flat deducted from the final bill as claimed for the three sites as also refund of security deposit for the three contracts has been held to be the entitlement of the plaintiff.

14. Challenging the impugned judgment and decree, learned counsel for DDA urged that the letters Ex.PW-1/D-1 to Ex.PW-1/D-9 established theft of some fittings and fixtures from the flats and that this was admitted even by the plaintiff in its letters Ex.PW-1/9 to Ex.PW-1/10, all of which requested DDA to lodge a claim with the insurance company with whom the fittings and fixtures were insured against theft; counsel urged that it was apparent that the plaintiff had not deployed any watch and ward staff at site and hence was not entitled to recompense for expenditure on account of watch and ward

staff. Counsel further urged that no documentary evidence was led of making any payment to chowkidars or watchmen deployed at the three sites. Conceding that entire fittings and fixtures in all the flats were not stolen, further conceding that the value of the stolen articles were not proved, counsel urged that the onus was on the plaintiff to establish as to how many flats were affected by the theft. Thus, counsel urged that the plaintiff was not entitled to a refund of Rs.700/- per flat which was deducted when the supplementary agreement was executed. Counsel urged that security deposit had to be forfeited because, admittedly, as per the contract the same was refundable when the works were completed.

15. Responding to the contention of learned counsel for the appellant/DDA, counsel for the respondent/plaintiff urged that no evidence was led by DDA of having spent any money for completion of the flats and hence a presumption arises that the work was completed in all the flats. Thus, counsel urged, the learned Trial Judge was justified in directing refund of the money retained by DDA @Rs.700/- per flat when the supplementary agreement was executed as also the refund of the security deposit. Pertaining to the claim for watch and ward charges, counsel urged that the learned Trial Judge has recompensed the plaintiff @Rs.6,600/- per month, the agreed rate, for a period of only 12 months as against the period of 18

months for which the claim was made. Counsel urged that merely because theft took place did not mean that watch and ward staff was not deployed. Pertaining to the plea that no documentary evidence was led pertaining to salary paid to chowkidars/watchmen, counsel urged that affidavits of three chowkidars, Nathu Ram, Ram Chander and Bhim Ram were filed in Suit No.227/2004 as per which affidavits the three persons were engaged as chowkidars at the three sites and had received their wages.

16. The undisputed position between the parties is that three supplementary agreements were executed on 9.8.1999, one each pertaining to the three works which were awarded by DDA to the plaintiff. At that time the flats were near completion and since experience of DDA was that fittings and fixtures, particularly relatable to sanitary fittings like taps, ball stoppers, mixtures, stop-cock, MS Stays, fasteners etc. are prone to theft, installation thereof was deferred as per the supplementary agreement and certifying the final bill for payment Rs.700/- per flat was retained to be paid over when the flats were handed over with all fittings and fixtures intact. Admittedly, fittings and fixtures were not intact when possession of the flats were handed over to the allottee. It may be clarified that theft pertained to only some flats and not all.

17. Unfortunately, learned Trial Judge has ignored intrinsic evidence which shows as to which flats were affected.

18. As noted above, the works pertained to 126 flats in Sector-25, Rohini. 136 flats in Sector-22, Rohini and 240 flats in Sector-21, Rohini. Ex.PW-1/D-1 evidences that 50 out of 136 flats in Sector-22 were affected. Ex.PW-1/D-6 shows that 41 flats out of 126 were affected in Sector 25. Ex.PW-1/D-8 shows that 67 flats out of 240 in Sector 21 Rohini were affected. We say so for the reason the plaintiff has been directed to complete the works in 50 out of 136 flats, 41 out of 126 flats and 67 out of 240 flats in the said three sectors.

19. Assuming that all pending works in the said flats remained unexecuted, at best, DDA could have retained the following amounts:-

(a) $\text{Rs.}700 \times 50 = \text{Rs.}35,000/-$.

(b) $\text{Rs.}700 \times 41 = \text{Rs.}28,700/-$.

(c) $\text{Rs.}700 \times 67 = \text{Rs.}46,900/-$.

20. But, it is not in dispute that the fittings and fixtures were insured with New India Assurance Company by DDA for which the premium was paid by the plaintiff. The letters written by the plaintiff to DDA show that the plaintiff repeatedly requested DDA to lodge a complaint with the insurance company. For unexplainable reasons, DDA did not do so.

21. Thus, the contractor would be entitled to a refund of the amount deducted from the final bill @Rs.700/- per flat and to that extent we find no infirmity in the view taken by the learned Trial Judge that the amount claimed in the three suits under (II) has to be awarded in favour of the plaintiff. On the same reasoning we hold that the view taken by the learned Trial Judge that the security deposit claimed in the three suits has rightly been directed to be refunded, additionally for the reason it is not the case of DDA that the security deposit has been forfeited. No order passed by the competent authority forfeiting the security deposit was shown to us.

22. Pertaining to the claim for watch and ward, merely because theft took place may not be sufficient to hold that no watch and ward was deployed. But, there has to be proof that the plaintiff deployed watch and ward staff and paid wages to the staff deployed. There is no evidence on record in the form of any register, voucher or a receipt that any amount was paid to any person deployed as a chowkidar/watchman. The only evidence is in the form of three affidavits filed by one Nathu Ram, Ram Chander and Bhim Ram to the effect that they were employed as chowkidars/watchmen at the three sites. The said affidavits do not inspire any confidence for the reason the deponents thereof were not produced as witnesses and did not subject themselves to cross-examination. We thus set aside

the finding of the learned Trial Judge pertaining to amount awarded for watch and ward.

23. The appeals are partially allowed. Impugned judgment and decree dated 5.5.2005 decreeing Suit No.227/2004, Suit No.228/2004 and Suit No.229/2004 is modified and the three suits are decreed as under:-

- (a) Suit No.227/2004 is decreed in sum of Rs.2,01,200/- (Rupees Two Lakhs One Thousand and Two Hundred only) together with interest @12% per annum from the date of the suit till realization plus proportionate costs.
- (b) Suit No.228/2004 is decreed in sum of Rs.3,18,840/- (Rupees Three Lakhs Eighteen Thousand Eight Hundred and Forty only) together with interest @12% per annum from the date of the suit till realization plus proportionate costs.
- (c) Suit No.229/2004 is decreed in sum of Rs.1,88,200/- (Rupees One Lakh Eighty Eight Thousand and Two Hundred only) together with interest @12% per annum from the date of the suit till realization plus proportionate costs.

24. There shall be no orders as to costs in appeal.

25. We note that pursuant to interim orders passed in all the appeals the decretal amount has been deposited by the

appellant in this Court which has been invested in a fixed deposit. We direct the Registry to calculate the amount payable to the respondent as per the present judgment and pay over the same to the respondent and refund the balance to the appellant.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

December 15, 2008
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