

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **R.F.A. No. 288/2006**

S.M.MALHOTRA Appellant
Through: Mr. Vikas Dutta, Advocate

VERSUS

M/S. BLUE STAR Respondent
Through: Ms. Manjula Gandhi, Advocate

RESERVED ON:
20.08.2008

% DATE OF DECISION:
27.08.2008

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

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 plaintiff is in appeal. He sought recovery of Rs.5,69,290.35 against the defendant. Claim was predicated on 3 contracts awarded by the defendant to the plaintiff under work orders; work order No.2351 dated 26.3.1996, Ex.PW-1/1, work order No.2105 dated 4.7.1996, EX.PW-1/2 and work order No.1768 dated 16.8.1996, Ex.PW-1/D-1.

2. It may be noted at the outset that the work order

Ex.PW-1/D-1 was in supercession of the work order Ex.PW-1/2.

3. Plaintiff's case as pleaded in the plaint was that under work order Ex.PW-1/1 he was to execute thermal insulation work after defendant had executed ducting work awarded to it by NPC. That basic material like polystyrene and fiber glass had to be supplied by the defendant. He alleged that the work of insulation which had to be completed by 28.2.1997 could not be completed for two reasons. Firstly, the polystyrene material supplied by the defendant was rejected by NPC, the party who had contracted the work with the defendant, and secondly due to defendant not completing ducting work. It was further pleaded that vide work order Ex.PW-1/2 defendant awarded balance ducting work to the plaintiff. It was alleged that to execute the work pertaining to the work order Ex.PW-1/2 the defendant agreed to provide accommodation, free of cost, to the workers to be deployed at site by the plaintiff. It was further alleged that on 16.8.1996, in supercession of the work order Ex.PW-1/2, work order Ex.PW-1/D-1 was awarded.

4. Claim was predicated on alleged unpaid bills stating that over and above the works executed at the contract rate, the plaintiff had to rectify earlier ducting work and that for long durations labour deployed at the site by the plaintiff remained

idle for which plaintiff claimed recompense. It was further stated that the defendant had to arrange for "A-Grade Welder". None was provided. It was further pleaded that while settling the bills submitted by the plaintiff, the defendant had illegally deducted alleged room rent for the labour stationed at the site by the plaintiff and also for alleged supply of ancillary materials.

5. The defendant denied any liability to pay. According to the defendant, far from any amount payable to the plaintiff, the defendant was entitled to a refund of Rs.14,104/-. The defendant denied delay on its part and also denied that it was obliged to provide, free of cost, accommodation to the labour of the plaintiff.

6. Bar of limitation, lack of territorial jurisdiction and non-joinder of a necessary party; requiring suit to be dismissed were also pleaded as technical defences.

7. The plaintiff succeeded on the technical defences raised by the defendant. The suit was held to be within limitation. The Court found that it had territorial jurisdiction. It was held that no necessary party was omitted to be impleaded as a defendant.

8. Since the defendant has not filed any cross appeal or cross objections pertaining to issues decided against the

defendant we need not bother ourselves with the facts constituting the 3 technical defences and hence we concentrate on the main issue debated between the parties; namely, whether the plaintiff was entitled to a decree in sum of Rs.5,69,290.35 or whether it had received excess payment in sum of Rs.14,104/-.

9. At this stage, we may note that though having pleaded that it had paid Rs.14,104/- in excess to the plaintiff the defendant did not seek recovery thereof by way of a counter claim.

10. Plaintiff examined himself as his only witness. The defendant examined its Senior Manager (Commercial) Sh.T.K.S.Kuti as its only witness.

11. Apart from proving the 3 work orders on which we note parties were not at variance the plaintiff reiterated the case pleaded in the plaint. The plaintiff proved Ex.PW-1/6, a bill raised upon the defendant on 31.7.1996 raising a claim for idle labour in sum of Rs.27,900/-. Plaintiff also proved Ex.PW-1/7, a letter dated 15.7.1996 written by the defendant acknowledging not meeting the commitment of the defendant. The plaintiff also proved Ex.PW-1/9, being defendant's letter acknowledging that stationing "A Grade Welder" was a problem at site.

12. Various other communications addressed between the parties were proved at the trial which we are not noting for the reason, while arguing the appeal learned counsel for the appellant urged submissions predicated on Ex.PW-1/6, Ex.PW-1/7 and Ex.PW-1/9.

13. As against the aforesaid documentary evidence of the plaintiff, defendant hinged its case on Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5.

14. Ex.PW-1/D-3 is a communication dated 28.11.1996 from the defendant to the plaintiff enclosing therewith a statement of the running bills received by the defendant from the plaintiff with defendant's remarks thereon; the document terminates with the defendant's certification of the bills raised by the plaintiff as settled for payment by the defendant and money released. Ex.PW-1/D-4 is defendant's letter dated 4.12.1996 addressed to the plaintiff. It refers to the bills received from the plaintiff post 28.11.1996. It records the defendant's version of what was payable to the plaintiff under the bills. It refers to excess payments raised by the plaintiff. It refers to the fact that the plaintiff did not execute certain works, which were claimed to have been executed by the defendant at the risk and cost of the plaintiff.

15. Ex.PW-1/D-5 is defendant's letter dated 26.5.1997

addressed to the plaintiff refuting the claim for any further payment and requesting plaintiff to refund Rs.14,104/-.

16. The defendant's witness gave evidence in harmony with the defence set up.

17. Noting that in the oral testimony of the two witnesses i.e. the witness of the plaintiff and the defendant, respective versions were given, the Learned Trial Judge held against the plaintiff for the reason there was no documentary evidence to show that the plaintiff refuted Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5. The findings returned by the learned Trial Judge are as under:-

“16. On the other hand, it is argued by Id counsel for the defendant that Sh.Rajput was representative of the plaintiff working at the site at Bangalore with whom matter was sorted out. It is argued that subsequently plaintiff also admitted that he had received statement of the payments made to the plaintiff Ex.PW-1/D-3, PW-1/D-4 and D-5 but he did not prefer to give reply thereto which is a clear proof that nothing was due and payable to the plaintiff. It is argued that plaintiff has not denied that Ex.PW-1/D-4 and D-5 were received by him and further has admitted that it preferred to give no reply to these letters, hence, no amount is due and payable.

17. It is true that plaintiff has proved on record that orders Ex.PW-1/1 and 1/2 were given to him and that he submitted bills Ex.PW-1/6, 1/7. However, the fact remains that defendant had sent a statement of account regarding claim of the plaintiff and payments made to him. It has been proved as Ex.PW-1/D-3. It is dated 28.11.96. In this document, defendant has given details of

various payments made to the plaintiff. Similarly defendant wrote the plaintiff Ex.PW1/D-4 dated 4.12.96. In Ex. PW1/D-4, it has been mentioned by the defendant that it had sent final bill against work order No.2351 and it was also mentioned that various payments had been made to the plaintiff. Defendant had also requested the plaintiff to settle the payment on receipt of which hammer drilling machines will be returned. Again, defendant wrote another letter Ex.PW1/D-5 which is dated 26.5.97. In this letter also, various payments made have been mentioned. It was also mentioned by the defendant that when statement of account was drawn it was found that an excess payment of Rs.14104/- was made to the plaintiff and it was requested that plaintiff should refund the same. In Ex.PW1/D-3 defendant had made references to the payments made in respect of bill No.2351. In Ex.PW1/D-4 there is a reference of work order No.2351 and the payments made. It was also mentioned in this letter that final bill in respect of work orders No.2351 was received. The defendant pointed out that it had already paid Rs.14104 in excess to the plaintiff in respect of these works and had requested the plaintiff to refund the same. In letter Ex.PW1/D-5 there is reference to work order No.2105. In this letter, it has been mentioned that the representative of the plaintiff Mr.Rajput was requested to make a final bill for the work carried out and according to final bill made by him and scrutinized by representative of the defendant claims were finalised. It is mentioned that when statement of account was drawn it was found that defendant had paid excess amount of Rs.14104/- to the plaintiff and requested him to refund the same. In his cross examination, PW-1 has admitted that he has received the statement of payments Ex.PW1/D-3 but he did not reply the same. In Ex.PW-1/D-3 he has also admitted that he did not send reply thereto. He has even admitted that he has received Ex.PW1/D-4 and D-5 but no reply was sent by him to these letters. When the plaintiff admitted that he had received letters Ex.PW-1/D-3 to D-5 containing assertion on behalf of the defendant that it did not owe any liability to

the plaintiff, I am of the view that inference is that plaintiff did not dispute the position as set up by the defendant. In other words, inference is that plaintiff admitted that it did not have any claim against the defendant. I am, therefore, of the view that it has been proved on record by the defendant that claim of the plaintiff was settled by the defendant. I, therefore, hold that plaintiff has failed to prove that he had any cause of action to file the present suit or the defendant is liable to pay any amount to the plaintiff. These issues are accordingly decided in favour of defendant and against the plaintiff.”

18. Though not expressly recorded by the learned Trial Judge, it is apparent that the signature tune of the decision of the learned Trial Judge is the contemporaneous conduct of the parties; the contemporaneous conduct being the plaintiff not responding, in writing, to Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5. It is apparent that the rival oral versions, being a case of word of mouth versus word of mouth, the impasse has been broken by the learned Trial Judge with reference to the 3 documents, Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5 written by the defendant to which no contemporaneous denial was made by the plaintiff.

19. It was urged by learned counsel for the plaintiff that the learned Trial Judge gravely erred in not appreciating that while raising a bill Ex.PW-1/6 on 31.7.1996, the plaintiff had raised a claim for idle labour. With reference to Ex.PW-1/7 the learned counsel urged that the learned Trial Judge failed to

appreciate that in the said letter dated 15.7.1996 the defendant acknowledged having failed to meet its commitment under the contract. With reference to Ex.PW-1/9, learned counsel urged that the learned Trial Judge failed to appreciate that in said letter defendant acknowledged that providing "A Grade Welder" at the site had been a problem.

20. Per contra, learned counsel for the defendant urged that the reasoning of the learned Trial Judge is correct for the reason admittedly plaintiff never refuted Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5.

21. It is settled law that where, on a given evidence, two views are possible the Appellate Court would not substitute its view with the view taken by the learned Trial Judge. The jurisdiction of First Appellate Court and especially when the Appellate Court is the final Court of law and facts is to consider, with reference to the evidence, whether the view taken by the learned Trial Judge is reasonably probable and while so doing it has to be ensured that the learned Trial Judge has neither ignored material evidence or a material circumstance and has not included irrelevant evidence or an irrelevant circumstance while evaluating evidence. If it is found that material evidence or circumstance has been ignored, the evidence has to be reconsidered bringing into

consideration the material evidence or the material circumstance found ignored by the learned Trial Judge. Similarly, where irrelevant evidence or irrelevant circumstance has been brought into aid while considering evidence by the learned Trial Judge, the Appellate Court has to reprobablize the evidence ignoring the said irrelevant evidence or irrelevant circumstance.

22. Indeed, the plaintiff never refuted Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5. This gives credence to the view taken by the learned Trial Judge that the contemporaneous conduct of the parties reveals that the plaintiff did not refute the reasons on which the defendant reduced the amount payable when cleared the bills received from the plaintiff.

23. It would not be out of place to mention that vide Ex.PW-1/D-3 all bills submitted by the plaintiff till 16.08.1996 were processed and against each bill, defendant gave comments under the 'remarks' column. Further, cash payments made to the employees/representative of the plaintiff at site were also detailed. Further, Rs.45,790/- paid to the workers of the appellant at site were referred to and deducted from the net amount payable to the plaintiff. In the said document the defendant made adjustment for material supplied by it to the

plaintiff by recording as follows:-

"I understand that we have supplied some material such as bolts, nuts, screws etc. to you from our office which is also debitable to your account. Your bills 105 and 106 are being processed and it will be adjusted in the excess payment already made to you."

24. No letter was shown to us by learned counsel for the plaintiff rebutting the contents of Ex.PW-1/D-3.

25. Similarly, while writing Ex.PW-1/D-4 on 4.12.1996 the defendant wrote: *"based on your workers' demand and subsequent discussions between NPC officials, your representative Mr.Rajput and Blue Star Ltd., we have settled the payment of wages of your 10 workers for a total amount of Rs.45,790/-. A copy of the stamped receipts has been collected by your representative Mr. Rajput."*

26. No document was shown to us rebutting the aforesaid contents as also other contents of Ex.PW-1/D-4. Similarly, learned counsel for the plaintiff could not point out any letter written by the plaintiff rebutting defendant's letter dated 26.5.1997 Ex.PW-1/D-5.

27. Conduct of the parties when a contract is under execution is relevant evidence. It throws light as to how parties understood the implementation of the contract from time to time. Thus, we are in complete agreement with the view taken by the learned Trial Judge that Ex.PW-1/D-3, Ex.PW-1/D-4 and Ex.PW-1/D-5 show that the plaintiff never refuted the scaling down of

the bills submitted by the plaintiff; adjustment of payment made to the workers of the plaintiff by the defendant as also adjustment on account of certain material supplied by the defendant to the plaintiff.

28. As noted hereinabove, learned counsel for the plaintiff made submissions with respect to Ex.PW-1/6, Ex.PW-1/7 and Ex.PW-1/9.

29. Vide Ex.PW-1/6, plaintiff raised a bill in sum of Rs.27,900/- on account of idle labour. It was urged that receipt of said bill and payment due pertaining to the bill stands admitted by the defendant, being entry at serial No.3, in Ex.PW-1/D-3. Learned counsel for the plaintiff urged that having admitted entitlement of the plaintiff to receive idle labour charges the defendant was precluded from urging to the contrary.

30. Pertaining to Ex.PW-1/6, as urged by learned counsel for the defendant, we note that while settling the various bills raised by the plaintiff, in Ex.PW-1/D-3, the defendant referred to the said bill but cleared payment only in sum of Rs.10,000/- as against Rs.27,900/- claimed in the bill.

31. As noted hereinabove, the plaintiff never refuted the contents of Ex.PW-1/D-3.

32. It is obvious that defendant accepted limited liability

on account of idle labour charges and released payment for the amount relatable to the liability admitted and plaintiff accepted the amount without demur. We say so for the reason in Ex.PW-1/D-3, the defendant paid only Rs.10,000/- towards idle labour charges.

33. That explains Ex.PW-1/6.

34. No doubt, vide Ex.PW-1/7, the defendant did write that it did not meet defendant's commitment under the contract. However, we note that the sentence on which learned counsel for the plaintiff picked up is a polite language used in a commercial letter. Read in the context of the succeeding sentence the truth would be revealed. The defendant has written as under:-

"We record to inform you that we could not meet our commitment just because of your uncomplete work. So far you did not shift your angles to the RAB-1 ladder welding generator. This is why we could not complete our supporting."

36. As we read the paragraph, in a polite language, the defendant has conveyed to the plaintiff that on account of plaintiff not shifting angles to the RAB-1 ladder welding generator the defendant could not comply of its commitment. Thus, we find no admission as alleged.

36. We note that two documents have been exhibited as Ex.PW-1/9. The first is a letter written by the plaintiff to the

defendant (at page 337 of the record of the Trial Court). The other is a letter written by the defendant to the plaintiff on 25.7.1996 (at page 345-347 of the Trial Court Record).

37. No doubt, in the said letter, the defendant has acknowledged that non-availability of A Grade Welder at the site has created a problem. But, that by itself would be neither here nor there for the reason we find no evidence on record to show the consequences of non-availability of A Grade Welder at site.

38. We note that vide Ex.PW-1/10, plaintiff raised an issue on account of non-availability of a welder at site for 2½ months. We note that Ex.PW-1/10 was written by the plaintiff to the defendant on 4.8.1996.

39. In the absence of any evidence or material to link idle labour deployed at the site by the plaintiff on account of non-availability of A Grade Welder, we are afraid, we are unable to quantify any amount payable to the plaintiff. We are further handicapped for the reason learned counsel for the plaintiff could not locate any proved document whereunder plaintiff had raised a specific bill on account of labour rendered idle for non-availability of A Grade Welder.

40. Learned counsel for the defendant pointed out to us that the bill for idle labour raised on 22.7.1996 was the bill

relatable to idle labour on account of non-availability of A Grade Welder. Counsel pointed out that said bill of the plaintiff was duly noted in defendant's letter Ex.PW-1/D-3 and as against claim in sum of Rs.27,900/-, the defendant had paid Rs.10,000/-. Counsel urged that it is apparent that the bill for idle labour on account of non-availability of A Grade Welder was raised by the plaintiff in sum of Rs.27,900/- and accepted by the defendant in sum of Rs.10,000/-. Further, when the defendant accepted part liability and tender payment for the same, plaintiff accepted the payment without demur.

41. In view of the fact that primary documents are not available on the judicial record and in the absence of any other bill for idle labour shown to us pre 4.8.1996 there is considerable merit in the submissions made by learned counsel for the defendant that the plaintiff was recompensed for idle labour at site due to non-availability of A Grade Welder.

42. We find no merits in the appeal.

43. The appeal is dismissed.

44. Defendant would be entitled to cost all throughout.

PRADEEP NANDRAJOG, J.

August 27, 2008
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SUNIL GAUR, J.