

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS (OS) No. 1305/2005**

Reserved on: 7th September, 2009

% Decided on: 6th October, 2009

Vardhman Properties Ltd. ...Plaintiff
Through : Mr. Sanjay Goswami with Mr. H.K.
Balajee, Advs.

Versus

North Delhi Power Ltd. ...Defendant
Through : Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Vikram Nandrajog and Ms.
Himani Jadoun, Advs.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported
in the Digest? | No |

MANMOHAN SINGH, J.

1. The plaintiff has filed the present suit for recovery of a sum of Rs. 21,07,930/- along with pendente lite and future interest @ 18% p.a. The plaintiff is a limited company duly incorporated under the Companies Act, 1956 and carries out construction of commercial properties on duly allotted land. The defendant is a licensee under the Electricity Supply Act, 1948 and is a distributor of electricity in North Delhi. The predecessor of the defendant is DVB, with which the plaintiff had the present arrangement, which forms the crux of the matter.

BRIEF FACTS

2. The plaintiff was allotted plot no. 7, District Centre, Manglam Place, Sector 3, Rohini, Delhi (hereinafter referred to as 'suit building') by way of an auction conducted by the DDA. After sanctioning of the building plan, the plaintiff approached the then licensee (DVB) to frame the electrification scheme of the building, for which the plaintiff and the licensee were to deposit 50% share each as part of the electrification charges.

3. On 31 August, 2001 the plaintiff gave an area of 30 x 31 feet to DVB to install the proposed sub-station. The total cost of electrifying the suit building was Rs. 84,65,700/- out of which the plaintiff paid Rs. 44,55,100/- on 19 August, 2002. These charges were the estimated charges subject to change upon actual cost realized after completion of the work.

4. After much delay and subsequent to this court's order in Civil Writ Petition No. 1496/2003 directing DVB to expedite the electrification, the same was done and the defendant sent letter dated 10 November, 2003 to the plaintiff stating therein that the suit building had been energized on 5 November, 2003.

PLAINTIFF'S CASE

5. The plaintiff's submission is that during the process of electrification of the suit building certain changes were made to the frame of the electrification scheme which resulted in the use of

substantially less money than the figure of cost arrived at previously, as instead of three 630 KVA transformers as proposed, only two were required as against the three in the proposal, and hence used. As a result of this change, the cost of the remnant transformer as well as of the corresponding material, transportation, cable and workmanship was saved and approximately Rs. 13,68,786.55/- were the said savings falling to the plaintiff's share.

6. The plaintiff claimed refund of the above-mentioned amount from the defendant, in lieu of the deposit of Rs. 44,55,100/- made by it on 19 August, 2002 by its letter dated 26 December, 2003. The plaintiff also claimed the prevalent market interest on the same. The defendant received the said letter but refused to refund the plaintiff, thereby violating the provisions of the Delhi Electricity Regulatory Commission (hereinafter referred to a 'DERC') (Performance Standards) Metering and Billing Regulations, 2002 and the Schedule of Miscellaneous Charges and Completion of Handling Procedures Relating to Distribution and Retail Supply.

7. The plaintiff filed a representation dated 27 January, 2004 under the DERC against the defendant, but received no relief and has been running for the same from pillar to post. The defendant has been enjoying the excessive amount deposited by the plaintiff since November 2003, when the electrification work in the suit building was completed. Thus, the present suit has been filed for recovery of Rs. 13,68,786.55/- with interest @ 18% p.a. from the date of deposit of Rs.

44,55,100/- till the filing of the instant suit, totaling an amount of Rs. 21,07,930/-.

DEFENDANT'S CASE

8. The defendant's submissions depict a completely different version of events altogether. As per the defendant, the plaintiff is guilty of approaching this court with unclean hands and of concealing material information. The defendant's entire case relies upon two points of fact. One, that the plaintiff failed to comply with a term of allotment of the suit building which provided that the plaintiff was to provide 'adequate space' for the construction of a sub-station and for installation of other equipment in the said building. The defendant has alleged that the plaintiff used the entire area available in the building for sale to commercial users, and provided the former with limited space (30 x 31 feet), i.e. space enough only for two transformers and not three, the latter being the number of transformers required to meet the estimated load requirement.

9. The second fact stated by the defendant is that it has nowhere stated that the electrification work at the suit building was 'complete' as the same is still pending. If a third transformer is not set up, the load on the other two transformers will cause over-heating and possible breakdown, resulting in danger to the occupants of the suit building as well as the building itself. The defendant has submitted that it is willing to install the third transformer provided the plaintiff provides it with the requisite space that it had promised.

10. The defendant has averred that the plaintiff did not get the building plans approved by the electricity provider in accordance with the allotment, as it was in a hurry to sell the area for commercial gain. Further, as per the defendant the delay in the implementation of the electrification scheme occurred wholly due to the plaintiff's failure to provide the requisite space for the same. Further still, the plaintiff is not entitled to any refund as according to the defendant, the question of any excess amount etc. can only be determined once the electrification process is completed. The said process can only be completed once the plaintiff provides space for another transformer, so that electricity can be provided keeping in mind the full load of the suit building.

EVIDENCE

11. The plaintiffs have exhibited several documents as evidence. Amongst other documents, the plaintiff has exhibited DVB's letter dated 15 March, 2001 (Ex P-3) stating that sub-station space measuring 25" x 32" must be earmarked on an approved copy of the layout plan for taking the electrification scheme further. By its letter dated 28 July, 2001 (Ex. P-4) the plaintiff has replied to the defendant's afore-mentioned letter stating that area measuring 30" x 31" is marked at stilt level for installation of the sub-station. Another letter dated 21 August, 2001 (Ex. PW1/5) from the defendant to the plaintiff states that "...the competent authority of D.V.B. has accepted the built up S/Stn space measuring 31" x 31" in the stilt above the basement in..."

12. The clinching evidence is DVB's letter dated 4 March, 2002 (Ex. PW1/6) to the plaintiff which discusses the load required and calculation of various costs expected in the electrification scheme etc. On page 15 of the evidence documents, internal page 2 of the instant document mentioned, para 3 mentions that the construction of the suit building is in its final stages and it is not feasible for the promoter to part with any additional space. Having said that, the defendant goes on to state the following :

“In view of the above CE (D) NW approved the installation of the new 630 KVA transformers in rge already handed over built-up s/stn space. *Which is adequate to accommodate 3 new 630 KVA Trs. as the measurement of the Trs. body of 630 KVA rating Trs. is 2.1mt x 1.5 mt.*”(emphasis added)

All the afore-mentioned documents have been admitted by the defendant without any reservation or exception as to content or otherwise.

13. The defendant has filed, by way of evidence, an affidavit of Mr. Shishir Singh who was examined, cross-examined and discharged on 3 October, 2008. Amongst other things, the said witness has claimed that it is incorrect to suggest that the two transformers installed in the suit building are more than sufficient for the same. However, he goes on to state in the next sentence itself that “it is correct that no need for the installation of the third transformer has been felt in the last five years.”

14. On 8 January, 2007 this court framed the Issues in this matter. Having perused the rival contentions of both parties and the evidence pertaining to the same, I shall now proceed to deal with the Issues separately.

15. ISSUE NO.1

“Whether the plaint has been signed and verified and the suit instituted by an authorized person?”

The plaintiff has filed a copy of the minutes of the meeting of Board of Directors held on 3 January, 2005 which is duly attested holding the plaintiff capacitated for filing the present civil suit for recovery of dues against the defendant. There is hardly any opposition to this issue. Therefore, it is held that the suit has been properly signed, verified and instituted by a duly authorised person.

16. ISSUE NO.2

“Whether the defendant while executing the electrification work made any changes/alterations to the scheme as it was originally proposed and thereby made certain reductions in expenditure and cost?”

The burden of this issue was put on the plaintiff. It is a matter of fact that while executing the electrification work the defendant made no changes/alterations to the Scheme as the electrification scheme/letter dated 28 February, 2002 filed by the plaintiff is duly proved by Ex.PW-1/7 as well as the copy of the scheme by Ex.PW-1/6, and both are admitted by the defendant. The defendant has neither filed any other scheme/letter which shows any changes/alterations to the scheme originally proposed and filed by the plaintiff, nor made any reduction in

the expenditure and costs. Therefore, this issue is duly proved by the plaintiff and is decided in favour of the plaintiff accordingly.

17. ISSUE NO.4

“Whether the defendant has notified the plaintiff of any deficiency enabling it to electrify the building?”

As regards issue No.4, the burden of this issue is also on the plaintiff. On 31 August, 2001 the plaintiff gave an area of 30 x 31 ft. to DVB to install the proposed sub station. The plaintiff also paid Rs.44,55,100/- on 19 August, 2002. In the letter dated 15 March, 2001 (marked as Ex. P-1), the defendant has asked the plaintiff to provide space measuring 25 x 32 in the open area with a road measuring six meters wide on two adjacent sites earmarked on the approval copy of the layout plan etc. The plaintiff wrote letter dated 28 July, 2001 to the defendant by which space for sub station measuring 30 x 31 was provided to the defendant at stilt level as well consent was given for installation of dry type transformer. By letter dated 21 August, 2001 (marked as Ex. PW-1/5), there is a confirmation by the defendant that the competent authority of DVB has accepted the built up space measuring 30 x 31 at the stilt level in the building. Physical possession of the said area was also taken by the defendant and the same is acknowledged by the defendant vide letter dated 31 August, 2001 (marked as Ex.PW-1/3). Handing over of the possession and taking over report which is duly signed by the parties and marked as Ex.PW-1/4 has also been placed on record. The plan of built up space at stilt level of the suit property is also placed on record and marked as Ex.P-6. The scheme was also approved by DVB's competent authority

on the basis of the area provided by the plaintiff and the said approval in this regard is also placed on record as Ex.PW-1/6.

18. There is no rebuttal on this regard by the defendant. There is no letter written by the defendant of any kind nor has any evidence been produced to notify/clarify that there was any deficiency hampering the defendant's capacity to electrify the building. No evidence has been produced by the defendant to the effect that the space provided by the plaintiff is enough only for two transformers and not three, rather the scheme approved by the defendant speaks otherwise. Thus in the absence of any evidence as afore-mentioned, this issue is also decided in favour of the plaintiff and against the defendant.

19. ISSUE NO.3

“Whether the plaintiff did not fulfil the requirements for electrification of the building no. 7, District Centre, Manglam Place, Sector 3, Rohini, Delhi as per the electrification scheme framed by the defendant?”

The burden of this issue lies on the defendant. I have already given my finding on issue No.4. The plaintiff has exhibited several documents as evidence. The plaintiff has produced evidence by way of affidavit wherein it is specifically mentioned that possession was handed over to the defendant and the defendant thereafter duly prepared the electrification scheme of the Building No.7 District Centre, Mangalam Place, Sector 3, Rohini on 2 December, 2001 vide the following particulars:-

No.	Date	Drawing No.
XPCNW1/2001-02/Pig/34/622	7-12-01	XPCNW.1/2001-02/

20. By letter dated 4 March, 2002 the Commercial Officer III DVB on the subject of electrification informed and gave the detailed schedule prepared for the Planning Department of DVB/Licensing amounting to Rs.84,65,700/- out of which Rs.44,55,100/- was deposited as its share of the electrification charges. Copy of the two letters Ex.PW-1/7 and PW-1/8 are duly marked. CWP No.1496/03 was decided on 25 February, 2003 by this court wherein a direction to complete the electrification work within a certain time frame was issued. The plaintiff was informed by letter dated 10 November, 2003 that the installation had been energized on 5 November, 2003 and the electrification work was completed. Copy of the said letter is attached as Ex.PW-1/10.

21. The contention of the plaintiff is that in the process of execution of the said electrification scheme, there was substantial saving of material and workmanship resulting in completion of electrification at a cost comparatively less than the original estimate. Therefore, on account of the reduction in use of equipment, cable, labour and transportation etc. an estimated saving of approximately Rs.13,68,786.55 was made against the share of the plaintiff which amounted to Rs.44,55,100/- which was deposited by the plaintiff with the licensing authority on 19 August, 2002. The details of the savings on account of reduction in use of material, labour and transportation which were worked out in detail by the plaintiff and sent to the defendant is marked as Ex.PW-1/11.

22. It is further contended by the plaintiff that as per letter of the licensee dated 4 March, 2002 calling upon the plaintiff to deposit its share, the electrification charges payable by the plaintiff were only estimated and tentative, subject to final adjustment as per actual cost worked out and accounts finalized by the Accounts Department of the licensee after completion of the work. In view of this the plaintiff submits that he is entitled to refund of Rs.13,68,786.55 on account of the savings in its share towards the total electrification charges. The plaintiff also sent notice dated 16 December, 2003 to the defendant for refund of the said amount. A copy of the notice and postal receipts are filed as Ex.PW-1/12 and Ex.PW-1/13. The plaintiff made a representation and replied to the defendant, both of which are marked as Ex.PW-1/14 and Ex.PW-1/15 respectively. Since the defendant did not refund the said amount the plaintiff filed the present suit.

23. Learned counsel for the defendant has referred to the cross examination of the plaintiff Sh. Sushil Kumar Jain wherein it was deposed by the plaintiff that the approval of the DVB was not obtained before commencement of construction. It is also admitted by the plaintiff that there was a provision in the lease deed for the area of construction of electric sub station and in the sanctioned plan no specified area for the same was mentioned. It appears from the said cross examination that the said admission of the plaintiff does not help the case of the defendant in the light of the correspondence exchanged between the parties from 28 April, 2002 up to the date of electrification scheme/letter dated 10

November, 2003 from the defendant whereby the defendant has stated that the suit building has been energized. Further, there is no contrary evidence which has been produced by the defendant to demolish the case of the plaintiff in this regard. Further still, no issue has been framed in this respect.

24. As regards the evidence of the defendant, the same was filed by way of an affidavit of Sh. Shishir Singh who has deposed that he was not working with the DVB when the electrification scheme in this case was framed. He deposed that his knowledge is based upon the study of the scheme and the site visit. According to him the electrification scheme of the building was complete in the year 2003, though he volunteered that it is still pending. He has also admitted letter Ex.P-13 having been issued by the defendant. In his cross examination he has admitted that no need of installation of three transformers has been felt in the last 5 years. He has also admitted that as per the electrification scheme the electrification cost which was estimated was only approximate and was dependent upon the completion of the scheme. He has also deposed that he could not say that in a particular building after 2003 the defendant had any requirement for carrying out load enhancement.

25. Learned counsel for the defendant has argued that the defendant is ready to install one more transformer as the defendant feels that two transformers are not sufficient for the building as such burden would cause over-heating and possible breakdown, resulting in danger to

the occupants. On the contrary the learned counsel for the plaintiff has argued that the defendant has failed to produce any evidence in this regard and if ever the need arises, the plaintiff will again apply for a third transformer and shall deposit the present charges as per current charges. As of now, however, the plaintiff submits that it is entitled to refund as prayed. This issue is also decided in favour of the plaintiff and against the defendant as the Department has failed to discharge its burden in issue No.3.

26. ISSUES NOS. 5 & 6

“5) Whether the plaintiff is entitled to recover any amount from the defendants? If so, then what amount?

6) Whether the plaintiff is entitled to recover any interest on the amounts due to it from the defendant? If yes, then at what rate?”

As regards issue No.5 and 6, the plaintiff has sent an estimate of the refund vide its letter dated 16 December, 2003 which is marked as Ex.PW-1/11 and estimate of Rs.13,68,786.55. The defendant has filed no other evidence nor made any statement to the effect that the estimation of Rs. 13 lac (approximately) given by the plaintiff is too high or that it should have been any less. In this regard, the plaintiff has referred to Section 114 (1) (g) of the Evidence Act, 1872 and submitted the following decisions in that regard. The relevant portions of both these decisions are produced hereinbelow :

(I) Union of India v. Mohan Behari Jasod Kumari, 2004 (114) DLT 516

“27. It is a settled principle of law that irrespective of the burden of proof, the party in possession of the best evidence is bound to produce the same. In this behalf regard be made to the judgment of the Supreme Court of India reported at AIR 1968 SC 1413. The forwarding note was in the power and possession of the defendant no. 1. It is not disputed that the same was material contemporaneous documentary evidence which was not produced. Adverse inference is, therefore, to be drawn against the defendant no. 1 for failure to produce the documents.”

(II) Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors., (1968) 3

SCR 862 (at page 866)

“Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.”

27. In view of the above-stated, the suit of the plaintiff for recovery of Rs.21,07,930/- is decreed as in my opinion the plaintiff is entitled to the said amount. As far as pendente lite and future interest is concerned, I feel that the claim of 18% p.a. is on the higher side. In the interest of justice and equity the plaintiff is entitled to pendente lite and future interest @ 8% p.a. from the date of filing of the suit till the date of realization of the said amount. The decree be drawn accordingly in favour of the plaintiff and against the defendant. The plaintiff is also entitled to costs of the suit.

MANMOHAN SINGH, J.

OCTOBER 6, 2009

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