

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

+ **RFA No.145/2002**

% **17th August, 2011**

M/S. GANPATHI ALUMINIUM PVT. LTD. Appellant

Through: Mr. D.K. Rustagi, Advocate with
Mr. B.S. Bagga, Advocate.

VERSUS

M/S. M. V. S. ENGINEERING LTD. & ANR. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. Arguments on behalf of the appellant in this case were concluded on 26.7.2011. The matter has thereafter been adjourned on four dates as requests were made on behalf of respondents. Today, once again no one is present for the respondents. Enough indulgence has

been granted to the respondents. I am therefore proceeding to pass the judgment.

2. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC), is to the impugned judgment and decree dated 24.9.2001 which dismissed the suit of the appellant/plaintiff although the claim for an amount of Rs.1,93,147/- was proved inasmuch it was held that the suit was barred by limitation.

3. The facts of the case are that an order was placed upon the appellant/plaintiff by the respondents/defendants on 24.5.1994 for aluminium glazing work. The appellant/plaintiff raised three running bills. The first bill was dated 10.10.1994 for Rs.4,49,495.60/-. The second running bill was dated 25.10.1994 and was for an amount of Rs.39,203.75. The third bill was dated 1.12.1994 for Rs.61,686.30/-. After 1.12.1994, the appellant/plaintiff did the further finishing work of Rs.44,385/- and raised its final bill dated 30.12.1994 for a sum of Rs.6,89,729.98/-. Certain payments were made by the defendant No.1/respondent No.1 against these bills and details of these payments are given in para 8 of the plaint as under:-

S. No.	Amount	Cheque/Cash	Dt.
1.	60,000/-	Cheque	2.6.94
2.	1,00,000/-	Cheque	13.8.94

3.	60,000/-	Cheque	25.8.94
4.	80,000/-	Cheque	23.9.94
5.	75,000/-	Cash	1.11.94
Total	Rs.3,75,000/-		

Since the balance dues of the appellant/plaintiff were not paid by the respondent No.1/defendant No.1, the subject suit came to be filed in which the following amounts were claimed:-

"Final bill dt. 30.12.94 for	6,89,729.98
Less Sale of Scraps	16,929.00
Total	6,72,800-98
Less 5% defect liability amounting to	33,640-00
Principal amount comes to	6,39,160-98
Less amount received.	3,75,000-00
Principal amount in total	2,64,160-98
Interest accrued on Principal amount @ 24% per Annum upto 1.11.97 comes to	1,84,912-00
Interest accrued on 5% defect Liability amount i.e. Rs.33,640/- @ 24% p.a. w.e.f. 1.7.95 to 1.11.97	19,511-00
Amount recoverable on Account of 5% defect Liability as per supply Order dt.24.5.94 after Expiry of 6 months	33,640-00
Total	5,02,223-00

(Rs. Five Lacs Two Thousand Two Hundred Twenty Three only)."

4. The respondent No.1/defendant No.1 contested the suit and besides claiming that the suit was barred by time alleged that the following payments were made by the respondent No.1/defendant No.1 and therefore nothing was due. The payments which are claimed to have been made by the respondent No.1/defendant No.1 are as under:-

Cheque No.	Date	Amount
438309	02.06.1994	60,000.00
438405	08.06.1994	21,000.00
438977	09.08.1994	54,000.00
438989	10.08.1994	1,00,000.00
439095	25.08.1994	60,000.00
439147	06.09.1994	47,208.44
499432	23.09.1994	80,000.00
Cash Payment	01.11.1994	75,000.00
Cash Payment	22.11.1994	1,17,604.00
	Total	Rs.6,14,812.44

The respondent No.1/defendant No.1 also denied that the appellant had incurred cost of finishing amount into Rs.44,385/-. Also,

it was disputed that the plaintiff submitted its final bill dated 30.12.1994 because the final bill was not certified by the Architect/defendant No.2. Another defence taken up in the written statement was that respondent No.1/defendant No.1 suffered losses on account of substandard material and defect in design and fabrication of the material. The respondent No.1/defendant No.1 finally alleged that the appellant/plaintiff did not complete the work which had to be got done from other sources.

5. After pleadings were complete, the trial Court framed the following issues:-

- “1. Whether the plaintiff did not complete the structure work and defendant No.1 was not liable to make payment because of defective structural work and non-completion of work?
2. Whether the plaintiff was not entitled to receive the payment without certificate?
3. Whether the suit of the plaintiff was not maintainable u/o 2, rule 2 CPC as alleged in para 6 of the preliminary objection of the Written Statement?
4. Whether the suit has been signed and verified by duly authorized person?
5. Whether the suit is barred by limitation?
6. Relief?”

6. The only relevant issues which were argued before me were issue Nos.2,5 and 6. So far as issue No.1 is concerned, the trial Court decided the same against respondent No.1/defendant No.1 as neither evidence was adduced of the alleged defects and nor was any counter claim raised. On the issue as to the entitlement of the appellant/plaintiff

for monies, the trial Court held the appellant entitled to a sum of Rs.1,93,147/- in the following terms:-

“15. PW1 D.S. Bhartiya has admitted that the total of the three running bills certified by the Architect was Rs.5,68,147.00. He has stated that defendant No.1 made a total payment of Rs.3,75,000/-. DW1 Rakesh Sharma has, on the other hand deposed that a total amount of Rs.6,44,812.44 was paid to the plaintiff.

16. The plaintiff has given the details of payment in para 8 of the plaint. Defendant No.1 has, on the other hand given the details in para 5 of the Written Statement. On comparison of the two details, I find that the following payments are disputed:-

CHEQUE NO.	DATED	AMOUNT (RS.)
438405	08.06.94	21,000.00
438977	09.08.94	54,000.00
439147	06.09.94	47,208.44
Cash Payment	22.11.94	1,17,604.00

17. PW1 D.S. Bhartiya has denied the cash payment of Rs.1,17,604/- on 22.11.94. He has admitted that the first mentioned three payments through cheque were received but he has explained that the said payments were made against another project at MB Road, Opposite Saket. He has produced the contract Ex.PW1/D1 to show that another job work had been assigned by defendant No.1 to the plaintiff at MB Road during the same period. This document falsifies the statement of DW1 Rakesh Sharma that no work was done by the plaintiff for defendant No.1 at MB Road. Defendant No.1 has also not produced any receipt to establish the cash payment which it alleges to have made on 22.11.94. Therefore, I am satisfied that defendant No.1 had made total payment of Rs.3,75,000/- only against the work done at E-24, East of Kailash. The total amount certified by the Architect was Rs.5,68,147. Therefore, balance amount of Rs.1,93,147/- remained unpaid.”

7. On the aspect as to the entitlement of the appellant/plaintiff for the work done, there is a clear cut admission of the respondent No.1/defendant No.1 of its liability because in para 5 of the written statement, the defendant No.1/respondent No.1 admits to have made payment of Rs.6,14,812/-. The respondent No.1/defendant No.1 alleged an excess payment of Rs.46,665/- in the aforesaid amount, however, no counter claim for recovery of this amount was filed. Therefore by virtue of para 5 of the written statement, it stands admitted that the appellant/plaintiff is entitled to Rs.6,14,812.44/-. Out of the amount of Rs.6,14,812.44/- there are four payments which are disputed and the same are as under:-

CHEQUE NO.	DATED	AMOUNT (RS.)
438405	08.06.94	21,000.00
438977	09.08.94	54,000.00
439147	06.09.94	47,208.44
Cash Payment	22.11.94	1,17,604.00

The appellant/plaintiff claimed that three payments said to have been made by the cheques were in fact not for the said contract but for another contract being a supply vide order dated 7.6.1994 and details with respect to which are given in para 5 of the replication. The

respondent No.1/defendant No.1 has not been able to dispute this in its evidence and therefore the appellant/plaintiff has successfully established that the payments by means of three cheques which are disputed were not towards the subject contract. So far as the cash payment is concerned, no receipt was filed and this payment was therefore not proved to the appellant/plaintiff. Accordingly, in my opinion, the appellant/plaintiff in addition to the amount of Rs.1,93,147/- as found to be due by the trial Court, is also entitled to an amount of Rs.44,385/- being the cost of finishing work done after 1.12.1994 and upto 30.12.1994 when the final bill was submitted. Merely because the Architect/defendant No.2 refused to certify the payment would not mean that the appellant/plaintiff will not be entitled to the amount. The appellant/plaintiff had written a letter to the Architect dated 30.10.1995, Ex.PW1/8, and in which reference was made to this final bill dated 30.12.1994. Therefore, the final bill dated 30.12.1994 has been proved to be received by the defendant No.1/respondent No.1.

8. The trial Court has dismissed the suit as barred by limitation by holding that the final bill dated 30.12.1994 has not been proved to be received by the respondent No.1/defendant No.1. Firstly, I have already held above that this bill was in fact duly sent to the respondent No.1/defendant No.1 and which is confirmed vide Ex.PW1/8 dated

30.10.1995. Secondly, in case of payments under a running contract, limitation is governed by Article 18 of the Limitation Act, 1963. As per Article 18, limitation will commence from the date fixed for payment or when the work is done. In the present case admittedly no date has been fixed for payment and therefore payment becomes due from the date of the work done. It is of course not as if on the very second that the work is done, that limitation begins under Article 18 inasmuch as in a running contract there can be various other conditions as to the requirement of submitting a final bill, joint measurement and so on and it is only whereafter can a cause of action be said to begin for the purpose of limitation. I have had an occasion to consider this aspect in the decision of **Satender Kumar Vs. Municipal Corporation of Delhi & Anr. 168 (2010) DLT 15**. Para 16 of this judgment is relevant and reproduced herein:

“16. A summary of the conclusions on reading of the aforesaid relevant clauses of the contract in question and the judgments as dealt with above, bring out the following salient points:

(i) Limitation commences when the cause of action accrues/arises.

(ii) Accrual/arising of cause of action necessarily varies as per facts and circumstances of each case and the nature of jural relationship between the parties viz contractual or otherwise and so on.

(iii) As regards contracts for execution of building work, Article 18 comes into play in that when no specific date for

payment is fixed, limitation commences and the cause of action accrues for the purpose of limitation on the completion of work.

(iv) In its application, Article 18 will cause different dates for accrual of causes of action in building works when a time period is fixed for submitting of a bill by the contractor and to which there is no response of the owner. Where a final bill is submitted and liability under the same, even if, in part, is admitted or some payment is made then such actions extend limitation in terms of Section 18 of the Limitation Act.

(v) No fresh period of limitation can arise simply because letters and reminders are written time and again, attempting to keep the claim alive, although the claim by virtue of Article 18 of the Limitation Act, has become clearly time barred."

9. A reference to the work order Ex.PW1/3 filed in the present case shows the payment terms as under:-

"Payment Terms:

a) 10% Mobilisation advance against Bank Guarantee which will be adjusted in running bills proportionately.

b) 80% of the cost of material brought to site will be paid after receiving the material at site, which will be adjusted along with advance in running bills.

c) 80% of rates approved on actual Quantities measured jointly will be paid after erection at site after deduction (a) & (b) above proportionately.

d) 95% of the rates after completing the total works.

e) Balance 5% will be made after the defect liability of 6 months."

It is therefore clear from the aforesaid terms that there was requirement of measuring of quantities for claiming payment after

measuring of the quantity and thereafter some time also have to be given for raising of the final bill. Further, reasonable time will have to be given from the date of this final bill inasmuch as the final bill was not payable by the respondent No.1 till the same was certified by the Architect/defendant No.2/respondent No.2. Since the appellant/plaintiff has done work from 1.12.1994 to 30.12.1994, work in terms of Article 18 of the Limitation Act, 1963 has continued till 30.12.1994. After this date i.e. 30.12.1994, a reasonable time has to be given to the Architect to certify the same and in the facts of the present case where the contract was to be completed within a few months, a period of about 30 days can be said to be a reasonable period for certification and if there is no certification within this period by the Architect/defendant No.2/respondent No.2, the appellant/plaintiff can be said to have the cause of action for filing of the suit for recovery. I may further note that vide Ex.PW1/10 dated 25.1.1995, and which is a letter written by the appellant/plaintiff to the respondent No.1/defendant No.1, a final certificate of payment was issued on 26.12.1994. Even therefore if we do not take the commencement of limitation as one month after 1.12.1994, since the final certificate of payment is dated 26.12.1994, the suit can definitely be filed by 26.12.1997 and the suit in the present case was filed on 23.12.1997. I may note that the appellant/plaintiff in para 11 of

the plaint specifically mentioned completion of finishing work only by 29.12.1994 and to which reply in the written statement was that the appellant/plaintiff did not complete the work and the respondent No.1/defendant No.1 had to get the same completed by some other sources, however, this has not at all been proved during evidence.

10. In view of the above, I hold that the suit which has been filed on 23.12.1997 was within limitation considering Article 18 of the Limitation Act, 1963 inasmuch as the final bill is proved to have been submitted on 30.12.1997 and the suit has been filed on 23.12.1997. In fact, limitation would begin only by 1.2.1995 if we take the period of one month after submission of the final bill for certification by the Architect. Further, the final certification of payment as stated in Ex.PW1/10 is dated 26.12.1994 and once again the suit has been filed within three years of this date. I therefore set aside the finding of the trial Court that suit is barred by limitation and hold the suit is within limitation.

11. In view of the above discussion, the suit of the appellant/plaintiff is decreed against respondent No.1/defendant No.1 for a sum of Rs.2,37,532/- (Rs.1,93,147/- + Rs.44,385/-). The appellant/plaintiff will also be entitled to pendente lite and future interest

@ 9% per annum simple. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

AUGUST 17, 2011
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VALMIKI J. MEHTA, J.