

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

+ **RFA No.453/2002**

% **14th November, 2011**

M/S VIVEK CO-OPERATIVE GROUP HOUSING SOCIETY LTD.

..... Appellant

Through: Mr. Kumar Kartikeya, Adv.

versus

A.K.TIWARI

..... Respondent

Through: Mr. B.P.Lathwal with
Mr. Y.K.Sharma, Adv.

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. The challenge by means of this Regular First Appeal filed under Section 96 CPC is to the impugned judgment of the Trial Court dated 20.4.2002 decreeing the suit for recovery of monies filed by the plaintiff/respondent/contractor for the electrical work done in the appellant/defendant/cooperative society.

2. The respondent/plaintiff filed a suit for recovery of Rs.2,24,505/- being the principal amount along with interest totalling to

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Rs.3,15,000/-. The amount of Rs.2,24,505/- was the amount claimed as per the final bill of the respondent/plaintiff dated 1.1.1991. The final bill comprised of three amounts, i.e. Rs.99,505/- towards running bill, escalation charges of Rs.75,000/- and an amount of Rs.50,000/- which was retained by the appellant/defendant from the running bills of the respondent/plaintiff and which is called as the security amount. The case of the respondent/plaintiff was that though originally the contract was for a fixed amount of Rs.8,00,000/-, however, this amount underwent a change for two reasons. The first reason was escalation charges, and which were agreed to be payable at Rs.75,000/-. The second reason was that extra items of work were done entitling the respondent/plaintiff for amount with respect to these extra items of work done.

3. The appellant/defendant contested the suit and claimed that the respondent/plaintiff had already received a net amount of Rs.10,10,000/-, i.e. much more than the contract value of Rs.8,00,000/- plus escalation of Rs.75,000/-. It was argued that there were no extra items of work which were done and the final bill dated 1.1.1991 was a manipulated and fabricated document which was never sent to the appellant/defendant. It was argued that as per the ledger maintained by the appellant/defendant, a gross amount of approximately about Rs.11 lacs

odd was already paid to the respondent/plaintiff. It was therefore prayed that the suit be dismissed.

4. The following issues were framed by the Trial Court after completion of pleadings:

“1. Whether the whole of the electrical works are agreed to be executed for the lumpsum amount of Rs.8,05,818/-? OPD.

2. What amount if any the plaintiff is entitled to recover from the defendant? OPP.

3. Relief.”

5. The main issue which was argued in the Courts below, and which was also an issue argued before me by counsel for both the parties, was as to whether the final bill dated 1.1.1991 was sent to the appellant/defendant or was the same a fabricated document. Related to this aspect was whether the final bill contained correctly the amount claimed with respect to extra items.

6. Most of the controversies between the parties, in my opinion, would be resolved by a reference to the admitted document Ex.PW1/D, and which document is the minutes of the meeting between the parties dated 6.9.1990. Since this document is extremely relevant, I would like to reproduce the same entirely, and which reads as under:-

“At the request of M/s Power Tech Engineers, a meeting was held on 06/09/90 at site to discuss all the issues

pending i.r.o. Electrical Contract and arrive at full and final settlement. The following were present:-

1. Mr. A.K.Tiwari Reps. M/s Power Tech Engineers
2. Mr. A.K.Dutta
3. Mr. P.N.Lahne
4. Mr. R.K.Singhal
5. Mr. R.P.S. Galawth
6. Mr. H.S. Bhatia

The following were discussed and decided on:-

1. Refer Running Bill No.9 dated 04/04/90 submitted by M/s. Power Tech and terms and conditions at contract submitted by M/s Power Tech vide their letter nO.PT/017/538/87 dated 14th October, 1987.

M/s Power Tech has claimed at Sl.No.3 of section "A" at the above mentioned bill, a total amount of Rs.2,66,240.00 towards "wiring of 3 pin 15 Amp. Switch" qty. 524 Nos. at the rate of Rs.510/-. The managing committee refused to item No.3 of Section 'A' at contract where in it is clearly stated that the quoted rate of Rs.510/- is for a pair of 15 Amp. Power points out of which one is a looped connection. M/s Power Tech initially contended that the rate of Rs.510/- is for a single power point (one 15 Amp. Switch only). However after detailed discussion including cost analysis it was mutually agreed that a pair of 15 Amp. Power points shall be paid at the rate of Rs.650 per pair (two 15 Amp. Switch looped).

The managing committee stressed that this is being agreed to only as a special case considering the plea of M/s Power Tech that they have incurred more cost overall in the project.

To further clarify the decision it is mutually agreed that 516 power points billed at Sl. No. 3 of running bill No.9 shall be paid as 516/2+ 258 Nos. at the rate of Rs.650/- and thus the total amount on this item works out to Rs.

650X258 + 1,67,700/-(Rupees One lakh Sixty seven thousand and seven hundred only).

2. M/s. Power Tech assured the managing committee that they will take up the balance work in all respects at the earliest but not later than 14th September, 90. The payments towards pending bills if any shall be done to the satisfaction of the managing committee.

3. Managing Committee take serious view of the in-ordinate delay in the installation of Power Transformer in spite of a payment of Rs.95,000/- to M/s. Power Tech International. It was also stressed that M/s Power Tech International has been promising that the Transformer shall be installed for post several months.

M/s Power Tech stated that all property work in this regard has been completed and they will get DESU transformer installed within a short time.

It was mutually agreed that Vivek Society shall hold back Rs.75,000/- agreed to earlier as escalation payment and also the security amount of Rs.50,000/- till such date, the transformer are installed and all related work to give power to individual flats completed.

4. Bills i.r.o. extra item were also discussed of, rates mutually agreed and initial of by both the parties as the bills for further processing.

(5) It was mutually agreed that all points raised by both the parties for total contract work as well as extra items till date have been satisfactorily resolved.” (underlining added)

7. A reading of the aforesaid document shows as incorrect the stand of the appellant/defendant that no extra items of work were done. Para 4 of this minutes of meeting specifically refers to the extra items and the rates with respect thereto and the bills for the same. Further, this document also disproves the stand of the appellant argued before me that

escalation of Rs.75,000/- was not payable as the contract was a fixed price contract of Rs.8,00,000/-. The fact that extra items of work were done also becomes clear from the document Ex.PW1/E which is a memorandum of understanding dated 25.11.1990 and which talks of payment of Rs.40,000/- in four instalments with respect to the extra work done.

8. The fact that the stand the appellant/defendant that no final bill dated 1.1.1991 was ever received by the appellant/defendant is incorrect becomes clear when we refer to the endorsement made on this final bill, Ex.PW1/F&G dated 1.1.1991 at the stage of admission/denial of documents in the Trial Court. The covering letter is Ex.PW1/F and the attached bills (colly.) are Ex.PW1/G. In the letter Ex.PW1/F during the time of admission/denial of the documents it is specifically mentioned in the endorsement that this bill has been received but only the amount thereof is disputed. I therefore fail to understand as to how the appellant could have argued in the Trial Court, and much less before this Court, that the final bill dated 1.1.1991, Ex.PW1/F is a forged and fabricated document. In this regard, the Trial Court has also referred to the fact that at the time of filing of an application earlier, the respondent/plaintiff had made a reference to this final bill, and the appellant/defendant had not denied the same in the reply to the same and had only stated that the same was a matter of record.

9. The Trial Court has rightly rejected the version of the appellant/defendant that an amount of Rs.11,08,746.26 was paid to the respondent/plaintiff inasmuch as the appellant/defendant only filed a copy of the ledger account without giving the details of the cheques by which payments were allegedly made totalling Rs.11,08,746.26. In fact, the Trial court has rightly noted that the ledger account filed and exhibited as Ex.DW1/12 does not contain the details of the cheques nor the dates thereof.

10. The Trial Court has given the following findings and conclusions in the impugned judgment, and with which I agree:

"44. I have given considered though to the arguments submitted by the counsels for the parties. In para no.3 of the reply to the application u/S. 151 CPC (for restoration of application for Condonation of delay in filing the leave to defend application) the plaintiff has specifically averred that he claimed Rs.99,505/- as the balance amount from the running bill no. PT/C-6/2/1166/91 besides Rs.75,000/- as escalation charges and Rs.50,000/- as security deposit. It is further averred in the said para (of the reply to the application u/S 151) CPC that the plaintiff submitted the bill of 1st January 1991 after completion of the whole electric work. It is also mentioned in the said para that the plaintiff reminded the defendant in respect of the aforesaid bill vide his letters dated 29.4.1991, 11.11.91 & 20.12.91 but the defendant did not give any reply or raised any objections to the said letters.

45. In the rejoinder, in reply to the averments made in preliminary objections no.3, it is submitted that the amount claimed in the suit is a matter of record and needs no reply. There was no specific denial by the defendant in his rejoinder in respect of the fact that the plaintiff raised

a final bill dated 1.1.91 claiming Rs.99,505/- as the balance of the bill amount besides Rs.75,000/- as escalation charges and Rs.50,000/- as security deposit. Now the case of the defendant is that no such bill was ever raised by the plaintiff; nor there was any occasion for the plaintiff to raise the said bill. Now the case set up during the arguments of the defendant is that the work of electrification had completed in April or at the most in September 1990 when the meeting dt. 8.9.1990 was convened.

46. If that would have been the case of the defendant in his rejoinder should have specifically denied the fact of raising the last bill by the plaintiff dt. 1.1.91. The defendant in his rejoinder has not denied the receipt of the letters dt.29.4.1991 and 20.12.1991 vide which the plaintiff is alleged to have made the demands of the aforesaid amount totalling Rs.2,24,505/-.

47. The version of the defendant is that he has paid to the plaintiff a total amount of Rs.11,08,746.26P. It is further submitted that besides the said amount the plaintiff owed an amount of Rs.36,357.26P as the price of cement and TDS deductions which he has used the same would have been the case, the defendant should have raised objection to the final bill Ex.PW1/G. The conduct of the defendant no raising objections to the final bill Ex.PW1/G and not replying to the letters/notice of the plaintiff demanding the aforesaid amount of Rs.2,24,505/- indicates that the defendant has nothing to say against the final bill.

48. The plaintiff has proved the copy of the demand notice Ex.PW1/T postal receipt as Ex.PW1/U and AD Card as Ex.PW1/V. The perusal of the AD Card Ex.PW1/V indicates that the notice was served upon the defendant. Besides this PW1 has deposed on oath that he has sent the aforesaid notice to the defendant and the same was served upon him. Vide the said notice Ex.PW1/T the plaintiff has claimed the total amount of Rs.2,24,505/-. The said notice is dt.8.4.92 and till date no reply has been by the defendant. This fact indicates that defendant has nothing to say in respect of the averments made in the

said notice and also that he did not dispute the amount mentioned therein.

49. Besides this the plaintiff has proved that he has sent a letters Ex.PW1/N, PW1/Q demanding the aforesaid amount from the defendant. He has also proved the postal receipt and AD Card thereof. But the defendant did not send reply any of these letters. This fact indicates that he did not dispute the amount claimed by the plaintiff vide the said letters.

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57. The plaintiff has admitted that the defendant has paid an amount of Rs.10,10,000/-. The defendant has deducted 2% TDS to the tune of Rs.22,917.26P and has also deducted an amount of Rs.13,440/- as price of 192 cement bags. If the said amount of Rs.36,357.20P is deducted from the total amount due t the plaintiff the final amount due to the plaintiff comes to Rs.2,24,505.76P. This amount of Rs.2,24,505.76P is the amount mentioned in the final bill dtd. 1.1.91. This amount was repeatedly mentioned in the letters and the notice sent to the defendant. The defendant has not denied the receipt of the said bill, the letters and the notice in his rejoinder to the reply to the application for leave to defend. Despite that the defendant did not send any reply to the said notice alleging that he had paid an amount Rs.11,08,745/- or stating that Ex.PW1/G was not the final bill between the parties or that the b ill dtd.4.4.90 was final between the parties. Therefore, I hold that it is proved that the plaintiff had been doing work after 4.4.90 and 6.9.90 for electrification of 72 flats and had submitted the final bill Ex.PW1/G dtd.1.1.91.

58. The entries in the ledger book produced by the defendant are not corroborated by any further evidence such as copy of cheques, bank accounts etc. The entries alone in the ledger book by itself are not a sufficient evidence to prove that the aforesaid amount was paid by the defendant to the plaintiff. The aforesaid observations made by the Hon'ble Supreme court in AIR 1967 1058 apply to the facts and circumstances of this case.

59. Moreover, in the copy of the ledger Ex.DW1/12 neither the cheques nor the dates thereof is mentioned. In view of the above discussions and my findings, I hold that the plaintiff is entitled to an amount of Rs.2,24,505/- (Rupees Two Lakh Twenty Four Thousand Five Hundred Only) from the defendant. However, the interest claimed by the plaintiff @ 24% p.a. is towards very higher side. In the facts and circumstances of the case I grant interest @ 9% p.a. to the plaintiff.” (underlining added).

11. A civil case is decided on balance of probabilities. Considering the evidences led by both the sides, the Trial Court on a preponderance of probabilities has held that the running bill, Ex.PW1/F&G was duly sent to the appellant/defendant and received by it. The Trial Court has also rightly held that the respondent/plaintiff did extra work beyond that as mentioned in the contract, and which becomes clear from the minutes of meeting dated 6.9.1990, Ex.PW1/D and the document Ex.PW1/E dated 25.11.1990. The respondent/plaintiff was therefore rightly held entitled to the balance payment of Rs.99,505/- under the final bill besides escalation charges of Rs.75,000/- and withheld amount of Rs.50,000/-.

12. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA,J

NOVEMBER 14, 2011
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