

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

+ **CS(OS) No.305/1999**

% **20th September, 2012**

KAMAL CONSTRUCTION CO. Plaintiff
Through: Mr. Raman Kapur, Sr. Adv.
with Mr. Ankur Gosain, Mr.
R.P.Singh and Mr. Aviral
Tiwari, Advocates.

VERSUS

DELHI DEVELOPMENT AUTHORITY & ANR. Defendants
Through: Mr. Bankey Bihari Sharma,
Advocate for DDA.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit has been filed by the plaintiff/contractor claiming a principal amount of ₹ 18,77,866 plus interest of ₹8,22,658/- totalling to ₹ 26,90,524/-, under different heads with respect to work done by it, for the defendant no.1/DDA. The work done by the plaintiff for the defendant no.1 was construction of 193 SFS House at Gazipur, SH: Construction of 101 SFS Houses on site No.2 (69 Category II and 32 Category III) including Shops Int. W/S S/I & Internal Development. The

agreement entered into between the parties in this regard is numbered as 14-EE/ED-8/DDA/1993-94.

2. The plaintiff claims that the entire work was completed to the satisfaction of the defendants on 2.7.1996 as per the completion certificate recorded by the defendants. Defendant no.2 is the Executive Engineer of defendant no.1/DDA. The plaintiff has further pleaded in the plaint that in the present case, the defendant no.1 as per practice was preparing the running final bills and maintaining all measurement books and records. The break-up of the principal amount of ₹ 18,77,866/- is given in para 16 of the plaint, and the same reads as under:-

- | | | |
|----|---|-----------------|
| a) | Towards final bill (details enclosed as Annexure A to the plaint) | Rs.9,09,332.00 |
| b) | Towards balance amount payable under clause 10CC of the Agreement (details of calculation under clause 10CC enclosed as Annexure B to plaint) | Rs.3,22,583.00 |
| c) | Towards withheld amount from various running bills | Rs.1,50,951.00 |
| d) | Towards balance security deposit | Rs. 30,000.00 |
| e) | Towards watch and ward for the period 1.7.96 to 31.4.99 | Rs.4,65,000.00 |
| | Total | Rs.18,77,866.00 |

3. The defendant no.1 has contested the claim of the plaintiff.

So far as claim under para 16(a) is concerned, the defendant no.1 contends that the amount claimed under this head towards the balance payment for the work done is not correct as per the measurements recorded of the work done, and is a wrongly inflated figure. The claim of Clause 10 CC under para 16(b) is also denied by stating that whatever amount was payable for escalation under Clause 10 CC has been paid. So far as amount of ₹1,50,951/- in para 16(c) of the plaint is concerned, the defendant no.1 states that the amount withheld is actually only ₹ 75,000/- and which has been withheld because the plaintiff was pointed out the defects and pending works in the completion certificate issued, but which defects were not rectified by the plaintiff nor were the pending works completed. Similar is the defence with respect to the claim of ₹ 30,000/- under para 16(d) which pertains to the balance security deposit. So far as the claim of watch and ward under para 16(e), the defendant no.1 states that the charges towards watch and ward cannot be paid inasmuch as till the work is completed by the plaintiff/contractor by remedying the defects to be rectified and completing the pending works, it is the duty of the plaintiff to employ the watch and ward.

4. Following issues were framed in this suit on 29.10.2001 which read as under:-

(1) Whether the plaintiff firm is a duly registered partnership

firm?OPP

- (2) Whether defendant no.2 is a proper and necessary party and should not be dropped from the array of defendants?OPP
- (3) Whether the plaint has been signed and verified by an authorised and competent person? OPP
- (4) Whether the plaintiff has not executed its part of contractual obligations as contemplated in the agreement and if not, its effect?OPD
- (5) Whether there are any defects and deficiencies in the work done by the plaintiff?OPD
- (6) Whether the completion certificate issued by defendant to the plaintiff was provisional completion certification?OPD
- (7) Whether the plaintiff is entitled to the amount of final bill as claimed? OPP
- (8) Whether the plaintiff is entitled to amount under Clause 10CC as claimed? OPP
- (9) Whether the plaintiff is entitled to the withheld amount as claimed?OPP
- (10) Whether the plaintiff is entitled to refund of security deposit? OPP
- (11) Whether the plaintiff is entitled to amounts towards watch and ward as claimed?OPP
- (12) Whether the plaintiff is entitled to interest, if so, at what rate on which amount and for what period?
- (13) Relief.”

Issue Nos. 1 and 3

5. So far as the issue no.1 is concerned, plaintiff has proved the

certificate of the Registrar of Firms as Ex.P-2 in his affidavit by way of evidence and which shows not only the plaintiff firm being registered, but also that Sh. Kamal Bassi who has instituted the suit, is a partner in the plaintiff firm. This issue is therefore decided in favour of the plaintiff and against the defendant no.1. Issue no.3 is also held in favour of the plaintiff and against the defendant no.1 as the plaint has been signed by Sh. Kamal Bassi who is shown to be the partner of the plaintiff firm. Accordingly, issue nos. 1 and 3 are decided in favour of the plaintiff and against defendant no.1.

Issue no.2

6. Issue no.2 is not pressed on behalf of the plaintiff as the defendant no.2 is only an Executive Engineer of the defendant no.1 who has signed the contract.

Issue nos. 4 to 11.

7. These issues are connected and can be decided together. These are issues basically with respect to the claim of the plaintiff for the work done and the defence of the defendant no.1 that no amount is payable to the plaintiff.

8. I have already reproduced para 16 of the plaint above. This para 16 of the plaint contains the total amount of claim of the plaintiff of ₹ 18,77,866.00 under five heads (a) to (e). Let me separately take up

each head of para 16 of the plaint.

(i) The first head is the claim of the plaintiff towards the balance payment due for the work done. For this purpose, plaintiff has relied upon the legal notice dated 20.6.1998 (Ex.P-2) sent to the defendant no.1. This document is also marked as Ex.P-6 in the affidavit by way of evidence of the plaintiff. This notice gives the total work done of the value of ₹ 2,34,29,340.42 and amount already paid being ₹ 2,25,20,008.41, leaving the balance of ₹ 9,09,332.01, the figure as stated in para 16(a). Learned senior counsel for the plaintiff also relies upon certain portions of the cross-examination of the witness of the defendant Sh. L.C.Dhingra (DW-1) to argue that the plaintiff has proved the work done in terms of the legal notice dated 20.6.1998 (Ex.P-2) in view of such admissions. Learned senior counsel for the plaintiff has drawn the attention of the Court to the following cross-examination of Mr. L.C.Dhingra (DW-1) on 14.12.2006 wherein Mr. L.C.Dhingra has stated as under:-

“I have checked up the entire available records with respect to the present suit made available to me by DDA. From the records, I could not find any amount spent by DDA in carrying out work at the risk and cost of the plaintiff.

Q: Has DDA done any work on the flats constructed by the plaintiff or spent any amount towards the same before the flats were handed over to the allottees?

Ans. I cannot say.

Q. As per record seen by you, made available by DDA, is there any entry with regard to the above or can you produce the records to show that any amount was spent by DDA.

Ans. There is no such entry in the record seen by me.

Q. I put it to you that entire work in completing the flats upto the stage of handing over the flats to the allottees including the finishing work mentioned in the completion certificate was done by plaintiff.

Ans. I cannot say.

Q. As per the records available with you is there any entry for work being done by any one else except the plaintiff.

Ans. There is no such entry.”

It is accordingly argued on behalf of the plaintiff that this Court should hold that there is balance payment due of ₹9,09,332/-.

(ii) The counsel appearing for defendant no.1 has countered the submissions on behalf of the plaintiff by referring to the letter dated 16.12.1998, Ex.LCDW1/2, copy of which was endorsed to the plaintiff, to argue that the plaintiff was duly informed by this letter that the claim of ₹ 9,09,332/- is on the basis of presumed quantities of fittings/fixtures and which is not proportionate to the number of existing flats and that the plaintiff can depute a person to check the figures/measurements as recorded in the measurement books. This letter also talks of the fact that

there are various pending works/defects to be rectified and as duly informed to the plaintiff. Learned counsel for defendant no.1 also argues that general answers given in the cross-examination of witness will not help the plaintiff to discharge the affirmative onus of proof that in fact the balance amount of ₹ 9,09,332/- is due to the plaintiff.

(iii) In my opinion, the plaintiff, if it wanted to prove that the total value of work done by it was ₹ 2,34,29,340.42, and as so stated in the legal notice dated 20.6.1998 (Ex.P-2), then nothing was easier for the plaintiff than to prove the same and which would have been done by summoning the measurement books with respect to the work done, and which admittedly were with the defendant no.1. The plaintiff however, failed to summon these measurement books or file any other proof with respect to the total value of the work done of ₹2,34,29,340.42, except the sending of the legal notice dated 20.6.1998 (Ex.P-2) with which the plaintiff is said to have attached the final bill. In my opinion, a final bill can contain any figure(s) or any item(s), however, containing of figures/items in a notice cannot mean that such work was in fact carried out by the contractor at site. The only way to prove the work done is through the recording of measurements in the measurement books and the plaintiff has failed to rely on/prove these measurement books. Of course, the plaintiff could also have led other evidence in case there was

a dispute as to recoding of measurements in the measurement books that in fact the amount/quantity/type of the work done is as stated by the plaintiff, however, no other evidence has been led on behalf of the plaintiff except a self serving statement. A self serving statement with respect to the huge monetary claims cannot be accepted by Courts as discharge of onus of proof once the same is contested and disputed on behalf of the defendant. I may state that the defendant no.1 in fact, has in its letter Ex.LCDW1/2 dated 16.12.1998 stated to the appropriate authority as also to the plaintiff to whom this letter was marked, that if there is any dispute with respect to the measurements as recorded in the measurement book, the same can be jointly reviewed on the plaintiff deputing his person for the purpose. I however find nothing on record that pursuant to this letter dated 16.12.1998 the plaintiff ever asked for review of the measurements contained in the measurement books. This could be including for the reason that the plaintiff may have thought that measurement books may not support the case of the plaintiff with respect to the total value of the work done and the measurements alleged by him, and therefore, the plaintiff seems not to have summoned this measurement book which admittedly is lying with the defendant no.1. Accordingly, I hold that the plaintiff has failed to discharge of onus of proof to claim that the total value of the work done, under the subject

contract was that ₹ 2,34,29,340.42 of which payment of ₹ 2,25,20,008.41 was made and thus there was balance amount due of ₹ 9,09,332/- to it. This part of the claim is therefore not substantiated by the plaintiff and hence rejected.

9. The next item of claim is claim of balance towards escalation under Clause 10CC of ₹ 3,22,583/-. Learned senior counsel for the plaintiff states that this claim is actually and only a percentage calculation over the balance amount of ₹ 9,09,332.00. Once I have held that the plaintiff has failed to prove his entitlement to ₹ 9,09,332/-, and since this claim of Clause 10CC is only consequential to the claim of ₹ 9,09,332.00 as per the plaintiff, I therefore, hold that this claim of ₹ 3,22,583/- also does not stand proved inasmuch as the claim of ₹ 9,09,332/- has been rejected. On this aspect I must note once again, the specific stand of the defendant no.1 in LCDW1/2 dated 16.12.1998 wherein the defendant no.1 has taken the categorical stand that all existing valid claims under Clause 10CC for escalation have already been paid. The defendant no.1 has also further taken up a fair stand that if there would be any other amount payable under Clause 10CC after completion of the balance work and rectification work, the same can be paid to the plaintiff/contractor, and the correct position will emerge only after finalization of the bill, but as already stated above, that the plaintiff

in spite of receipt of the letter dated 16.12.1998 has not shown anything on record that it ever had asked for review of the measurements in the measurement books.

10(i). The third claim is the claim towards the amounts withheld under various running bills of ₹ 1,50,951/-. In this regard, the defendant has admitted an amount only of ₹ 75,000/- as per the written statement. To substantiate its contention the plaintiff has drawn the attention of this Court to the following portion of the cross examination of the DW-1 Sh. L.C.Dhingra reading as under:-

“Q. I put it to you that DDA withheld Rs.20,000/- from 4th R.A. Bill vide voucher No.50 of May 1994, Rs.20,000/- from 6th. R.A.Bill, Rs. 15000 from 10th R.A.Bill vide voucher No.51 of 10th May 1995, Rs.20,000 from 12th R.A.Bill vide voucher No. 79 of 25.11.1995 and Rs.75,951 vide voucher No.16 dated 7.11.1996 in all total amount withheld coming to Rs.1,50,951/-, which amount has still not been released by DDA to the plaintiff.

Ans. Amount can be released after checking the record if the plaintiff reports the office and accepts the measurement and the final bill.”

(ii) In response, counsel for defendant no.1 has drawn the attention of this Court to the following admission made in the cross-examination of PW-1 Sh. Kamal Bassi.

“ I do not remember as to how many running bills. I have given to the department. However, I can point out

the same only after I see the records maintained by me. I have not brought the said record today. I do not remember when the last running bill was submitted and paid.”

(iii) In my opinion, not too much will turn on the fact whether the withholding of the amount by the defendant is only of ₹ 75,000/- or ₹ 1,50,951/- as per the plaintiff inasmuch as, the amount which has been retained by the defendant no.1 is with respect to deficiencies/defects and pending work and plaintiff has failed to prove that it has rectified the defects or done the balance works. In the completion certificate Ex.LCDW1/1/Ex.P-4, the defendant no.1 has specifically noted that the plaintiff was to rectify the following defects/deficiency and do the stated pending works.

.....

“This is however subjected to measurements being recorded and quality being checked by the competent authority and also rectification of defects already pointed out to the Contractor from time to time of which are given below.

1. Rectification of plaster and grit wash where ever required.
2. Final grinding of mosaic surface 2/c flooring.
3. Fixing of panes glass and window and skirting etc fittings 2/c replacement of broken glass panes etc.
4. Fixing of bran and CP bran and other sanitary fittings 2/c bib cock, pillar taps, water tower rails, shower ball cock and looking mirror.
5. Replacement and damages of aluminium fittings. Such as tower bolts, pull bolts etc and replacement of wrapped, damages defective door shutters with fittings etc.

6. Attending to seepage/leakage and testing of line if any & disinfecting of water line and making connection with 150 mm. Dia CI L.A pipe
 7. Replacement/welding of grills glazed windows and frames etc. wherever left out and damages.
 8. Replacement of broken damages pipe and fittings C.I.& SCI pipe)
 9. Final coat/more coat of paints on steel/wood work and G.I , SCI and AC pipes and final coat of white wash, sheem etc. on walls.
 - 10.Easing of doors and windows shutters etc.
 - 11.Cleaning of doors and windows of glass panes done wherever.
 - 12.Defects if observed during maintenance in road, parking, cic paths, s.w.Drain, Sewerage and water supply line etc.
 - 13.Providing of necessary fittings in PVC tanks.
 - 14.Replacement of broken water meter boxes wherever required.
 - 15.Fixing of C.I.Covers for house manholes and gully traps to be provided.
 - 16.Replacement of broken kota stone and glazed tiles grinding and polishing with proper finishing of joints and nose wherever required.
 - 17.Leakage through joints of SCI stacts.
 - 18.At places cover on sluice value, fire hydrants chamb ers are damages if any this may be got repaired or replaced.
 - 19.Sluice value and fire hydrants being rusted may be painted with anti-corrosive paint.
 - 20.Seepage to WC and bath rooms, wherever noticed to be attended.
 - 21.Replacement/rectification of damages and defective wire making of kitchen, door shulders and kitchen windows wherever noticed.
 - 22.Grit wash and plaint plaster junction to be repaired wherever noticed defective.
 - 23.Cleaning of spouts and proper fixing to be done wherever required.
 - 24.Providing and fixing of rawl plugs in doors frame and steel windows sections wherever required.
 - 25.Rectification of defects as pointed.
- Out in defect register from time to time.

26.Premixing is to be done in parking area.

27.Internal s.w.drain is to be connected with existing peripheral s.w. drain for proper draining out water. Besides these various defects pointed out by chief Engineer (East Zone), Chief Engineer (Quality Control , Superintending Engineer,Circle-8, C.T.E and this office may also be attended and rectified and necessary repair/recoveries may be initiated where defects can not be rectified if otherwise structurally safe.

These defects be rectified by the Contractor or by the department at his risk and cost, action will be taken in term & conditions of the contract.”

11(i) During the course of arguments I put a query to the learned senior counsel for the plaintiff as to how the aforesaid long list of defects/deficiencies and pending works were done by the plaintiff, and to which, the response on behalf of the plaintiff is that since in the cross-examination of the witness of the defendant no.1, it is admitted that the defendant no.1 has not spent any amount towards any work till these flats were handed over to the allottees therefore it should be held that the pending works have been done.

(ii) I cannot agree. Once in a completion certificate (Ex.LCDW1/1) a huge list of defects/deficiencies and pending works have been pointed out, surely, if the plaintiff would have carried out such works, he would not have left it to the oral good faith and would have surely prepared some documentary evidence to ensure record of the fact that the deficiencies/defects have been removed and the pending works

have been done. However it admitted that on the record of this Court, nothing has been filed after drawing up of the completion certificate Ex.LCDW1/1 that there exists documentary evidence showing removal by the plaintiff of all the defects/deficiency or doing of the pending works.

(iii) Learned senior counsel for the plaintiff has argued that the contractor always does such work because it is under pressure of the DDA and therefore, it should be held that the deficiencies were removed and pending works done. I cannot agree to this argument because if I agree to this argument it would mean that merely on self serving statement a huge list of pending works will be deemed to be done and defects removed/deficiencies rectified, and therefore, I cannot accede to the argument. In civil law, onus of proof has to be reasonably discharged. As already stated above, a mere oral statement made in a deposition, once it is disputed cannot amount to discharge of onus of proof.

(iv) I therefore, hold that the plaintiff is not entitled to the claim of ₹ 1,50,951/- under para 16(c) of the plaint inasmuch as, the withheld amount cannot be paid till the plaintiff has completed the balance works and removed the defects/deficiencies.

12. The next head of claim as per para 16(d) is the claim

towards security deposit of ₹ 30,000/-. The findings and conclusions given with respect to para 16(c) of the plaint, and given in paras 10 and 11 above, will also apply with respect to this claim, and which is accordingly rejected.

13(i) This leaves me with the final claim towards watch and ward for the period 1.7.1996 to 31.4.1999 of ₹ 4,65,000/- i.e around two years and 10 months. Learned senior counsel for the plaintiff has invited the attention of this Court to two documents to show that in fact the defendant no.1 itself admits that watch and ward was kept by the plaintiff, and therefore, the claim of watch and ward has to be allowed in terms of the general circular of the defendant no.1 dated 12.5.1997 Ex.DW1/P2 which provides that contractor should be paid a sum of ₹6,600/- towards payment of two chowkidars.

(ii) The two documents relied upon by the plaintiff of the defendant no.1 are first the letter dated 11.5.1999, Ex.P-3(exhibited as P-14 in the affidavit by way of evidence of the plaintiff) and second the letter dated 15.4.1998, Ex.P-5. Portion of the first document i.e letter dated 11.5.1999 relied upon by the plaintiff reads as under:-

“XXXX XXXX XXXX XXXX
It would be pertinent to mention here that this office shall not be responsible for any theft, loss/damages occurred at site as watch and ward is being done by your goodself. If watch and ward is terminated, same shall be at your risk

and const and this office shall not be responsible for any damage/theft/loss.”

So far as the letter dated 15.4.1998 is concerned, the following portion is relied upon:-

“You are therefore requested to depute adequate numbers of security guards/Chowkidars for the effective watch and ward of these houses round the clock. Please note it is obligatory on your part to provide/handover these flats with complete fittings and fixtures to the department until all the flats are physically handed over to the allottees.”

(iii) In my opinion, before the plaintiff succeeds in relying upon the circular for claiming a sum of ₹ 6,600/- per month as watch and ward charges, two things are necessary. Firstly, it must be shown that in fact there was some watch and ward i.e there was employment of some chowkidars/guards. No doubt, the circular of the defendant no.1 will help to show that what should be the quantification of the watch and ward charges per month, but the pre-condition for application of the circular would be existence of chowkidars/guards. Admittedly, on the record of this Court there is absolutely nothing to show that there was in fact employed by the plaintiff chowkidars/guards for the relevant period. The portions of the letters dated 11.5.1999 and 15.4.1998 of the defendant no.1 to the plaintiff only ask the plaintiff to keep the watch and

ward, but the same do not prove that in fact, watch and ward was kept by the plaintiff pursuant to those letters.

(iv) The second aspect is that the entitlement of the plaintiff to the claim of watch and ward charges would be if the work was completely done and thereafter though the defendant no.1 was liable to take possession, the defendant no.1 did not take possession. If, however, the work is not complete, i.e defects/deficiencies are not removed and pending works are not done, and the list of which is found in Ex.LCDW1/1 (and which is reproduced above), the plaintiff cannot say that it is entitled to claim of watch and ward charges till the work is done and completed. The plaintiff has to remain in possession of the site, and has to complete the works, and thus for the period for which works under the contract had to be done, the watch and wards charges cannot be claimed unless the plaintiff had set up a specific case that possession was handed over to the defendant No.1 in spite of the fact that works were pending, and which is not so.

14(i) Learned senior counsel for the plaintiff relied upon two judgments of two learned single judges of this Court in the cases of ***K.R.Builders Pvt. Ltd. Vs. Delhi Development Authority & Anr. 144(2007) DLT 741*** and ***A.S.Sachdeva and sons (P) Ltd. Vs. D.D.A. and Anr. 164(2009) DLT 162*** in support of the claim of watch and ward

CS(OS) No.305/1999

charges.

(ii) With respect to the judgment in the case of ***K.R.Builders Pvt. Ltd.***, learned senior counsel for the plaintiff has relied upon paras 105 to 109. In my opinion, the judgment in the case of ***K.R.Builders Pvt. Ltd.*** as cited on behalf of the plaintiff cannot apply inasmuch as, paras referred to on behalf of the plaintiff show that all the defects were removed by the contractor, and it is for the period thereafter, that watch and ward charges were claimed. Para 108 shows the conclusion arrived at in the said judgment which says that the testimony in that case showed that the defects were removed during the maintenance periods and watch and ward charges were for the period thereafter. In my opinion, therefore, the judgment in the case ***K.R.Builders Pvt. Ltd. (supra)*** does not support the plaintiff.

(iii) So far as the judgment in the case of ***A.S.Sachdeva and sons (P) Ltd.(supra)***, reliance is placed upon by the plaintiff on paras 21, 30 and 31 of the said judgment. Once again, in my opinion, this judgment does not apply to the facts of the present case because in the cited case, the letter extending time for completion was issued after the completion certificate was prepared and the DDA was not able to establish that the plaintiff did not carry out the defects as pointed out in the completion certificate. Also para 30 of the said judgment shows finding in the said

case that evidence of the plaintiff showed that it did employ watch and ward and which is not the position in the present case. It is in those different facts that the Court in the cited case granted claim of watch and ward charges. The facts of this case as stated above are different because the plaintiff has failed to prove that any watch and ward was appointed, or that the defects were removed. This judgment also therefore does not help the plaintiff.

15. In view of the above, issue nos. 4 to 11 are decided in favour of the defendant no.1 and against the plaintiff. Plaintiff is held disentitled to the claims as stated in para 16 of the plaint. Suit is accordingly dismissed for the claims in para 16 of the plaint.

Issue no.12

16. This issue is the claim of interest. Since the main claims have been dismissed there does not arise any issue of grant of interest. This issue is therefore decided against the plaintiff.

Relief:-

17. In view of the above discussion, suit of the plaintiff is therefore dismissed, leaving the parties to bear their own costs. Decree sheet be prepared.

VALMIKI J. MEHTA, J

SEPTEMBER 20, 2012

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