

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

+ **RFA No.123/2004 & RFA No.124/2004**

% **1st March, 2012**

1. RFA No.123/2004

M/S PANDIT CONSTRUCTION CO. Appellant
Through: Mr. Raman Kapur, Sr. Adv. with
Mr.R.P.Singh, Adv.

versus

D.D.A. & ANR. Respondents
Through: None.

&

2. RFA No.124/2004

M/S PANDIT CONSTRUCTION CO. Appellant
Through: Mr. Raman Kapur, Sr. Adv. with
Mr.R.P.Singh, Adv.

versus

D.D.A. & ANR. Respondents
Through: None.

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

To be referred to the Reporter or not? Yes.

VALMIKI J. MEHTA, J (ORAL)

1. Both these appeals can be disposed of by this common judgment as facts are similar and same issues are involved. For the sake of convenience, reference is made to the facts of RFA No.123/2004.

2. The facts of the case are that the appellant/plaintiff filed a suit for recovery of Rs.5,00,000/- from the respondents/DDA being the amount alleged to be wrongfully withheld under a contract including from encashment of bank guarantee given as security. The Trial Court has dismissed the suit by holding that there were defective works and for such defective works, as per Clause 29 of the contract, respondents/DDA were entitled to withhold the amounts.

3. The facts of the case are that the appellant/plaintiff was awarded work of construction of EWS and LIG houses in Bindapur, Dwarka and with respect to which agreements No.51/EE/WD-1/DDA/1991-92 and 9/EE/WD-6/DDA/1995-96 were executed between the parties. It was pleaded that the work was completed on 5.6.1994 and completion certificate was issued by the defendants/respondents and the maintenance period under the agreements also expired on 5.12.1994. Appellant/plaintiff pleaded that it had been submitting running bills from time to time and from which running bills' amounts

totalling to ₹10,000/- + ₹10,000/- + ₹25,000/- + ₹3,19,720/- were withheld. The respondents/defendants are also stated to have encashed the bank guarantee for ₹1,50,000/-. In this way, a total sum of ₹5,14,720/- was said to have been illegally withheld by the respondents/defendants. The appellant/plaintiff restricted its claim to ₹5,00,000/-, and for recovery of which the subject suit came to be filed along with the claim of interest.

4. The respondents/defendants contested the suit and pleaded that in the completion certificate itself it was recorded that the completion was subject to removal of certain defects and which have not been removed.

These defects are as under:-

- “a) Fixing of window glass i/e fixing of window stay and fasteners.
- b) Fixing of brass fittings such as bib, cocks, stop cock and fitting of over head tanks etc.
- c) Fixings of wash basin with fittings looking mirrors and towel rail etc.
- d) Fixing of C/I Cistern with fittings.
- e) Fixings of C.I. grating and covers etc. and cleaning thereof.
- f) Fixing of M.H. Covers and cleaning the same.
- g) Final grinding of mosaic flooring and polishing thereof.
- h) Testing of internal C.I./S.C.I. Pine line.
- i) Final coat of painting and white washing and colour washing.
- j) Fixing of C.I./M.S. covers of over head tank mosquito proof coupling

hereof.”

5. It was pleaded that the appellant/plaintiff was requested by the respondents/defendants several times to complete the flats, but since the appellant/plaintiff failed to do so, the respondents/defendants had no option but to get the work completed from another contractor at the risk and costs of the appellant/plaintiff. The respondents/defendants also pleaded the right to withhold the amounts in terms of Clause 29 of the contract between the parties.

6. After the completion of pleadings, the Trial Court framed the following issues:-

- “1) Whether the suit is without cause of action? OPD
- 2) Whether the suit has framed is not maintainable? OPD
- 3) Whether the suit is not properly valued for the purpose of Court fees? OPD
- 4) Whether the suit is not barred u/S 53 (B) of the DD Act? OPP
- 5) Whether the defendants have withheld ₹3,64,720/- legally and with justification? OPD
- 6) Whether the defendants have unlawfully and illegally encashed the bank guarantee number 99/15 dated 24/12/1999 for ₹1,50,000/-? OPD
- 7) Whether the plaintiff is entitled to a sum of ₹5,00,000/- as claimed? OPP
- 8) Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP

9) Relief.”

7. The main issues which were framed by the Trial Court with respect to the entitlement of the appellant/plaintiff, and which are also the only issues argued before me, were issues no. 5 and 6. With regard to these issues, the Trial Court has held that since the completion certificate itself records that there were certain defective works, i.e. works which had to be done by the appellant/plaintiff, and since such works were admittedly not done by the appellant/plaintiff, the respondents/defendants had the right to withhold the amounts. The following are the observations of the Trial Court in this regard:

“20. As mentioned above, it is an admitted fact that the defendants withheld an amount of ₹3,64,720/- from the payment of the plaintiff. It was argued on behalf of the plaintiff that defendants were not entitled to withhold the said amount as completion certificate was recorded on 06.06.1994. On the other hand, it was contended on behalf of the defendants that completion certificate was recorded subject to rectification of defects. I perused the document Ex.DW1/1 to DW1/3. Ex.DW1/3 is completion certificate. It contained interalia that work has been completed according to the contract on that day i.e. on 7.6.1994 and no defects was apparent and it was subject to complete the following items of work. Items of work have been mentioned therein and these are as contained on page 4 and 5 of this judgment and these works of the rectification are also mentioned in paragraph no.3 in the WS. In corresponding paragraph of replication, it was pleaded by the plaintiff that completion certificate was not recorded subject to rectification of any defect in the work completed by the plaintiff and the defendant did not ask the plaintiff or sent any notice/letter to the plaintiff to complete the said minor work within the reasonable time. As the record of completion certificate was within the knowledge of the plaintiff and it was also signed by Sh.S.D.Tiwari, on behalf of the plaintiff on 07.06.1994 and a copy of the completion certificate was filed by the plaintiff and was proved as Ex.PW1/3. So I am of the view that it was not necessary for the

defendants to serve any fresh notice to the plaintiff to complete the works mentioned in the Ex.PW1/3/ DW1/3.

21. It was further argued on behalf of the plaintiff that a sum of ₹3,64,720/- could not be withheld by the defendants as the defendants have failed to prove on record that they have, in fact, spent this amount for completion of works mentioned in Ex.PW1/3/DW1/3. It is an admitted fact that defendants did not adduce any evidence on this aspect. In his affidavit, DW1, on this aspect, deposed that defendants requested the plaintiff several times to rectify the defects and complete the work in all respect by the plaintiff failed to rectify the defects and therefore, defendants were constrained to withhold the said amount as per the provisions of Clause 29 of the agreement.

22. Clause 29 of the agreement is as under:

“(1) Whenever any claim or claims for payment of a sum of money arise out of or under the contract against the contractor, the Engineer-in-Charge or the DDA shall be entitled to with-hold and also have a lien to retain such sum of sums in whole, or in part from the security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-Charge or the DDA shall be entitled to with-hold the security deposit, if any furnished as the case may be, and also have a lien over the same pending finalization for adjustment of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Engineer-in-charge of the DDA shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge of the DDA or any contracting person through the Engineer-in-Charge pending finalization or adjudication of any such claim.”

23. The provisions of Clause 29 thus empower the defendants to withhold the amount in the circumstances where the plaintiff/contractor failed to fulfill his obligation as per the contract. It has been established on record that completion certificate. Ex.PW1/3/DW1/3 contained some defects was recorded. It is not the

case of the plaintiff that he rectified those defects. The contents of the claim nowhere provides that it was necessary for the defendants to prove that they actually spent the withheld amount in repairing of alleged defects, which were not completed by the plaintiff. Ex.DW1/1 are the photostat copies of the various bills wherein the withheld amounts have been shown. In his cross-examination, DW1 clearly stated that completion certificate was recorded subject to the rectification of defects pointed out. As the plaintiff failed to rectify his defects mentioned in completion certificate Ex.PW1/3/DW1/3, therefore, it is held that defendants were within their rights to withhold the amount to be spent for rectification of said defects. In the light of the above discussion, it is held that defendants legally withhold ₹3,64,720/- from the payment to be made to the plaintiff. This issue is, accordingly, decided in favour of the defendants and against the plaintiff.

FINDINGS ON ISSUE NO.6

24. It is an admitted fact Bank Guarantee of ₹1,50,000/- was encashed by the defendants. The claim of the plaintiff is that it was illegally encashed whereas the claim of the defendants is that Bank Guarantee was legally encashed as the plaintiff failed to fulfill the obligation arising out of the contract Ex.DW1/4. As it has been held herein above that the defendants legally withheld ₹3,64,720/- and plaintiff failed to fulfill the obligation of agreement as per Ex.DW1/4, therefore, the defendants have a right to encash the bank guarantee of ₹1,50,000/- as per the provisions of the agreement. This issue is, therefore, decided in favour of the defendants and against the plaintiff.” (underlining added).

8. The aforesaid facts and the relevant paras of the impugned judgment show that there is no dispute that certain works which were pointed out as defective in the completion certificate were not completed by the appellant/plaintiff. Also, indubitably there is a Clause 29 in the contract for withholding the payments for works which have to be completed by the contractor. This Clause 29 has already been reproduced above.

9. In view of the aforesaid Clause 29, withholding of the amounts which have been withheld by deductions from the running bills and also by encashment of the bank guarantee given as a security, is justified, since it has otherwise come on record that certain works remained pending and which were stated in the completion certificate itself.

10. Learned senior counsel for the appellant/plaintiff argued that since the respondents/defendants failed to prove that what was the value of the work which was got done by the respondents/defendants from another contractor, therefore, the respondents/defendants were not entitled to withhold the amount with it. It was pleaded that the maximum amounts which could have been withheld by the respondents/defendants was the value with respect to the defective works stated in the completion certificate, and since the respondents/defendants failed to discharge their onus of proof with respect to the value of these works done by another contractor, the suit ought to have been decreed.

11. In my opinion, the arguments as have been urged on behalf of the appellant/plaintiff do not carry any weight. It was the appellant, who was plaintiff in the Trial Court, and therefore onus of proof was upon the appellant to show that what would be the value of the incomplete/defective work under

the contract and which was stated in the completion certificate. Appellant/plaintiff could always have led evidence with respect to the contractual documents, value of the incomplete/defective works under the contract, and the measurement/value from the measurement books with respect to the incomplete/deficient works under the contract. The appellant/plaintiff however did not file or summon these relevant documents which could have shown the value of the incomplete/defective works. If the appellant/plaintiff would have led such evidence, the appellant/plaintiff could have shown that the amounts which have been withheld by the respondents/defendants were in excess of the value of the incomplete/defective works. Unless the value of the defective/incomplete works comes on record, it cannot be held by the Courts that the withholding by the respondents/defendants is excessive than the value of the defective/incomplete works. That the respondents/defendants had a right to withhold, as I have already stated above, cannot be disputed in view of Clause 29 of the contract. Therefore, merely because the respondents/defendants did not lead evidence with respect to the value of the defective works done from the alternative contractor, did not take the case of the appellant any further, inasmuch as, the onus was on the appellant as plaintiff to prove the value of

the incomplete/defective works and therefore excessive withholding by the respondents/defendants.

12. In view of the above, I do not find any merit in the appeals, which I accordingly dismiss, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

MARCH 01, 2012
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