

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

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Order decided on: 02.07.2012

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I.A. Nos.15970/2010, 15960/2010, 3029/2011, 6126/2011, 6127/2011 & 10205/2011 in CS(OS) No.1995/2010

DAMAYANTI CAPUR

..... Plaintiff

Through

Ms. Sucharita Ghosh, Adv. with
Mr. Navin Prakash, Adv.

versus

STAR FACILITIES MANAGEMENT LTD. & ORS

..... Defendants

Through

Mr. Rahul Malhotra, Adv. with
Ms. Pallavi Tayal, Adv. for D-1.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff, namely, Smt. Damayanti Capur has filed the present suit under order XXXVII CPC for recovery of Rs.23,90,878/- plus interest @ 24% per annum and future interest from the date of institution of the suit till the realization of the amount.

2. The plaintiff is a widow lady and on the date of filing of the suit, she was 69 years old. She is an Interior Designer by profession and is the sole proprietor of firm D's Designs having its office at New Delhi and the registered office at Kolkata.

3. The plaintiff was granted three work contracts for renovation of offices of defendant No.1, Star Facilities Management Limited. Two work orders were granted on 1st March, 2008 vide a written work contract bearing Letter No.FM/WO/SL/37/2008 and the third work order was granted on 30th May, 2008 vide Letter No.FM/WO/SL/2008.

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4. The suit is also filed against Mr. Sushil Ansal, Chairman; Mr. Pranav Ansal, Vice Chairman & Managing Director; and Mr. Anil Kumar, C.E.O., Ansals Properties & Infrastructure Limited, who are impleaded as defendants No.2 to 4 mainly on the reasons that the defendant No.1 is the subsidiary of Ansal Group of Companies and she was asked to meet them for the purpose of recovery of the amount due and for the purpose of settlement of accounts.

5. After the issuance of notice in the suit under Order XXXVII CPC in the prescribed manner, defendant No.1 filed the application under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 (hereinafter called the "Act") being I.A. No.15970/2010 on 17th November, 2010, inter alia, on the ground that there is an existence of arbitration clause in the agreement arrived at between the plaintiff and defendant No.1 and instead of invoking the arbitration clause, the plaintiff has filed the present suit, which is not maintainable.

6. Defendants No.2 to 4 also filed the application being I.A. No.15960/2010, under Order I, Rule 10 read with Order VII, Rule 11 read with Section 151 CPC for deletion of their names from the array of parties or in the alternative, rejection of the plaint qua defendants No.2 to 4.

7. After filing appearance, the plaintiff filed the application being I.A. No.2479/2011, under Order XXXVII, Rule 3(4) CPC for issuance of summons for judgment.

8. Defendant No.1 filed fresh application being I.A. No.3029/2011, under Section 151 CPC read with Sections 5 & 8 of the Act, praying that all the proceedings in the suit be stayed, pending disposal of the application filed by defendant No.1 for referring the matter to arbitration. And also

filed an application for leave to defend under Order XXXVII, Rule 3(5) read with Section 151 CPC, being I.A. No.6126/2011, along with an application for condonation of delay in filing the application (I.A. No.6127/2011) for leave to defend.

9. Replies to all these applications were filed by the plaintiff and the matter was listed before Court from time to time for disposal of ending applications. When the matter was listed on 30th March, 2012, defendant No.1 was asked to deposit Rs.5 lac as a security amount with the Registrar General of this Court within fifteen days as it appears to the Court that the matter was being delayed by the defendants. The said amount was deposited by defendant No.1 as per statement made in the court.

10. Defendants No.2 to 4 also filed the application for leave to defend, being I.A. No.10205/2011. Prayer made in the application was opposed by the plaintiff, as the same was not filed within the time.

11. Both parties also tried to settle their disputes as the plaintiff was not agreeable to receive the amount offered by the defendant No.1. Thereafter, both the parties addressed their submissions before Court and orders were reserved.

12. First submission of defendant No.1 was that in view of averment made in the application being I.A. No.15970/2010 under Section 5 and 8 of the Act, the suit itself is not maintainable. It is argued by counsel that vide clause E of General Conditions of the Contract of work order dated 1st Marcy, 2010 and 30th May, 2010, it was, inter alia, agreed by the plaintiff that all dispute relating to settlement of rates for extra items and deductions for item of work not done shall be decided by the Facility Manager. Learned counsel referred the said clause, which reads as under:

“E. Extra Item & Rates

1. No claim for extra items shall be entertained unless agreed to before in writing by the Company's authorized representative.
2. All cases of settlement of rates for extra items and deductions for items of work not done shall be decided by the Facility Manager. In case of difference of opinion in any matter, the decision of the CEO shall be final and binding on both the parties and shall be taken as sole Arbitrator's decision.”

Counsel appearing on behalf of the defendant No.1 argued that inspite of the existence of an arbitration agreement between the parties, the plaintiff, instead of invoking the arbitration Clause, chose to file the suit which is not maintainable as the same has been filed with malafide intentions. Since there is an arbitration clause in the agreement and the disputes pertaining to the subject matter have arisen, therefore, the plaintiff is not entitled to the relief claimed in the application for summons for judgment.

13. In the reply, the plaintiff has specifically alleged that there never arose any dispute between the parties which would require the appointment of any Arbitrator. The defendant No.1 has been acknowledging the liabilities of the bills raised by the plaintiff, therefore, question of invoking arbitration clause does not arise.

14. The defendant No.1's application seeking leave to defendant No.1 under Order XXXVII Rule 3 (5) read with Section 151 CPC being I.A. No.6126/2011 has to be considered alongwith I.A. No.6127/2011 for consideration of delay of 20 days under the provisions of Order XXXVII Rule 3 (7) read with Section 5 of Limitation Act.

15. On merits, defendant No.1 has mainly raised the following defence in the application being I.A. No.6126/2011:

- (a) That after completion of work by the plaintiff, the quality of work was verified at site by the defendants and it was found to be not as per the work orders and hence, the defendant is entitled to deduct the same from the bills as raised by the plaintiff for work completed by her. It is submitted that the defendant after verifying the work as well as quality has reconciled the work done and deducted as per the work actually executed by the plaintiff.
- (b) It is submitted that the rates and measurements as executed by the plaintiff was not upto the standards and hence, the defendant was liable to pay only Rs.47,21,323/- to the plaintiff, where as the defendants have already paid an amount of Rs.50,30,803/- (Rupees Fifty Lac Thirty Thousand Eight Hundred And Three Only) towards the advances in respect of the work orders mentioned above and the plaintiff is liable to refund the balance amount to the defendants. It is submitted that in various meetings plaintiff was provided the detailed breakup and measurements and the plaintiff was intimated that the bills raised by the plaintiff are inflated and work worth only Rs.47,21,323/- was executed by the plaintiff and hence, is liable to refund excess amount of Rs.3,09,460/- (Rupees Three Lac Nine Thousand And Four Hundred And Sixty only) received by her.

16. The defendant No.1 has raised following triable issues in the application for leave to defend:

- (a) Whether there is any admission on part of the Defendants as alleged by the plaintiff that the defendant are liable to pay an amount of Rs.23,90,878/- (Rupees Twenty Three Lac Ninety Thousand Eight Hundred And Seventy Eight only)?
- (b) Whether the plaintiff has completed the work as per terms and conditions of abovesaid three work orders?
- (c) Whether the plaintiff has charged rates in respect of items as per abovesaid three work orders?

(d) Whether the plaintiff is entitled to interest? If yes, at what rate of interest?

17. The plaintiff in her reply to the application for leave to defend in paras-8 to 11 put up her case and has denied the averment made in the application for leave to defend. It is necessary to reproduce these four paras of reply:

“8. That the contents of the para No.8 are denied in toto. It is submitted that the defendant is trying to read between the lines, which is against the judicious interpretation. The plaintiff after completion of the work order submitted two final bills on 28.08.2008 and one final bill on 05.09.2008 in the concerned office of the defendant. The concerned authorities of the defendant thereafter verified the work done after visiting respective work sites and thereafter doing measurements and verifying the quality, quantity and rates of the materials used in the work, gave their satisfactory consent and remarks on 10.09.2008 and 11.09.2008 respectively i.e. that the defendants after thoroughly scrutinizing the documents approved the same. The remarks in the final bills are as “Checked personally all measurements and quantifies is O.K. Sir, release the final bill after deduction”. Herein the deductions were meant for the advances paid so far against the work order. Again in the final bill presented on 05.09.2008. The concerned authority remarked as “All measurement and quantities is checked personally (O.K.)”. Under these circumstances no triable issue can be raised.

9. That the contents of para No.9 are strongly denied. It is submitted that the plaintiff after completion of the work order submitted the final bills in the concerned office of the defendant. The concerned authorities of the defendant thereafter verified the work done after visiting respective work sites and thereafter doing measurements and verifying the quality, quantity and rates of the materials used in the work, after thoroughly scrutinizing the documents the concerned authority of the defendant company approved the same and gave their satisfactory consent and remarks on the

final bills which has been annexed with the main plaint. It is further submitted that if the defendant was dissatisfied with the work of the plaintiff they should have informed the plaintiff, which in this case was never done. On the other hand the defendants kept on prolonging the due payment on their part and kept on harassing the 70 year old plaintiff by making her visit the offices of all the defendants on a regular visit. Judging by the conduct of the defendant it is evident that the defendant is bent upon harassing the plaintiff and trying to cart off her legal entitlements.

10. That the contents of para No.10 are vehemently denied. It is submitted that the defendant has alleged false and frivolous allegations without any material proof substantiating the same. It is very strange that if the defendant is claiming that the defendant owes Rs.3,09,460 from the plaintiff, wherein the final bills and the comments of the concerned officials of the defendant company proves altogether a very different picture. If the defendant, as claimed owed the abovementioned amount from the plaintiff what prevented them from claiming the amount when it became due i.e. after completion of the work in the year 2008. The amount mentioned by the defendant are false and fabricated and an afterthought of the defendant. It is further submitted that there are no discrepancies in the quotation of the work orders and the final bills which have been annexed with the main plaint. It is prima facie not a case for trial.

11. That the contents of para No.11 are strongly denied. It is submitted that the plaintiff after completion of the work order submitted the final bills in the concerned office of the defendant. The concerned authorities of the defendant thereafter verified the work done after visiting respective work sites and thereafter doing measurements and verifying the quality, quantity and rates thoroughly scrutinizing the documents the concerned authority of the defendant company approved the same and gave their satisfactory consent and remarks on the final bills. The plaintiff after submitting the final bills kept on approaching the defendant's office for payment but the plaintiff was being continuously harassed by the defendants by directing her to approach

various other authorities for payments. The plaintiffs also sent various letters to the defendants thereby requesting them to clear her dues, which were accepted by the offices. The plaintiffs also send a legal notice to the defendants on 11.08.2010 which the defendants never replied to. The plaintiff admits that she had filed a criminal complaint in P.S. Kalkaji on 11.8.2010, since no action was taken by the police there was no point in mentioning the same in the plaint. The annexure annexed is a matter of record and needs no reply.”

18. I have gone through the pleadings and have also considered the rival submissions of the parties. The facts of the case are:-

18.1 As per the first work order dated 1.3.2008, the renovation work for two premises were given – the scope of work agreed by the defendant No.1 were annexed as Annexure-I and Annexure-II along with their work order.

18.2 The annexure I was for the renovation of SFMAL OFFICE (Ground Floor) – SUSHANT LOK-I. The value of the scope of work offered by the defendant No.1 was Rs.36,21,183/- (Thirty Six Lac Twenty One Thousand One Hundred and Eighty Three).

18.3 After completion of the work within the stipulated time the plaintiff submitted the final bills with the defendant with a final amount at par to the agreed scope of work i.e. Rs.36,21,183 (Thirty Six Lac Twenty One Thousand One Hundred and Eighty Three).

18.4 The plaintiff submits that after the measurements checked and verified by the authorities of the defendant the actual amount raised by the plaintiff was deducted and the amount so derived at by the defendant was Rs.36,03,478/- (Thirty Six Lac Three Thousand Four Hundred And Seventy Eight). The concerned authority of the

defendant Mr. Vimal who did the measurements and verification of the work order and final bills after approval put his signature on the final bill with the comments to make the payment of the final bill of Rs.36,03,478/- (Thirty Six Lac Three Thousand Four Hundred And Seventy Eight) after deducting the advance payment made on the work.

18.5 Similarly the other work order given as annexure II was for the renovation of SFML OFFICE (First Floor) – SUSHANT LOK-I. The value of the scope of work offered by the defendant No.1 was Rs.24,11,342/- (Twenty Four Lac Eleven Thousand Three Hundred And Forty Two). The final bill raised by the plaintiff also tallied with the work order i.e. Rs.24,11,342/-.

18.6 The case of the plaintiff is that after verification, checking and measurements done by the concerned authority Mr. Vimal the actual amount raised by the plaintiff was deducted to Rs.23,59,521/- (Twenty Three Lac Fifty Nine Thousand Five Hundred And Twenty One). Mr. Vimal from the defendant's office approved the bill and cleared it for making the final payment after deducting the advance payment made on the work order.

18.7 For third work order given on 30th March, 2008 was for the renovation of Old SFML OFFICE (First Floor) – Sushant Lok-I. The value of the scope of work offered by the defendant No.1 was Rs.15,29,968/- (Fifteen Lac Twenty Nine Thousand Nine Hundred Sixty Eight). Thereafter, there was some extra work done by the plaintiff after due approval of the defendant No.1 against which the final bill raised by the plaintiff was Rs.15,47,728/- (Fifteen Lac

Forty Seven Thousand Seven Hundred Twenty Eight).

19. It is alleged by the plaintiff that after verification, checking and measurements done by the concerned authority Mr. Vimal, the actual amount raised by the plaintiff was deduced to Rs.15,31,132/- (Fifteen Lac Thirty One Thousand One Hundred Thirty Two). Mr. Vimal approved the bill and cleared it for making the final payment after deducting the advance payment made on the work order.

20. Thus, the final bills of all the three work contracts raised and approved by the defendant No.1 after checking and verification was (Rs.36,03,478 + Rs.23,59,521 + Rs.15,31,132 = Rs.74,94,131/- (Seventy Four Lac Ninety Four Thousand One Hundred Thirty One). The plaintiff had received an advance payment of Rs.51,03,253/- (Fifty One Lac Three Thousand Two Hundred And Fifty Three) on all the three work orders in total. Therefore, the balance amount to be paid by the defendant No.1 as per the final bills raised and approved is $\text{Rs.74,94,131} - \text{Rs.51,03,253} = \text{Rs.23,90,878/-}$ (Twenty Three Lac Ninety Thousand Eight Seventy Eight).

21. As far as defendant Nos. 2 to 4 are concerned, they are not parties to the contract nor they were involved in the three work orders passed by defendant No.1, apparently, the plaintiff has made them parties to the suit as she was asked by defendant No.1 to contact them for the purpose of making the payment. Thus, I am of the view that they are not necessary and proper parties to the suit. Their application under Order I, Rule 10 CPC being I.A. No.15960/2010 is allowed and they are deleted from the arrays of the parties. The defendant No.1 is the subsidiary of Ansal Group and plaintiff was asked by defendant No.1 to approach them for the purpose of settlement of account. In view of the abovesaid position, I am of the

view that final orders prayed for by the plaintiff cannot be passed against them as they are not necessary party to the suit.

22. After having considered the documents placed on record and clause E of General Conditions of contract, it reveals that the completion of contract work was to the satisfaction of the defendant and every time final bills were checked personally by the authorized representative of defendant No.1 after all measurements. The question of deduction after that does not arise. I do not agree with the submissions of learned counsel appearing on behalf of defendant No.1 that only admitted amount of Rs.15,14,837/- be ordered to be paid to the plaintiff and for rest of the amount, which is disputed by defendant No.1 be referred for arbitration as per clause E of General Conditions of Contract as the said amount is the deduction amount as per terms of agreement. The said argument of defendant No.1 was totally misconceived, as the work in question was completed by the plaintiff as per satisfaction of defendant No.1 as per contract, hence, no dispute pertaining to contract left for any work items for determination which can be led to the reference to Arbitrator under the provisions of the Arbitration and Conciliation Act. There is no merit in two applications being I.A. Nos.15970/2010 & 3029/2011 filed by defendant No.1 in this regard. It appears that the same were filed apparently in order to delay for making the payment to the old lady. Both the applications are, therefore, dismissed.

23. As far as the two applications filed by defendant No.1 for leave to defend on merit and condonation of delay in filing thereof are concerned, the same are also dismissed, as the defence raised by defendant No.1 is totally moonshine and changes of success in the suit are nil, in case, the

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matter is decided after trial. Therefore, the application being I.A. No.6126/2011 for leave to defend is dismissed. Another application being I.A. No.6127/2011 for condonation of delay in filing of I.A. No.6126/2011 does not survive and is disposed of accordingly.

The application filed by defendants No.2 to 4 for leave to defend being I.A. No.10205/2011 has become infructuous as their application for deleting their names from the array of the parties is already allowed. Hence, the same is also disposed of as such.

24. In view of dismissal of defendant No.1's all applications, consequently, the suit of the plaintiff is decreed with costs. Decree is passed against defendant No.1 for a sum of Rs.23,90,878/- along with interest at the rate of 9% from the date of filing of suit till the date of payment as this Court feels that rate of interest granted is reasonable. The plaintiff is also entitled for costs. Suit against the defendant Nos. 2 to 4 is dismissed.

The plaintiff is entitled to receive the amount of Rs.5 lac already deposited by the defendant No.1 with the Registrar General of this Court in terms of the order dated 30th March, 2012, along with interest accrued thereon. The Registry is directed to release the said amount to the plaintiff by way of pay-order through counsel. As far as the remaining amount is concerned, the plaintiff is entitled to recover the balance amount in accordance with law.

JULY 02, 2012

MANMOHAN SINGH, J.

the office note file
dt 16/8/12
For Taxation