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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : March 14, 2012*
Judgment Pronounced on: March 19, 2012

+ RFA(OS) 81/2007

K.R.BUILDERS PVT. LTD. Appellant
Represented by: Mr. Raman Kapur, Senior Advocate
instructed by Mr. R.P. Singh, Advocate

versus

DDA Respondent
Represented by: Ms. Sangeeta Chandra, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. We are concerned in the instant appeal with the correctness of the judgment and decree dated September 28, 2007, disposing of CS(OS) No.142/2003 filed by the appellant; not in full, but only in relation to items of claim at serial No.(e), (h), (i) and (n) of para 11 of the amended plaint, which have been rejected by the learned Single Judge. We highlight that the claims decreed by the learned Single Judge have not been challenged by DDA and not all claims rejected have been questioned in the instant appeal.

2. Claim vide para 11(e) in sum of ₹1,38,245/- pertains to the grills affixed by the appellant and the factual setting of

the claim is that the contract required, vide item No.6.6 of the description of items, to provide and fix MS grills of required pattern fabricated with MS flat square or round bar, and the claim of the appellant is that this description conforms to ordinary grills. The appellant claims that when the drawing was furnished to it the same pertained to an ornamental grill and hence the differential claim over and above the item rate, as per the contract, which has been paid for. The claim as per para 11(h) of the plaint in sum of ₹43,504.10 pertains to amount not paid in terms of clause-10(cc) of the contract and to understand the claim it needs to be highlighted that the appellant had, vide para 11(g), a claim in sum of ₹80,795.45 alleging that this amount was wrongly withheld notwithstanding the appellant having rectified the defective works on account of which the said sum was deducted from the running bills. The claim in para 11(h) pertained to the material and labour escalation pertaining to the said work i.e. the work carried out towards rectification of the defects. Claim vide para 11(i) was with respect to clause-10(cc) of the contract and was not that no money was paid under clause-10(cc) nor was the dispute pertaining to the quantum of work executed each quarter or the relevant index or indices applied, but was to the manner in which the clause had to be interpreted and applied. Claim vide para 11(n) was on account of damages due to work being prolonged by about 48 months, over and above the 18 months contract stipulated time; damages were claimed on account of idle establishment, idle

tools, plant and machinery at site. ₹7,20,000/- has been claimed under this head.

3. Parties are not at variance that as against 18 months period stipulated in the contract for work to be completed, the overrun period was 48 months. We highlight that at some places there is a reference in the pleading and the evidence that the overrun period was 66 months, but we find that in the pleading relating to claim No.11(n), the overrun period is stated to be 48 months. It appears that the confusion has arisen on account of contract stipulated period being 18 months and overrun period being 48 months: equaling 66 months and thus probably it has got referred at certain places that the overrun period was 66 months.

4. The discussion by the learned Single Judge pertaining to the claim as per para 11(e) is to be found in para 63 and 64 of the impugned decision. Rejecting the claim the learned Single Judge has held that the appellant, not having produced any drawing, could not substantiate the claim that as against the contract describing the grill work as pertaining to an ordinary grill, the respondent required the appellant to affix ornamental grills.

5. It was urged by learned counsel for the appellant that in response to appellant's pleading in para 11(e) of the plaint, in the written statement filed, the respondent had not denied that the grill affixed was ornamental and thus no evidence was led, except for the witness to state that the grill was ornamental.

6. Respondent's reply to sub-para (e) of para 11 of the plaint reads as under:-

"(e) The contents of sub para (e) are wrong and denied. It is stated that the drawings for the grill were issued to the plaintiff on 28/06/1994 and the grill was made accordingly. The payments pertaining to the same were made to the plaintiff in the running bills.

It is submitted that as per clause 8-A of the agreement, the plaintiff must object within seven days after receipt of the payment if there is any dispute, otherwise, the measurements taken by the Engineer-in-Charge or the defendant shall be final and binding on both the parties and no objections raised by the plaintiff at a later stage shall be entertained.

It is further submitted that the claim of the plaintiff is baseless and is an afterthought. The plaintiff never challenged the running bills and the plaintiff duly accepted the payments. Hence, the present claim merits rejection."

7. At the outset we must note that there is a denial of the averments made in para 11(e) of the plaint and this denial is to be found in the very first sentence of para 11(e) of the written statement.

8. It is not in dispute that neither party has brought on record the drawing of the grills which were required to be installed by the appellant and there is no evidence as to what constitutes an ornamental grill.

9. The onus is on the plaintiff to prove the case.

10. That apart, it is not in dispute that as and when grills were installed in the flats constructed by the appellant,

after measuring the work, the respondent made payment as per contract stipulated price and there is no evidence that the appellant ever protested that less payment was being released. Further, when the final bill Ex.D-14 was prepared by DDA, the payment determined as payable was accepted by the appellant by writing: '*Final Bill and measurements accepted.*' It is only thereafter that the appellant started raising the issue.

11. We agree with the view taken by the learned Single Judge that the appellant has not discharged the onus of proving that it had installed ornamental grills.

12. Pertaining to claim No.11(h), the basis for the claim has already been noted by us in para 2 above.

13. The reasoning of the learned Single Judge to deny the claim is to be found in paragraph 80 to 82 of the impugned decision.

14. Learned counsel for the appellant urged that once claim under sub-para (g) was allowed, the claim under sub-para (h) followed automatically.

15. The argument is fallacious. The reason is that for substandard works executed, DDA deducted ₹80,759.45 from the running bills. In the teeth of evidence that before handing over possession of the flats the appellant removed the defective substandard works i.e. carried out the necessary rectifications, the learned Single Judge correctly held that the cause or the reason for not making the payment was no longer existing and hence decreed the claim. But, denying payment on account of escalation, which we find would be payable under the clause-10(cc) of the contract, the learned Single

Judge declined the relief holding that subsequent rectification would not entitle the appellant to the said claim.

16. We need to expand a little on the reasoning of the learned Single Judge. The work had to be completed as per a plan which was an integral part of the contract. As per clause-10(cc), escalation on material and labour had to be paid as per the terms of the said clause, which required work to be measured each quarter and with reference to the applicable indices, the escalation had to be worked out. If a contractor executes defective works and then at a much later stage rectifies the defect, it would not be entitled to any escalation pertaining to the rectification work, for the reason this would not relate to the applicable time when the work had to be otherwise executed. Besides, the clause is to recompense the contractor the price rise in the cost of material and labour for the work properly executed and not defectively executed but subsequently rectified.

17. Claim under clause-10(cc) i.e. vide para 11(i) of the contract was in sum of ₹16,01,007.53 and for which we find that DDA had made the payment to the contractor, who was wanting more; and the bone of contention was the manner in which the clause had to be applied.

18. We thus begin our discussion with respect to the rival contentions urged by noting clause-10(cc) of the contract. It reads as under:-

““Clause 10(cc). If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with Clauses 10 & 34 hereof) and/or wages of labour required for

execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject at the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions:

1. The base date for working out such escalation shall be the last date on which tenders were stipulated to be received.
2. The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final, and from this amount the value of materials supplied under clause 10 of this contract or services rendered at fixed charges as per clause 34 of this contract, and proposed to be recovered in the particular bill, shall be deducted before the amount of compensation for escalation is worked out. In the case of materials brought to site for which any secured advance is included in the bill, the full value of such materials as assessed by the Engineer-in-Charge (and not the reduced amount for which secured advance has been paid) shall be included in the cost of work done for operation of this clause. Similarly when such materials are incorporated in the work and secured advance is deducted from the bill, the full assessed value of the materials originally considered for operation of this clause should be deducted from the cost of work shown in the bill, running or final. Further, the cost of work shall not include any work for which payment is

made under clause 12 or 12(a) at prevailing market rates.

3. The components of materials, labour, P.O.L., etc. shall be pre-determined for every work and incorporated in the conditions of contract attached to the tender papers and the decision of the Engineer-in-Charge in working out such percentage shall be binding on the contractor.

FLY LEAF NO.10:

The component of materials, labour and P.O.L. as indicated in para-3 of the sub-clause 10 (CC) have been pre-determined as below:

a)	Material	Seventy five	Percent	75
b)	Labour	Twenty five	Percent	25
c)	P.O.L.	NIL	Percent	X
	Total	HUNDRED	-	100

4. The compensation for escalation for materials and P.O.L. shall be marked out as per the formula given below:-

$$(i) \quad V_M = W \times \frac{X}{100} \times \frac{(MI - MI_o)}{MI_o}$$

V_M = Variation in material cost i.e. increase or decrease in the amount in rupees to be paid or recovered

W = Cost of work done worked out as indicated in sub-para 2 above.

X = Component of materials expressed as percent of the total value of work.

MI & MI_o = All India whole sale index for all commodities for the period under reckoning as published by the Economic

Advisor to Government of India, Ministry of Industry and Commerce, for the period under consideration and that valid at the time of receipt of tenders, respectively.

ii)
$$V_F = W \times \frac{Z}{100} \times \frac{(FI - FI_o)}{FI_o}$$

V_F = Variation in cost of fuel, oil and lubricants, increase or decrease in rupees to be paid or received.

W = Value of work done, worked out as indicated in sub-para 2 above.

Z = Component of P.O.L. expressed as a percent of total value of work is indicated under the special conditions of contract.

FI & FI_o = Average index number of wholesale price for groups (fuel, power, light & lubricants) as published weekly by the Economic Adviser to Govt. of India Ministry of Industry for the period under reckoning that valid at the time of receipt of tenders, respectively.

The following principles shall be followed while working out the indices mentioned in para above.

(a) The compensation for escalation shall be worked out at quarterly intervals and shall be with respect to the cost of work done during the three calendar months of the said quarter. The first such payment shall be made at the end of three months after the month (excluding) in which the tender was accepted and thereafter at three months' interval. At the time of completion of the work, the last period for payment might become

less than three months, depending on the actual date for completion.

(b) The index (MI/FI etc.) relevant to any quarter for which such compensation is paid shall be the arithmetical average of the indices relevant to the three calendar months. If the period up to date of completion after the quarter covered by the last such installment of payment, is less than three months, the index MI and FI shall be average of the indices for the months falling within that period.

(c) The base index, MI_0 , FI_0 etc. shall be the one relating to the month in which the tender was stipulated to be received.

6. The compensation for escalation for labour shall be worked out as per the formula give below:-

$$i) \quad V_L = W \times \frac{Y}{100} \times \frac{LI_0}{LI}$$

V_L = Variation in labour cost i.e. amount of increase or decrease in Rupees to be paid or recovered.

W = Value of work done, worked out as indicated in sub-para 2 above.

Y = Component of labour expressed as a percentage of the total value of the work.

LI_0 = Minimum daily wage in Rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as on the last date on which tenders for the work were to be received.

LI = Minimum wage in rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as applicable on the last day of the quarter previous to the one during which the escalation is being paid.

7. The following principles will be followed while working out the compensation as per sub para 6 above.

a) The minimum wage of an unskilled male mazdoor mentioned in Sub-para 6 above shall be the higher of the following two figures: namely, those notified by Government of India, Ministry of Labour and those notified by the local administration, both relevant to the place on work and the period of reckoning.

b) The escalation for labour also shall be paid at the same quarterly intervals when escalation due to increase in cost of materials and/or P.O.L. is paid under this clause. If such revision of minimum wages takes place during any such quarterly intervals, the escalation compensation shall be payable for work done in all quarters subsequent to the quarter in which the revision of minimum wages takes place.

c) Irrespective of variations in minimum wages of any category of labour, for the purpose of this clause, the variation in the rates for an unskilled adult male mazdoor alone shall form the basis for working out the escalation compensation payable on the labour component.

8. In the event the price of materials and/or wages of labour required for execution of the work decrease/s, there shall be downward adjustment of the cost of work so that such price of materials and/or wages of labour shall deductible from the cost of work under this contract and in this regard the formula herein stated under this clause 10 (cc) shall mutatis mutandis apply, provided that:-

(i) No such adjustment for the decrease in the price of materials and/or wages of labour aforementioned would be made in case of

contracts in which the stipulated period of completion of the work is six months or less.

(ii) The Engineer-in-Charge shall otherwise be entitled to lay down the principles on which the provision of this sub-clause shall be implemented from time to time and the decision of the Engineer-in-Charge in this behalf shall be final and binding.

Provided always that the provision of the proceeding clause 10(c) shall not be applicable for contracts where provisions of this clause are applicable but in cases where provisions of this clause are not applicable, the provisions of clause 10 (c) will become applicable.”

19. We first note the contention urged before the learned Single Judge, which was repeated before us, by the appellant. The contention was that vide para 2 of the clause, the cost of work on which escalation had to be paid was 85% of the total cost of the work. Vide para 3, Fly Leaf Condition No.10 was incorporated, as per which the component of material and labour was: Material – 75% and Labour – 25%. Thereafter, vide para 4 and para 6, compensation for escalation towards material and labour had to be determined by applying the formula and the applicable indices listed therein. Counsel urged that as per para 2, the price of secured materials had to be deducted. We highlight that under the contract, DDA was supplying three items, namely; cement, steel and bricks at a fixed price and while raising the bill the contractor would be charging for cement, steel and bricks and then deduct the price thereof as per the price at which DDA was supplying the

three items. The appellant was claiming that since 85% of the cost of work included the price of material and labour and since of this 85% cost of work, 75% thereof was attributable to the material and 25% to labour, while applying the para, firstly from the value of the work 85% had to be treated on which material and labour escalation had to be paid. Thereafter 75% of this cost i.e. of the 85% cost, had to be apportioned towards material and from this price the price at which material was supplied by DDA had to be deducted and escalation paid on the balance and on the 25% of the 85% cost of the work, labour escalation had to be determined and paid.

20. As per DDA this was not the method to apply clause-10(cc) and that the escalation for material had to be as per the formula in para 4(i) of clause-10(cc) and for labour as per para 4(ii) of the clause.

21. The reasoning of the learned Single Judge is to be found in paragraphs 84 to 102 of the impugned decision.

22. After discussing the arguments, in para 98, the learned Single Judge has held that at first blush the argument advanced by the appellant appears to be logical, but has gone on to hold that once the parties have agreed to a formula to work out escalation, the same had to be determined as per the formula and not on any other logic.

23. We agree. If a price, whether by way of escalation or otherwise is agreed to be determined by the parties in the

contract on the application of a given formula, it is the formula which would govern and not what may otherwise be logical.

24. It is true that clause-10(cc) treats 15% of the price of work as allocable to the contractor's profit and overheads and 85% towards material and labour. Thus, where the contract requires that 85% of the cost of work to be relatable towards material and labour with 75% thereof to be apportioned towards material and balance 25% thereof towards labour, by ordinary plain logic, it would mean that of the 100% cost of work, 85% would be towards material and labour and inter-se material and labour, the division would be 75% of 85% towards material and 25% of 85% towards labour. Or to put it differently, the contract price could be appropriated: 15% towards overheads profits, 63.75% towards material and 21.25% towards labour; and in this way we reach the figure $15 + 63.75 + 21.25 = 100$. Now, it stands to logic and reason that where the owner of the work has supplied some component of the material at a fixed price, no escalation thereon would be payable to the contractor. It also stands to logic and reason that horses have to be traded with horses and cows have to be traded with cows, and thus while determining the escalation, the cost of material supplied by the owner of the work has to be deducted with reference to the cost of the material consumed and not with reference to the cost of labour input in the execution of the contract.

25. But, this logic would have no place where the parties have agreed to a formula, on basis whereof the escalation on

material consumed has to be determined. We extract the formula from clause-10(cc), pertaining to escalation for material. It is to be found in para 4(i) of the clause and reads as under:-

$$(i) \quad V_M = W \times \frac{X}{100} \times \frac{(MI-MI_0)}{MI_0}$$

V_M = Variation in material cost i.e. increase or decrease in the amount in rupees to be paid or recovered

W = Cost of work done worked out as indicated in sub-para 2 above.

X = Component of materials expressed as percent of the total value of work.

MI & MI_0 = All India whole sale index for all commodities for the period under reckoning as published by the Economic Advisor to Government of India, Ministry of Industry and Commerce, for the period under consideration and that valid at the time of receipt of tenders, respectively.

26. Suffice would it be to state that the index 'X' in the formula refers to the component of material, expressed as percent of the total value of the work, and thus the index 'X' would be the 75% component of the 85% component of the work. The index 'W' represents the cost of work done, worked out as indicated in para 2, and this would be 85% of the cost of work. The indexes MI & MI_0 represent the All India Wholesale Index for Commodities at the time of execution of the work and receipt of tender respectively. Thus, the variable ' V_M ' has to be determined by applying the indices as they stand and not by tinkering with the indices on a theory of logic.

27. This is the reasoning of the learned Single Judge with which we agree.

28. The submission that the learned Single Judge could not disagree with the view taken by another learned Single Judge of this Court in the decision reported as 70 (1997) DLT 521 P.C.Sharma & Co. v. DDA, needs a word to be spoken by us in appeal.

29. The learned Single Judge has noted the said decision in paragraph 92 of the impugned decision, but has held that in construing a document, the Court is bound by the language used by the parties and this we understand to mean that if a formula is stipulated, it governs the charter relationship. The learned Single Judge has held that the decision in P.C.Sharma's case (supra) had to be understood in the context of the decision being by way of a challenge to an award and therefore the view of the Single Judge that if an interpretation by an arbitrator was plausible, the Court would not interdict.

30. We agree with the view taken by the learned Single Judge that a decision pertaining to the acceptance of an award would stand on a totally different footing with reference to a primary adjudication by a Court. Secondly, we find the view taken by the learned Single Judge in P.C.Sharma's case (supra) to be an incorrect view, for the reason it is settled law that an arbitrator, being the creation of a contract, the terms of the written contract are his Bible and he cannot sing or script his own psalms. While deciding P.C.Sharma's case (supra), the learned Single Judge has ignored the fact that if on the issue of

arriving at a sum, the contract stipulates a formula, it is the formula which governs and the application thereof has to be of the given indices and not what the arbitrator feels to be logical and reasonable, howsoever logical or reasonable be the view taken by the arbitrator. We thus overrule the view taken in P.C.Sharma's case (supra).

31. With reference to the claim for damages due to work being prolonged by 48 months and the basis thereof being idle tools, plants and machinery as also site overhead expenses, the learned Single Judge has negated the claim as per reasons in paragraphs 112 and 113 by noting that the contractor had been compensated for escalation towards cost of material and labour, a reasoning which may not stand the scrutiny of law for the reason, it is settled law that loss to the contractor when there is a delay in performance of the work not attributable to the contractor but to the owner may subsume various counts; being: (1) loss of profits; (2) contribution to fixed heads; (3) increase in prime cost which includes components of material, plant, labour and salaries to the staff; and (4) off site and on site overheads. Thus, if a clause in the contract compensates the contractor escalation in the price of material and labour during execution of the work, this would not mean that the contractor has been recompensed fully.

32. The subject at hand finds a good mention in *Hudson's Building and Engineering Contracts* 11th Edn. and one of us (Pradeep Nandrajog, J.), who authored the decision on

November 30, 2011 in RFA(OS) No.55/2011 'DDA v. J.S.Chaudhary' had opined in paras 36 to 38 thereof as under:-

"36. Loss of a contractor's profit as a head of damage in a terminated contract requires to be distinguished from a quite different claim which contractors may be able to establish in cases where an owner's breach can be shown to have had the effect of delaying completion by the contractor. In a delayed contract the basis of the contractor's loss is the postponement of the time when the contractor's organization, viewed as a profit-earning entity, is free to move on and earn elsewhere in the market, the combined profit and necessary contribution to fixed overheads of which it is reasonably capable. A construction contractor's enterprise as a whole will incur a range of off-site expenditure which by its nature will not vary or be affected by the delay in performance of an individual contract, or the degree to which that contract may have been delayed, as a result of owner's breach of contract. This class of expenditure is commonly referred as '*fixed overhead*' expenses. A contractor pricing an individual project, therefore, after providing for the estimated total '*prime-cost*' of all kinds which will be required to carry out the contract itself must then additionally estimate for a *combined operating margin* which will not only produce his required net or '*pure*' profit, but will also serve to make an appropriate contribution, *together with that from his other projects*, to the *fixed* overheads of the enterprise as a whole. In case of a delayed contract, where the concern is to ascertain the 'profit' which the contractor might have expected to earn *elsewhere in the market on other contracts*, it is this necessary combined operating margin of profit and fixed overhead, which in appropriate market conditions, the contractor's enterprise will have lost as a consequence of the period of owner-caused delay on the individual project, and to which he will

be entitled as damages. However, in this regards, a distinction needs to be drawn, on the one hand, small contractors having few (and indeed sometimes no) overheads other than those of the '*jobsite*' itself, and on the other, large contractors with centralized offices, transport systems, yards and depots; and while again some main contractors may operate as little more than employers of sub-contractors, with virtually no overheads of their own. (See Articles 8-176-79, pages 1072-74, Hudson's Building and Engineering Contracts, XIth Edition).

37. Delay in performance of contract due to owner's breach may also, of course, increase the contractor's prime costs or his site overhead costs. The contractor's various items of prime-cost for a project will themselves break down into some or all of the four prime-cost components of materials, plant, labor and salaries (including supervisory and other staff) and sub-contracts. Some items of cost will be obviously referable to individual parts of the constructed cost, such as the prime-cost elements of plant, labor and materials or sub-contracts for constructed concrete or brickwork, and so relatively easily applied to any additional *permanent* work directly necessitated by a breach of contract. Others, however, usually referred to as 'site overheads', may not be conveniently referable to any particular part of the permanent work (for example, supervision, access roads, site huts or tower cranes etc), but will themselves contain some or all of the four elements. (See Articles 8-180 and 8-190, pages 1074-76 and 1080-81, Hudson's Building and Engineering Contracts, XIth Edition).

38. From the aforesaid, it is clear that in case of a delayed contract caused due to owner's breach the contractor can claim damages under following heads: - (i) loss of profits; (ii) contribution to fixed overheads; (iii) increase in prime cost which

includes components of materials, plant, labor and salaries and sub-contracts and (iv) increase in off-site and on-site overheads caused due to delay in performance of contract.”

33. But, at the same time, in another decision penned by one of us (Pradeep Nandrajog, J.) after noting the aforesaid paragraphs, it was further noted that the learned Author had, with reference to Hudson’s formula, opined further, and this further was noted in paragraph 16 of the decision dated February 08, 2012 in FAO(OS) No.667/2006 ‘DDA vs. M/s.Associate Builders’ wherein it was opined:-

“16. On the applicability of the HUDSON’s formula, we are noticing that in many judgments the same is being applied mechanically ignoring certain important passages from the commentary and especially para 8.201, 8.209 and 8.211 from the 11th Edition of the Book in question. In para 8.201 the learned Author opines that the formula should be applied *‘provided proper site records have been kept, a total cost basis of claim can be justified, it is submitted; and it is hard to see how a plaintiff, whether owner or contractor, who has failed to keep records should be in a better position to subject the defendant and the Tribunal to the difficulties of assessment and the reversal of the particular onus of proof, which total cost involves, unless it can be convincingly shown that the keeping of useful or relevant record was in the circumstances impractical or impossible.’* In para 8.209 the learned Author opines *‘Arbitrators in particular should treat their own ability to insist on proper particularization and to carry out a detail and critical analysis and separation of quantum as a very important part of their role in construction litigation, where the presentation of highly exaggerated or theoretical complaints, by owners and contractors alike, is a common feature.’* At

para 8.211 the learned Author has noted *'It seems to be the practise in the construction industry to employ consultants to prepare a claim almost as soon as the ink on the contract is dry.'*"

34. In the instant case we find no evidence led of the number of tools, plant and machinery stationed at the site when the work got prolonged. There is no evidence of site overhead expenses. Mere statement on oath of the witness of the appellant is of no value. We find that in the affidavit by way of examination-in-chief the witness of the appellant has simply parroted the language of para 11(n) of the plaint and has not stated a word about the number of tools, plant and machinery, the capital value thereof or the hire charges for the same (if they were taken on hire); the number of non-workmen personnel deployed at the site or even to a site office.

35. Thus, the claim must fail, not on the reasoning of the learned Single Judge, but due to there being no evidence.

36. The appeal fails and is dismissed but we leave the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

March 19, 2012
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