

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

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Date of decision: 5th December, 2013

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RFA 54/2004

TEEN MURTI CONSTRUCTION (P) LTD. Appellant

Through: Dr. Sarbjit Sharma & Ms. Arpita
Bhalla, Advs.

Versus

M/S NIRMAL TEXTILES (P) LTD. Respondent

Through: Mr. S.S. Saluja, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 26.08.2003 of the Court of Additional District Judge (ADJ), Delhi in Suit No.530/2002 filed by the appellant / plaintiff and in counterclaim (which appears not to have been numbered) filed by the respondent / defendant and whereby, while the suit of the appellant / plaintiff was dismissed, the counterclaim of the respondent / defendant for recovery of Rs.5,96,840/- with interest was decreed against the appellant / plaintiff.

2. Notice of the appeal was issued and subject to deposit of decretal amount in this Court, execution was stayed. A sum of Rs.7,25,160/- is

reported to have been deposited by the appellant / plaintiff in response thereto. The appeal was on 18.08.2004 admitted for hearing and the amount so deposited by the appellant / plaintiff permitted to be withdrawn by the respondent / defendant subject to furnishing security. The amount so deposited is reported to have been released to the respondent / defendant against security bond and by restraining the respondent / defendant from selling, alienating or parting with possession of the property mentioned therein. The appeal was on 30.01.2013 dismissed in default of appearance of the parties and the security bond furnished by the respondent / defendant was discharged. However, on application of the appellant / plaintiff, the appeal was vide order dated 15.07.2013 restored to its original position along with the security bond. The counsels for the parties have been heard. Though the appeal was accompanied with an application for remand of the case to the Trial Court and another application for production of additional documents but the counsel for the appellant / plaintiff while addressing arguments did not refer to the said applications, inspite of it being so pointed out by the counsel for the respondent / defendant. Accordingly, while reserving the judgment, it was noted in the order that the said applications are deemed to be not pressed.

3. The appellant / plaintiff instituted the suit from which this appeal arises, for recovery of Rs.11,87,000/- with interest from the respondent / defendant, pleading:

- (i) that the appellant / plaintiff is engaged in the business of construction:
- (ii) that the respondent / defendant had in the year 1999 approached the appellant / plaintiff for construction of their building at Sector-14, Gurgaon;
- (iii) that after settling the terms and conditions, the appellant / plaintiff started the work of construction of the factory building i.e. Rolex and Nirmal and in the course of construction raised running bills which were duly paid by the respondent / defendant; and,
- (iv) that the appellant / plaintiff submitted the 8th running bill in the sum of Rs.11,87,118/- as per the work done upto 31.03.2000 and though the respondent / defendant assured and promised payment thereof but did not pay, also inspite of legal notice.

4. The respondent / defendant filed a written statement-cum-counterclaim pleading:

- (A) that the plaint was vague, no details of measurement of construction work with its costs or of the earlier seven running bills had been furnished; though the respondent / defendant had filed an application under Order VII Rule 14 of the CPC but in compliance therewith also all the documents were not sent and the alleged five running bills and the statement of account were missing;
- (B) that the appellant / plaintiff amended the rate of construction to Rs.235/- per sq.ft. vide letter dated 16.04.1999 and final bill dated 18.03.2000 for Rs.25,98,160/- in respect of total area of construction of 11056 sq. ft. was submitted by the appellant / plaintiff;
- (C) that the respondent / defendant had paid a sum of Rs.30,00,000/- on account from 20.04.1999 till 29.01.2000 to the appellant / plaintiff and the appellant / plaintiff had thus

been over paid and the respondent / defendant was entitled to recover back Rs.4,01,840/- from the appellant / plaintiff;

(D) denying that any running bills were submitted by the appellant / plaintiff or that the bill of Rs.11,87,118/- was submitted and denying that any such amount was due from the respondent / defendant to the appellant / plaintiff; and,

(E) besides the counterclaim of the principal amount claimed to be due of Rs.4,01,840/-, interest thereon at 18% was also claimed and thus a counterclaim for Rs.5,96,840/- made.

5. The appellant / plaintiff filed replication to the written statement-cum-counterclaim pleading:

(I) that the letter dated 18.03.2000 was given in good faith to the respondent / defendant for the purpose of closing his books of accounts; otherwise also the said letter had no relevancy since the letter dated 16.04.1999 makes a mention that all the terms of the offer dated 11.04.1999 remained unchanged;

- (II) that work over a covered area of 14,181.14 sq.ft. had been carried out;
- (III) that the respondent / defendant had paid a total sum of Rs.47,43,300/- against cheques as on 03.03.2000 and the statement of accounts furnished by the respondent / defendant pertained only to Nirmal and not to Rolex which project also was undertaken by the appellant / plaintiff;
- (IV) the respondent / defendant had paid an amount of Rs.30,00,000/- as on 31.01.2000 towards Nirmal and an amount of Rs.17,61,300/- as on 31.01.2000 towards Rolex; and,
- (V) that the appellant / plaintiff from the first running bill had been making a mention of Nirmal and Rolex in its running bills; that after receipt of the payments, amount of Rs.20,48,577/- was due towards Rolex and a further sum of Rs.45,08,542/- towards Nirmal i.e. total amounting to Rs.65,57,119/- out of which the respondent / defendant had paid an amount of Rs.49,50,000/- by means of cheques and a sum of Rs.4,20,000/- in cash leaving

behind a balance of Rs.11,87,119/- to be paid to the appellant / plaintiff.

6. The respondent / defendant filed a replication to the written statement to the counterclaim:

- (a) denying that the letter dated 18.03.2000 was given by the appellant / plaintiff for the purpose of closing the books of accounts;
- (b) that the work done by the appellant / plaintiff regarding chhajja, mumty and water tank was completely unsatisfactory and sub-standard and had to be re-build;
- (c) that the water tank was leaking and the appellant / plaintiff neglected and failed to make the water tank workable;
- (d) water proofing was also done by the respondent / defendant at its own costs; and,
- (e) denying that Rs.45,08,542/- was due to the appellant / plaintiff from the respondent / defendant.

7. On the aforesaid pleadings of the parties, the following issues were framed in the suit on 02.04.2003:

- “1. Whether the suit has been signed, verified and instituted by a duly authorized person? OPP*
- 2. Whether there is no cause of action in favour of the plaintiff as alleged in the written statement? OPD*
- 3. Whether the plaintiff is entitled to suit amount?*
- 4. Whether the plaintiff is entitled to interest, if so at what rate and for what period?*
- 5. Whether the defendant is entitled to the counter-claim as well as interest on the amount of counter-claim if so, at what rate and for what period? OPD*
- 6. Relief.*

8. The appellant / plaintiff examined its Director Mr. Ashok Aggarwal in support of its case and the respondent / defendant examined its General Manager and Power of Attorney holder and two other witnesses in support of its defence / counterclaim.

9. The learned ADJ, in the impugned judgment and decree, has found / observed / held:-

- (i) that the suit had been filed and plaint signed and verified by the duly authorized person on behalf of the appellant / plaintiff;
- (ii) that the appellant / plaintiff had not placed on record the agreement / contract entered into between the parties to prove who were the parties to agreement and what were the terms and conditions agreed between the parties;
- (iii) that the onus was on the appellant / plaintiff;
- (iv) that the Director of the appellant / plaintiff in cross-examination had admitted that M/s Nirmal Textiles (P) Ltd. i.e. the respondent / defendant and M/s Rolex Hosiery Pvt. Ltd. were private and independent companies and had issued separate TDS certificates in favour of the appellant / plaintiff;
- (v) that the said two companies were separate and distinct legal entities;

- (vi) that M/s Rolex Hosiery Pvt. Ltd. was not a party to the suit;
- (vii) that the appellant /plaintiff had raised the running bills Ex.PW1/2 to Ex.PW1/9 in the joint names of the respondent / defendant and M/s Rolex Hosiery Pvt. Ltd.;
- (viii) that the statement of accounts proved by the appellant / plaintiff was of joint account maintained by the appellant / plaintiff in the name of the respondent / defendant and M/s Rolex Hosiery Pvt. Ltd.;
- (ix) there was nothing to show that the respondent / defendant had entered into the agreement for and on behalf of Rolex Hosiery Pvt. Ltd. for construction of their factory known as Rolex;
- (x) that the appellant / plaintiff had withheld the agreement / contract which was the best piece of evidence and an adverse inference had to be drawn against the appellant / plaintiff;
- (xi) that had the contract been proved, it would have been proved that the respondent / defendant had entered into the agreement with the appellant / plaintiff for its building known as Nirmal

only and not for construction of the building known as Rolex for and on behalf of M/s Rolex Hosiery Pvt. Ltd.;

(xii) it could not be said that the respondent / defendant owed any liability to the appellant / plaintiff for the dues if any outstanding from M/s Rolex Hosiery Pvt. Ltd.;

(xiii) that though the statement of account proved by the appellant / plaintiff being not primary evidence was not to be looked into but was in the joint name of respondent / defendant and M/s Rolex Hosiery Pvt. Ltd. and did not show that which particular payment was made by the respondent / defendant and which particular payment was made by M/s Rolex Hosiery Pvt. Ltd.; it also did not spell out that the entire payment of Rs.47,43,300/- was by the respondent / defendant;

(xiv) on the contrary, the respondent / defendant had duly proved its statement of account as well as original books of accounts and no cross examination with respect thereto was done by the appellant / plaintiff; the same have thus to be admitted;

- (xv) that as per the said statement of account of the respondent / defendant, the respondent / defendant had made a total payment of Rs.30,00,000/- to the appellant / plaintiff from 01.04.1999 to 31.03.2000;
- (xvi) the very fact that the appellant / plaintiff had itself filed the TDS certificates issued in favour of the appellant / plaintiff by M/s Rolex Hosiery Pvt. Ltd. showed a total payment of Rs.17,61,300/- by the said M/s Rolex Hosiery Pvt. Ltd. to the appellant / plaintiff;
- (xvii) the same also showed that the respondent / defendant was not making and was not required to make payment on behalf of M/s Rolex Hosiery Pvt. Ltd.;
- (xviii) that the respondent / defendant had denied that any running bills were being raised and it was its case that ad-hoc payments were being made from time to time;
- (xix) the appellant / plaintiff had failed to prove that eight running bills were delivered to the respondent / defendant;

- (xx) had the appellant / plaintiff been raising running bills on the respondent / defendants, the payments by the respondent / defendant to the appellant / plaintiff would have been of the exact amounts of the said bills but it was not so and which falsified the claim of the appellant / plaintiff of raising running bills on the respondent / defendant;
- (xxi) that the Director of the appellant / plaintiff had admitted having submitted a final bill in the sum of Rs.25,98,160/- to the respondent / defendant;
- (xxii) that the appellant / plaintiff had failed to prove having done work for the respondent / defendant for any more amount;
- (xxiii) that the appellant / plaintiff had also failed to prove that the said final bill for Rs.25,98,160/- was only for the purpose of closing the accounts;
- (xxiv) that the final bill on the face of it, was not subject to any running bill;

(xxv) accordingly, Issues No.2&3 were decided against the appellant / plaintiff and in favour of the respondent / defendant; and,

(xxvi) since as per the document of the appellant / plaintiff itself, the appellant / plaintiff had done work for the value of Rs.25,98,160/- for the respondent / defendant as against the payment admittedly received of Rs.30,00,000/- vide letter dated 11.04.1999, the appellant / plaintiff was liable to refund the excess payment received of Rs.4,01,840/- with interest.

10. The appellant / plaintiff, in the memorandum of appeal, has *inter alia* stated:

- (I) that the appellant / plaintiff in April, 1999, after settling terms, commenced the work at the construction site of the respondent / defendant;
- (II) after few days, the Director of the respondent / defendant again approached the appellant / plaintiff and requested it to take over the completion and finishing of the existing structure of the factory premises owned by the sister concern of the respondent

/ defendant viz. M/s Rolex situated on the adjacent plot, construction site of the respondent / defendant; accordingly, on 24.04.1999, the appellant / plaintiff started work of the said sister concern of the respondent / defendant also on the same rates as being charged to the respondent / defendant;

(III) that the Director of the appellant /plaintiff had handed over copy of the aforesaid letter dated 11.04.1999 to his Advocate so that the same could be placed on record but the said lawyer of the appellant / plaintiff appeared to have been won over by the respondent / defendant and did not place the said letter on record;

(IV) even at the time of cross-examination of the Director of the appellant / plaintiff, his advocate satisfied him by saying that he would place the same on record at the time of final arguments;

(V) that the said letter dated 11.04.1999 would show that the parties had agreed to a figure of Rs.285/- per sq. ft. as the rate of construction;

- (VI) that from time to time the appellant / plaintiff issued eight running bills to the respondent / defendant and separate bills to its sister concern but maintained a consolidated memorandum of payment because the payment of the appellant / plaintiff was sometimes from the accounts of respondent / defendant and sometime from the account of its sister concern M/s Rolex;
- (VII) that the details of the various running bills are given in the memorandum of appeal;
- (VIII) that the Director of the respondent / defendant had on 18.03.2000 approached the Director of the appellant / plaintiff for issuance of a back dated quotation along with a final bill for its tax purpose at the rate of construction of Rs.235/- per sq. ft. and since the respondent / defendant was a potential customer, the appellant / plaintiff agreed to oblige;
- (IX) however, the said quotation letter dated 16.04.1999 referred to the earlier offer letter dated 11.04.1999;

- (X) that similarly the final bill dated 18.03.2000 was issued in good faith for the convenience of the respondent / defendant; and,
- (XI) that the respondent / defendant however committed breach of trust and misused the back dated quotation letter dated 16.04.1999 and bill dated 18.03.2000.

11. Though the counsel for the appellant / plaintiff, as aforesaid, has not pressed the applications filed along with the appeal for remand of the case and for filing documents but a perusal thereof shows that the appellant / plaintiff therein also is wanting to place on record the letter dated 11.04.1999 and an opportunity to lead additional evidence with respect thereto.

12. The counsel for the appellant / plaintiff besides drawing attention to the pleadings, evidence and the judgment has also informed that the appellant / plaintiff had after the impugned judgment lodged a complaint with the Bar Council of Delhi against the Advocate engaged by it in the suit. However, on enquiry as to the fate of the said complaint, the counsel fairly admits that the appellant / plaintiff has not followed up the same. The counsel for the appellant / plaintiff has further contended that the bone of

contention between the parties is whether the appellant / plaintiff after having quoted the rate of construction of Rs.285/- per sq.ft. in its quotation dated 11.04.1999 could have after five days, in the quotation dated 16.04.1999, reduced the same to Rs.235/- per sq. ft., when the work of construction had not even commence till then. He has further argued that no such plea was taken by the respondent / defendant in the reply to the legal notice preceding the suit. He has yet further contended that the lawyer engaged by the appellant / plaintiff before the Trial Court is to be blamed.

13. The counsel for the respondent / defendant per contra has merely supported the impugned judgment.

14. As would be obvious from the aforesaid, the case set up in the memorandum of appeal is entirely different from the case set up in the suit, without even filing any application for amendment. Needless to state that the new case so set up in the memorandum of appeal, which though is cogent and plausible, cannot be looked at.

15. I have yet further enquired from the counsel for the appellant / plaintiff as to what could be the purpose or even taxation purpose for which the respondent / defendant may have required a back dated quotation, as the

quotation dated 16.04.1999 is stated to be or a final bill and both of which according to the appellant / plaintiff now, did not reflect the true contractual position agreed between the parties. I have further enquired as to what could be the reason for the appellant / plaintiff to so oblige the respondent / defendant. It is not the case of the appellant / plaintiff that the Directors / officers of the appellant / plaintiff had prior or friendly relationship with the Directors / officers of the respondent / defendant. It belies logic as to why such documents, which did not represent the true contract between the parties, were prepared and as to why the appellant / plaintiff obliged the respondent / defendant especially when no reason even of the need of the respondent / defendant therefor is forthcoming.

16. No answer is still forthcoming from the appellant / plaintiff.

17. Once the appellant / plaintiff in the appeal has sought to justify its claim on facts different from those set up in the suit and has abandoned the case set up in the suit, there is no need for this Court to discuss in detail the evidence in the suit. Suffice it is to state that I have perused the evidence recorded and find the learned ADJ to have, on a correct appreciation of the

same, rightly held that the appellant / plaintiff had failed to prove its case and the respondent / defendant had proved its counterclaim.

18. Once the appellant / plaintiff fails in its suit claim, no error can be found in the judgment decreeing the counterclaim of the respondent / defendant.

19. Resultantly, the appeal is dismissed. However, since the possibility of the appellant / plaintiff having suffered at the hands of its Advocate cannot be ruled out, though the appellant / plaintiff is itself to be blamed equally for having, inspite of the written statement the counterclaim of the respondent / defendant having not corrected position in the replication and or in the written statement to the counterclaim, I refrain from imposing any costs.

20. The security bond furnished by the respondent / defendant for restitution of the monies which it was permitted to withdraw, is discharged.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

DECEMBER 05, 2013

‘gsr’..