

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

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Date of decision: 6th November, 2013

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RFA No.77/2005

CROWNE PLAZA SURYA HOTEL

..... Appellant

Through: Mr. Ravi Kant Chadha, Sr. Adv. with
Mr. R.K. Gautam, Adv.

Versus

PEREGRINE SECURITY P. LTD.

..... Respondent

Through: Mr. Sankalp Goswami with Mr.
Azhar Alam and Mr. Akshat
Rehmani, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugns the judgment and decree dated 30.10.2004 (of the Court of Additional District Judge in Suit No.045/02/2002 filed by the respondent / plaintiff) of recovery of arrears on account of increase in wages as shown vide statement of account Ex.DW1/PX5 for the period from May, 1999 onwards from the appellant / defendant with interest *pendente lite* at 8% per annum and costs.

2. The appeal was admitted for hearing and vide order dated 22.09.2005, subject to the appellant / defendant depositing the decretal amount in this

Court, execution was stayed. Vide subsequent order dated 11.05.2006, the decretal amount so deposited by the appellant / defendant was ordered to be released to the respondent / plaintiff subject to furnishing security for restoration of the said amount with interest at 8% per annum in the event of the appeal being allowed. The appeal was on 22.05.2009 dismissed in default of appearance of the parties but on an application of the appellant / plaintiff was restored vide order dated 27.07.2009. Attempts at compromise thereafter remained unsuccessful. It appears that the respondent / plaintiff has not withdrawn the decretal amount deposited by the appellant / defendant as was permitted, as the amount of Rs.6,08,473/- is stated to be still lying in the FDR. The counsels were heard on 09.10.2013. However the hearing was adjourned on the request of the counsel for the respondent / plaintiff as he was on that date unable to show as to how it had proved its claim. On 11.10.2013, the counsel for the respondent / plaintiff sought an adjournment stating that he wanted to engage a senior counsel. Today, inspite of passover the senior counsel for the respondent / plaintiff has not appeared and the counsels have been heard further.

3. The respondent / plaintiff instituted the suit from which this appeal arises, for recovery of Rs.8,29,075/- with interest, pleading:

- (i) that vide Agreement dated 04.09.1995 between the parties, it was agreed that the respondent / plaintiff shall provide security personnel at the appellant / defendant's hotel for round the clock security arrangement for all seven days of the week;
- (ii) that the said contract was renewed from time to time, upto 31.03.2002; thus the respondent / plaintiff had been providing security arrangement at the appellant / defendant's hotel since 1995;
- (iii) that the appellant / defendant for the first time vide letter dated 01.08.2001 made complaint regarding the performance of security guards provided by the respondent / plaintiff;
- (iv) that on 18.08.2001, the respondent / plaintiff sent a letter to the appellant / defendant asking them to make payment of arrears of Rs.8,29,075/-;
- (v) that the appellant / defendant vide letter dated 20.08.2001 terminated the contract and asked the respondent / plaintiff to withdraw the services with effect from 01.09.2001;

- (vi) that the appellant / defendant under the terms of the Agreement was required to make full and final payment of all dues before termination; and,
- (vii) that the respondent / plaintiff had earlier also instituted a suit for restraining the appellant / defendant from terminating the contract without settling the dues of the respondent / plaintiff but the said suit was disposed of giving liberty to the respondent / plaintiff to initiate the appropriate proceedings for recovery of its dues.

Accordingly, the suit for recovery of the said sum of Rs.8,29,075/- along with *pendente lite* and future interest at 18% per annum was filed.

4. The appellant / defendant contested the suit by filing a written statement denying that any amount was due to the respondent / plaintiff and pleading that all bills raised by the respondent / plaintiff from time to time had been fully and finally paid. Though the plaint was absolutely quite as to the particulars of the arrears claimed but in the written statement, it was also pleaded that a sum of Rs.2,36,114/- had been paid by the appellant / defendant to the respondent / plaintiff vide cheque dated 09.12.2000 on

account of increase in minimum wages by Delhi Administration and that there was no increase in minimum wages after September, 2000.

5. The respondent / plaintiff filed a replication denying that the payment of Rs.2,36,114/- was in full and final settlement and pleading that it was towards the then current bills and referring to Clause 4 of the Agreement whereunder the appellant / defendant was liable to make payment of increase in minimum wages notified by the Government of NCT of Delhi from time to time and pleading that no payment had been made by the appellant / defendant on this account.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 21.01.2003:

- “1. Whether the plaintiff is entitled to the suit amount? OPP*
- 2. Whether the plaintiff is entitled to interest? If so, at what rate and on what amount? OPD*
- 3. Relief.”*

7. The respondent / plaintiff examined one of its own officials and two employees of the appellant / defendant in support of its case. The appellant / defendant examined one witness in defense.

8. The learned Additional District Judge has in the impugned judgment found / observed / held:

- (a) that the respondent / plaintiff through the testimony of its witnesses had successfully proved that the appellant / defendant had undertaken to pay for the services provided by the respondent / plaintiff according to the minimum wages applicable to the Government of NCT of Delhi; even otherwise it was statutory requirement to pay minimum wages;
- (b) that the respondent / plaintiff had placed on record the Notifications whereby the minimum wages had been increased from time to time;
- (c) that the claim of the appellant / defendant of having paid Rs.2,36,114/- in full and final settlement of the bill of Rs.8,29,075/- had not been proved;

- (d) that from the mere encashment by the respondent / plaintiff of the cheque of Rs.2,36,114/-, the plea of the appellant / defendant of the said payment being in full and final settlement could not be accepted; and,
- (e) however, since the suit was instituted on 14.05.2002, the claim for recovery of arrears only from 14.05.1999 was within time and the claim for arrears of before 14.05.1999 was barred by time.

9. The senior counsel for the appellant / defendant has argued that though the appellant / defendant has relied on Clause-4 of the Agreement, which is as under:

“4. The above professional charges are based on the prevailing minimum wages act of Delhi. In future, if any revision in the above mentioned act takes place, the increase in the professional charges will be made accordingly.”

but the respondent / plaintiff has not proved the bills of increase in minimum wages.

10. The counsel for the respondent / plaintiff has argued that the respondent / plaintiff was not required to prove the bills since the claim in the suit of the respondent / plaintiff is not on basis of bills but on basis of contract which is admitted. Attention is invited to the Notifications dated 19.05.1998, 26.03.1999, 09.03.2000 and 28.09.2001 bearing Ex.DW1/PX1 to Ex.DW1/PX4 on the Trial Court record, of increases effected in minimum wages.

11. Finding, that the Agreement between the parties is akin to a rate contract and does not give the number of security guards to be provided, it was enquired as to on what basis payments were made from time to time.

12. The counsel for the respondent / plaintiff informs that the respondent / plaintiff used to raise monthly bills on the appellant / defendant.

13. On further enquiry, as to on what rate the respondent / plaintiff has been raising bills after the first of the aforesaid Notifications dated 19.05.1998, the counsel for the respondent / plaintiff has replied that the bills raised were without claiming any increase and the demand for the increased wages, as per the said increases, was made for the first time vide letter dated 18.08.2001 proved as Ex.DW1/PX5.

14. The counsel for the respondent / plaintiff argues that since the appellant / defendant admits the agreement for payment to the respondent / plaintiff in accordance with the minimum wages and since the revision of minimum wages has been proved and the only defence of the appellant / defendant of full and final payment has not been proved, the learned Additional District Judge has rightly decreed the suit. It is further argued that the appellant / defendant has not raised any defence, of the respondent / plaintiff having waived its rights under Clause 4 supra by raising the monthly bills at a lesser amount. Reliance in this regard is placed on para 23 of *V.M. Salgaocar & Bros. Vs. Board of Trustees of Port of Mormugao* (2005) 4 SCC 613 and on para 5 of *M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh* (1979) 2 SCC 409 laying down that waiver is a question of fact and must be properly pleaded and proved and that no plea of waiver can be allowed to be used unless it is pleaded and the factual foundation for which is laid in the pleadings.

15. It is however enquired from the counsel for the respondent / plaintiff, whether not it is the respondent / plaintiff itself who is raising the plea of waiver without even the appellant / defendant doing so.

16. The counsel for the respondent / plaintiff contends that there is no dispute about the number of persons that were provided.

17. The counsel for the respondent / plaintiff has in this regard also referred to the deposition of PW1 being the ex-Vice President and General Manager of the appellant / defendant to the effect that the respondent / plaintiff had not waived its claim regarding the arrears and settled with the appellant / defendant by accepting partial payment and has contended that he was not cross examined on the said aspect and his said deposition is thus deemed to be admitted.

18. It is however further enquired from the counsel for the respondent / plaintiff as to what could constitute a contract between the parties in such a situation and whether the agreement which is like a rate contract and on the basis whereof no computation is possible, can be taken to be a contract or each bill raised by the respondent / plaintiff and paid by the appellant / defendant would constitute a contract.

19. No answer is forthcoming.

20. The senior counsel for the appellant / defendant in rejoinder arguments has contended that Clause 4 supra of the Agreement provides for 'increase in the charges to be made' and there was thus to be no automatic increase without such increase being agreed between the parties.

21. I have considered the rival contentions.

22. The Agreement dated 04.09.1995 proved as Ex.PW1/1 between the parties is only of the rate at which the security guards / lady searchers and supervisors were agreed to be provided by the respondent / plaintiff at the hotel of the appellant / defendant and of certain other terms and conditions but does not provide the number of security guards and supervisors to be provided. Without such number being certain, there could be no claim merely on the basis of the said agreement. It is for this reason only that the said agreement has been described hereinabove as akin to a rate contract. The said agreement provided for payment for the security guards / lady searchers at the rate of Rs.1950/- per month per guard and for the supervisors at the rate of Rs.2,300/- per month per supervisor. Though the said agreement did not provide any term thereof but the appellant / defendant vide its letter dated 01.03.1997 proved as Ex.PW2/1, in reference

to the earlier letters dated 17.12.1996 and 08.01.1997 of the respondent / plaintiff (which have not been proved) extended the contract upto 31.12.1997 'on the existing terms and conditions' with the rates for security supervisor being Rs.2,452/- per month for eight hours duty and for the security guard being Rs.2,117/- per month for eight hours duty.

23. Vide another letter dated 25.03.1998 proved as Ex.PW2/3, the appellant / defendant with reference to the letter dated 10.12.1997 of the respondent / plaintiff (again not proved) renewed the contract for hiring of security services upto 31.03.1999 'at the existing rates and conditions as stated in the contract dated 04.09.1995'. From a reading of the letter dated 25.03.1998 it also appears that vide earlier letter dated 28.02.1998, the appellant / defendant had terminated the contract with the respondent / plaintiff and vide the said letter, the said termination was also revoked.

24. Vide letter dated 30.03.2001 proved as Ex.PW1/2, the appellant / defendant with reference to letter dated 24.03.2001 of the respondent / plaintiff (again not proved) renewed the security contract 'on the same rates and terms and conditions as outlined in the previous contract..... for the last year for a further period of one year (i.e. upto 31.03.2002).' The said letter

is signed on behalf of the respondent / plaintiff also in token of acceptance of terms thereof.

25. It would thus be seen that though the increases in minimum wages are stated to have come into effect on 19.05.1998 i.e. after the Agreement dated 04.09.1995 as well as renewal thereof on 01.05.1997 and 25.03.1998 and on 26.03.1999 and 09.03.2000 but the respondent / plaintiff thereafter also continued to raise the bills without such increase and on the contrary on 30.03.2001 renewed the contract till 31.03.2002 on the same rates, terms and conditions as outlined in previous contract for the last year;

26. The demand vide letter dated 18.08.2001 (Ex.DW1/PX5) is for increased wages with effect from the month of February, 1998. Though the letter dated 18.08.2001 refers to various letters on the subject of arrears but no such earlier letters have been proved. The Managing Director of the respondent / plaintiff appearing as PW3, in his cross examination admitted that the respondent / plaintiff used to raise bills on the appellant / defendant and that no demand in writing for arrears had been made prior to 18.08.2001.

27. In my view, from the respondent/plaintiff notwithstanding the increase in minimum wages, continuing to raise bills on the appellant/defendant at the old rates and on 30.03.2001 agreeing to renewal of contract on rates of previous years, disentitled itself from the increase under clause 4 supra of the Agreement. Clause 4 of the Agreement applied to 'future' revision in minimum wages. The respondent/plaintiff on 30.03.2001 agreed to providing personnel on the rates of previous year and after having agreed so, cannot subsequently claim enhancement on the basis of increases in minimum wages which had come into effect prior thereto. There is no bar in law to the respondent/plaintiff charging the appellant/defendant for the man power supplied at a rate below the minimum wages. The liability under the law for payment of minimum wages was/is of the respondent/plaintiff and the counsel for the respondent/plaintiff has been unable to show any such liability in law of the appellant/defendant qua the respondent/plaintiff.

28. The question which was put to the counsel for the respondent / plaintiff and to answer which he had sought adjournments as aforesaid i.e. whether not it is the bills raised in pursuance to a rate contract which

constitute the contract between the parties and how the respondent / plaintiff can now renege from the said contract, remains unanswered.

29. The Agreement dated 04.09.2005 between the parties, as aforesaid is only of the rate at which the respondent/plaintiff had agreed to place/deploy security personnel at the hotel of the appellant/defendant. The said Agreement did not provide as to how many security personnel were to be so placed or deployed. Without such number being specified or agreed to, the said Agreement/contract was vague and unenforceable per se save to the extent that upon the parties agreeing in future upon the number of security personnel to be provided, the rate at which the said security personnel were to be provided was to be as per the Agreement dated 04.09.2005. It can safely be assumed that the appellant/defendant must have from time to time communicated such number to the respondent/plaintiff. In my opinion, upon such number of security personnel to be placed/deployed being communicated by the appellant/defendant and agreed to by the respondent/plaintiff an enforceable contract came into being between the parties. Some of the bills produced on record show the said number to be varying even from month to month. Such contract which came into being between the parties pursuant to communication by the appellant/defendant of

its requirement of the number of security personnel to the respondent/plaintiff and the respondent/plaintiff agreeing to place/deploy the same, even if not in writing, stood confirmed and was/is reflected in the bills raised by the by the respondent/plaintiff on the appellant/defendant from time to time.

30. I am further of the opinion that for the respondent/plaintiff to be entitled to subsequently claim a rate higher than the rate at which it billed the appellant/defendant, and which bill at least upon acceptance by the appellant/defendant constituted a contract between the parties, the respondent/plaintiff was required to plead and prove the grounds on which a party to a contract can be said to be entitled to change of terms thereof. I find Section 26 of the Specific Relief Act, 1963 to be providing for such a remedy. The said provision reads:

“26. When instrument may be rectified.-(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956) applies] does not express their real intention, then-

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) *the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or*

(c) *a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.*

(2) *If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.*

(3) *A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.*

(4) *No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:*

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."

I am unable to find any other provision for such a remedy. The bills raised by the respondent/plaintiff on the appellant/defendant from time to time and

accepted and paid by the appellant/defendant constituted a contract in writing between the parties. This has been so held in plethora of cases enumerated in ***TTK Prestige Ltd. Vs. India Bulls Retail Services Ltd.*** MANU/DE/1063/2013 in the context of Order 37 of the Civil Procedure Code. The respondent/plaintiff in the said contract charged the appellant/defendant not at the rate to which it may have been entitled to as per the Agreement dated 04.09.2005 but at a lesser rate. The claim of the respondent/plaintiff, of the said bills not expressing the real intention of the parties of the respondent/plaintiff charging the appellant/defendant at the rate of minimum wages applicable to Delhi is a claim of such written contract not expressing the real intention of the parties. For the respondent/plaintiff to be successful in the said claim, it was required to plead and prove that such real intent remained to be expressed owing to a fraud or a mutual mistake of the parties. The pleadings and the case set up by the respondent/plaintiff is bereft of any such pleading. The respondent/plaintiff has not only not proved the said bills but has not even claimed rectification of the said bills. The Court can, only upon returning a finding of such written contract not expressing the real intention of the parties, on account of fraud or mutual mistake of the parties direct such rectification and not otherwise. Without the contract being

so rectified, the question of the respondent / plaintiff being granted a relief as per the real intention of the parties and not reflected in the written contract does not arise. The respondent/plaintiff has utterly failed to set up such a case.

31. That though undoubtedly the appellant / defendant has not raised the plea of waiver / acquiescence but in the light of the view taken hereinabove, there was no need for the appellant / defendant to have done so inasmuch as it was for the respondent / plaintiff to seek rectification of the bills raised and accepted and paid and which the respondent / plaintiff has failed to do.

32. The learned Addl. District Judge unfortunately has not considered the matter in the aforesaid perspective, perhaps for the reason of even the counsel for the appellant / defendant having not pleaded the suit as framed to be misconceived. However, judgments of this Court which are reportable and constitute a precedent, cannot be made merely on the submissions of counsels, if the position emerging from the record is otherwise.

33. I am satisfied that the equities also are not in favour of the respondent / plaintiff. Had the respondent / plaintiff paid the security guards and supervisors provided by it to the appellant / defendant at a rate higher than it

was charging from the appellant / defendant, it would have immediately raised bills at increased rate on the appellant / defendant. The inference, that the respondent / plaintiff for the period for which it is demanding arrears from the appellant / defendant paid to the security guards and supervisors deployed at the Hotel of the appellant / defendant at the same rates as charged from the appellant / defendant, is writ large. There is no reason to allow the respondent / plaintiff to profiteer without having paid to the manpower at the increased rates and of which there is no plea, evidence or argument. The contention of the counsel for the respondent / plaintiff of enforcement of the rate contract on equitable and contractual grounds thus has no basis. Even otherwise, if such belated claims were to be allowed without laying any foundation in law therefor, the same would be extremely detrimental to the conduct of trade / business inasmuch as viability of critical decisions / investments therein is dependant upon the costs to be incurred therefor and any retrospective increase in the same is bound to deal a body blow to the financial health of such trade / business.

34. The appeal therefore succeeds. The impugned judgment and decree is set aside. The suit of the respondent / plaintiff is dismissed. However, in the facts, no costs.

Decree sheet be drawn up.

The amounts deposited by the appellant / defendant in this court as a condition of stay of execution, together with interest accrued thereon be refunded to the appellant / defendant.

RAJIV SAHAI ENDLAW, J

NOVEMBER 06, 2013
'gsr'