

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

+ **RFA No. 905/2018**

% **2nd November, 2018**

M/S UNISON AIRCONDITIONER & ANR

..... Appellants

Through: Mr. C.S. Bhandari, Advocate
(Mobile No. 8860346364).

versus

M/S CREONS ADVERTISING PVT. LTD.

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 46047-48/2018 (for exemption)

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 46049/2018 (for delay)

2. For the reasons stated in the application the delay of 16 days in re-filing the appeal stands condoned, subject to just exceptions.

C.M. stands disposed of.

RFA No. 905/2018 and C.M. Appl. No. 46046/2018 (for stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants/counter-claimants impugning the judgment of the Trial Court dated 31.05.2018 by which the trial court has decreed the suit for recovery of Rs. 6,53,054/- filed by the respondent/plaintiff for claiming back the advance 50% price paid by the respondent/plaintiff to the appellants/defendants and work not having been done by the appellants/defendants, and by the same impugned judgment the counter-claim filed by the appellants/defendants for a sum of Rs.4,12,765/- for works allegedly done by the appellants/defendants for the respondent/plaintiff has been dismissed.

4. The facts of the case are that respondent/plaintiff filed the subject suit pleading that the appellants/defendants were engaged in the business of air conditioner fittings and related services and therefore the respondent/plaintiff issued a Purchase Order dated 21.10.2007 upon the appellants/defendants for installation of equipment and providing services of air conditioning at the site at

Udyog Vihar in Gurgaon where the respondent/plaintiff was to carry on work. The total value of the purchase order was Rs. 6,84,740/- and the respondent/plaintiff additionally was to pay Value Added Tax (VAT) amounting to Rs. 79,217.50/- and service tax of Rs. 6,303.60/-. In terms of the purchase order, 50% amount of the contract was paid as advance, and this 50% amount of Rs. 3,42,371/- including Tax Deducted at Source (TDS) and Work Contract Tax (WCT) was paid by the respondent/plaintiff to the appellants/defendants, but the appellants/defendants did not start the work at site resulting in the work having to be allotted by the respondent/plaintiff to M/s Blue Star. The respondent/plaintiff claimed to have suffered losses during breach of contract on the part of the appellants/defendants, and after serving Legal Notice dated 16.03.2009, the subject suit for recovery was filed by the respondent/plaintiff.

5. The appellants/defendants contested the suit by filing written statement wherein a set off was also claimed. It was pleaded by the appellants/defendants that in fact it was the respondent/plaintiff who stopped the workers of the appellants/defendants from doing the work after 15 days of commencement of the work on 22.10.2007. The

appellants/defendants pleaded to have incurred expenses of Rs. 85,000/- for doing the work under the subject purchase order. The suit was prayed to be dismissed because it was stated that except a sum of Rs. 9,709/- nothing was due from the appellants/defendants to the respondent/plaintiff. The appellants/ defendants pleaded that in fact they were entitled to counter claim for other works done by them for the respondent/plaintiff from 08.12.2006 to 09.01.2008, and counter-claim was prayed to be decreed for an amount of Rs. 4,12,765/- along with interest.

6. After the pleadings were complete, the trial court framed issues and parties led evidence, and these aspects are recorded in paras 10-13 of the impugned judgment and these paras read as under:-

10. From pleadings of the parties, following issues were framed for adjudication vide order dated 24.07.2013.

- 1. Whether the defendant failed to start the work and discharge his obligation in pursuance of purchase order dated 20.10.2007? OPP**
- 2. Whether the plaintiff stopped the workers of the defendant from working on the site as alleged in the written statement ? OPD**
- 3. Whether the plaintiff is entitled to recovery of sum of Rs. 6,53,054/- from the defendant? OPP**
- 4. Whether the plaintiff is entitled to interest, is so, at what rate and for which period? OPP**

5. Whether the defendant is entitled to claim set off to the tune of Rs. 4,12,765/- alongwith interest @ 15% per annum as claimed in the written statement? OPD

6. Relief.

11. In order to prove its case, plaintiff examined Mr. Arun Kumar Yadav, accountant of plaintiff company as PW-1 who exhibited his affidavit in evidence vide Ex. PW1/A wherein he reiterated averments made in plaint. During his deposition, he also relied upon and exhibited following documents: -

Ex. PW1/1: Certified copy of resolution passed by BOD of plaintiff company in favour of PW-1

Ex. PW1/2(colly): Copy of Quotation submitted by defendant

Ex. PW1/3: Copy of purchase order dated 20.10.2007

Ex. PW1/4: Payment voucher dated 21.10.2007

Ex. PW1/5 : Payment Voucher dated 24.10.2007

Ex. PW1/6: Copy of Legal notice dated 16.03.2009

Ex. PW1/7: Original Postal receipts qua Ex. PW- 1/6

Ex. PW1/8: Returned Envelop alongwith AD card

Ex. PW1/9: Returned Envelop alongwith AD card

Ex. PW1/10: Extract of resolution passed by BOD of plaintiff company dated 01.10.2009 in favour of Mr. Devendra Kansal

Ex. PW-1/D1 : Copy of letter dated 10.11.2007 written on behalf of Smile Interactive Technologies to plaintiff (exhibited in cross examination of PW-1)

12. Defendants on the other hand examined defendant no. 2 Mr. Sachin Katiyal as DW-1 who exhibited his affidavit in evidence vide Ex. DW1/A. He has deposed in consonance with stand taken by defendants. During his deposition, he also relied upon the following documents i.e.:-

Ex. DW-1/1: Statement of account /ledger account of plaintiff maintained by defendant

Ex. DW-1/2: Copy of Invoice dated 07.11.2016

Ex. DW-1/3 : Copy of Invoice dated 08.12.2016

Ex. DW-1/4: Copy of Invoice dated 21.12.2016

Ex. DW-1/5: Copy of Invoice dated 21.12.2016

Ex. DW-1/6: Copy of Invoice dated 08.03.2007

Ex. DW-1/7: Copy of Invoice dated 08.03.2007

Ex. DW-1/8: Carbon copy of Invoice dated 22.04.2007

Ex. DW-1/9: Carbon copy of Invoice dated 29.04.2007

Ex. DW-1/10: Carbon copy of Invoice dated 30.04.2007
Ex. DW-1/11: Carbon copy of Invoice dated 30.04.2007
Ex. DW-1/12: Carbon copy of Invoice dated 30.04.2007
Ex. DW-1/13: Carbon copy of Invoice dated 30.04.2007
Ex. DW-1/14: Carbon copy of Invoice dated 30.04.2007
Ex. DW-1/15: Carbon copy of Invoice dated 18.06.2007
Ex. DW-1/16: Carbon copy of Invoice dated 18.06.2007
Ex. DW-1/17: Carbon copy of Invoice dated 20.06.2007
Ex. DW-1/18: Carbon copy of Invoice dated 26.07.2007
Ex. DW-1/19: Carbon copy of Invoice dated 27.07.2007
Ex. DW-1/20: Carbon copy of Invoice dated 27.07.2007
Ex. DW-1/21: Copy of Invoice dated 15.11.2007
Ex. DW-1/22: Copy of Invoice dated 15.11.2007
Ex. DW-1/23: Carbon copy of Invoice dated 09.01.2008

13. Defendants further examined Mr. Rohit as DW-2 who exhibited his affidavit in evidence vide Ex. DW2/A. He supported stand of defendants so far as Ex. DW-1/1 is concerned.”

7(i). The trial court has held that there is no dispute that the Purchase Order/Ex.PW1/3 dated 20.10.2007 was placed upon the appellant/defendant and execution of work under which was to be completed within 15 days i.e. by 05.11.2007. It was also not disputed and otherwise proved in terms of the Payment Vouchers Ex.PW1/4 and Ex.PW1/5 that the appellants/defendants had received 50% of the price as advance. The trial court has rejected the stand of the appellants/defendants that the respondent/plaintiff stopped the appellants/defendants from executing the work after 15 days and it has been held by the trial court that the appellants/defendants have filed nothing to show commencement of work at Udyog Vihar site at

Gurgaon and nor has any measurement record been submitted by the appellants/defendant of having done a particular amount of work. The trial court has also noted the admission made by DW-1 in his cross-examination that the appellants/defendants do not have any register or record to show that the work was started from 22.10.2007 and the same carried on till 05.11.2007. The trial court has also rejected the case of the appellants/defendants that he submitted the bill of Rs. 85,000/- for work done because the said bill is not shown to have been received by the respondent/plaintiff by fixing its seal on the same and that the DW-1 could not state as to who made this bill as Ex.DW1/23 which was allegedly sent to the respondent/plaintiff and nor the person to whom the bill was submitted with the respondent/plaintiff was stated. The trial court has also given a finding that DW-1 in his cross-examination recorded on 09.07.2016 has admitted that he never brought any complaint or protest letter written to the respondent/plaintiff that the respondent/plaintiff has illegally stopped the work being done by the appellants/defendants. The trial court has also held that the case of the appellants/defendants is clearly incorrect because if the work was stopped prior to expiry of 15 days, which

expired on 05.11.2007, then how come the case of the appellants/defendants is that they had worked for 15 days as was claimed by the appellants/defendants.

7(ii). This Court completely agrees with the aforesaid findings and conclusions of the trial court and therefore it is held that the respondent/plaintiff has proved that despite receiving the advance 50% of the amount of the purchase order, the appellants/defendants failed to do work resulting in the respondent/plaintiff having to award the work to M/s Blue Star.

8(i). So far as the case of the appellants/defendants pertaining to its counter-claim, the same was subject matter of Issue no.5, and this issue has been decided against the appellants/defendants by the trial court by holding that appellants/defendants have failed to prove that the bills Ex.DW1/2 to DW1/23 were ever served upon the respondent/plaintiff because it is not stated that the bills Ex.DW1/2 to DW1/23 bear whose signature on receipt, with the fact that the bills do not even bear the seal of the respondent/plaintiff company showing receipt. To the aforesaid conclusions of the trial court, this court would also like to add that if the appellants/defendants had done work

from December, 2006 as per bills Ex.DW1/2 to DW1/23, then there was no reason as to why the appellants/defendants were not paid for the work done way back from December, 2006. Also, from December 2006 till the filing of the suit on 23.10.2009, no correspondence was entered into by the appellants/defendants claiming payments of the bills Ex.DW1/2 to DW1/23. This Court would further like to note that the appellants/defendants have not stated as to what are the purchase orders with respect to which the bills Ex.DW1/2 to DW1/23 were issued by the appellants/defendants to the respondent/plaintiff.

8(ii). This Court, therefore, does not find any illegality in the reasoning and conclusions of the trial court that the appellants/defendants failed to prove their counter claim which was subject matter of Issue no. 5.

9. In view of the aforesaid discussion, there is no merit in the appeal, and the same is hereby dismissed.

NOVEMBER 02, 2018

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VALMIKI J. MEHTA, J