

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

% *Judgment Reserved on: September 17, 2015*
Judgment Delivered on: September 30, 2015

+ **RFA (OS) 137/2012**

KAMAL CONSTRUCTION CO. Appellant
Represented by: Mr.Raman Kapur, Sr.Advocate
instructed by Mr.Aviral Tiwari,
Advocate

versus

DELHI DEVELOPMENT AUTHORITY Respondent
Represented by: Mr.Pawan Mathur, Advocate with
Mr.Himanshu Gupta, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Suit filed by the appellant praying for a decree in sum of ₹26,90,524/- (₹18,77,886/- as the amount due under the contract plus interest in sum of ₹8,22,658/-) has been dismissed by the learned Single Judge vide impugned judgment and decree dated September 20, 2012.
2. The break-up of the sum of ₹18,77,886/- has been noted by the learned Single Judge as consisting of five components as under:-

(i)	Towards final bill as per details enclosed in Annexure A to the plaint	₹9,09,332/-
(ii)	Towards balance amount payable under clause 10(CC) of the agreement as per Annexure B to the plaint	₹3,22,583/-

(iii)	Towards sum withheld under running bills	₹1,50,951/-
(iv)	Towards balance security deposit	₹30,000/-
(v)	Towards watch and ward for the period July 01, 1996 to April 30, 1999	₹4,65,000/-

3. Technical issues were either given up by the respondent or have been decided in favour of the appellant, and thus we note nothing qua the same. At base would therefore be the issue : Whether the appellant has proved its claims as per five sub-heads noted above. Needless to state, the question of payment of interest would arise if any or all sub-head of the main claim are allowed. Thus we note only such facts as would be relevant to decide whether the appellant is entitled to the decree as prayed for.

4. Delhi Development Authority awarded a contract to the appellant by accepting its offer, as per tender floated by Delhi Development Authority to construct 193 SFS Flats at Gazipur as also to construct 101 SFS Flats including shops at a nearby site in Gazipur. A formal agreement No.14/EE/ED/8/DDA/1993-94 was executed. The case of the appellant was that evidenced by Ex.P-4, a completion certificate dated July 02, 1996, the work was completed and in spite thereof, the payment was not made and therefore amounts payable under sub-heads (i) to (iv) were payable. As per the appellant, since officers of Delhi Development Authority did not take charge of the site till April 30, 1999 the appellant had to engage watch and ward to protect the flats from pilferage and thus amount as per said head (v) was payable. As per Delhi Development Authority the work was not completed as alleged and thus no amount as per sub-head (i) to (iv) was payable. Delhi Development Authority denied that the appellant had engaged any watch and ward to protect the flats.

5. The appellant examined only one witness, being Mr.Kamal Kumar Bassi, the partner of the appellant. He proved various documents in his testimony, which were not required to be proved because during admission/denial of the documents, Delhi Development Authority had admitted the same. The documents are 15 in number and briefly could be noted as under:-

- (i) Ex.P-1 - Letter dated December 16, 1996 written by the Executive Engineer, B.P.Srivastava, Delhi Development Authority to the appellant regarding not releasing the withheld amount as requested by the appellant until all the QC paras are settled.
- (ii) Ex.P-2 - (Annexures 'A' and 'B') – Legal Notice dated June 20, 1998 under Section 53B of Delhi Development Act, 1957 demanding the suit amounts allegedly due and payable for the work of construction of 193 SFS houses at Gazipur. SH: C/O 101 SFS houses on Site No. 2. (69 CAT – II & 32 CAT –III) I/C. Shops INT. W/S, S/I, and INT.Dev.
- (iii) Ex.P-3 - Letter dated May 11, 1999 written by the Delhi Development Authority to the appellant regarding rectification of work and request to hand over to the site staff the various fittings and fixtures lying in appellant's custody.
- (iv) Ex.P-4 – Completion certificate dated July 02, 1996, issued by the Delhi Development Authority to the appellant.
- (v) Ex.P-5 - Letter dated April 15, 1998 written by the Assistant Engineer, Delhi Development Authority to the appellant intimating theft of the SCI rain water pipes with bend and CI water meter boxes and requesting to depute adequate number of security guards for effective watch and ward of houses round the clock.

(vi) Ex.P-6 to Ex.P-14 – Taking over memos listing the number of fittings and fixtures received by A.K. Jain, Junior Engineer, Electric Division-9, from the appellant.

(vii) Ex.P-15 - (Annexures 'A' and 'B') – which we find is the same as Ex.P-2.

6. Delhi Development Authority examined only one witness, Sh.L.C.Dhingra, Executive Engineer and he proved only four documents. Briefly described the same would be:-

(i) Ex.LC DW-1/1 – Completion Certificate dated July 02, 1996 (**which is the same as Ex.P-4**).

(ii) Ex.LC DW-1/2 – Reply to the legal notice Ex.P-2.

(iii) Ex.DW-1/P1 – Letter dated March 22, 2006 written by the Executive Engineer, Delhi Development Authority to the appellant for acceptance of the 19th and final bill for C/O 101 SFS houses at site No. II at Gazipur.

(iv) Ex.DW-1/P2 – Letter dated January 22, 2007 written by the Executive Engineer Delhi Development Authority to the manager Punjab National Bank, Nauroji Nagar requesting to extend the validity of bank guarantee for further one year i.e. upto March 24, 2008.

7. The view taken by the learned Single Judge is that the appellant was obliged to prove its case. The appellant has failed to prove having completed the works. Learned Single Judge has opined that the appellant could have summoned the measurement books where work done was measured i.e. the best evidence to break the impasse.

8. Sub-head (i) having failed, sub-head (ii) had to fail as a necessary corollary. This became the reason for rejection of sub-head (iii) of the claim as also sub-head (iv). Regarding sub-head (v) the learned Single Judge has

held that the appellant has proved having kept any watch and ward. Ex.DW-1/P2, the only relevant document concerning said claim has been opined as insufficient evidence.

9. Before we re-look into the documentary evidence and testimony of the two witnesses, we need to note certain fundamental principles of law which seem to be in the wilderness these days; and we say so for the reason, hearing regular first appeals against decrees passed by learned Single Judges of this Court we are finding that in more than 50% cases the learned counsel for the parties are guilty of not guiding their clients with reference to the quality of evidence which is required to be led. God knows how many meritorious claims have fallen like nine pins. Or for that matter how many defences, which otherwise could have been sustained, have likewise fallen like nine pins.

10. Illustration (g) to Section 114 of the Evidence Act, 1872 guides that a Court may presume a fact against a party which could but has not produced the best evidence on the reasoning that if produced it would be unfavourable to the person who withholds it.

11. It is trite, and we may only note one authority : (2011) 9 SCC 126 Khatri Hotels Pvt. Ltd. & Anr. Vs. UOI & Anr. that generally it is the duty of the party to lead the best evidence which could throw light on the issue in controversy and in case such material evidence is withheld the Court may draw an adverse inference, notwithstanding that the onus of proof does not lie on such party and it was not called upon to produce the said evidence.

12. In the instant case, the learned Single Judge has correctly opined that the best evidence of the appellant could be, and we may add : had to be, the measurement books in which joint measurements were recorded. The

appellant never attempted to produce and prove the same. The importance of the measurement books would be that the contract was an item rate contract and a bill of quantity was stipulated. Though the contract has not been proved, but Ex.P-2 (which is same as Ex.P-15) would establish the same. In the legal notice in question demand in sum of ₹9,09,332.01 has been raised by item wise raising a bill totaling ₹2,34,29,340.42 and deducting ₹2,25,20,008.41 already received. The appellant had to prove that the quantity of work referred to in the legal notice was completed.

13. The 15 documents exhibited by the appellant and proved at the trial just do not throw any light that the work as per quantities listed in Ex.P-2 was completed. Learned counsel for the appellant urged that Ex.P-4, the completion certificate dated July 02, 1996, proved conclusively that the contracted works were completed.

14. Ex.P-4, though labeled as a completion certificate, is as a matter of fact a document noting the defects to be rectified. It notes that the work of construction of the flats and the shops is over but records as many as 27 rectifications to be done. Thus, the claim cannot succeed on the strength of Ex.P-4.

15. That apart, assuming that the construction work was completed as per the contract, since the contract was item rate fixed with a schedule of quantity (to be measured at the completion of the works), unless the schedule of quantity was quantified the final bill could never be settled. We take judicial notice of the fact that for the work of the magnitude in question, deviations here and there are bound to occur and it is only the final measurements which matter and are determinative of the amount payable. That apart, the appellant has not led any evidence that the 27 defects and

deficiencies noted in Ex.P-4 were rectified. Thus, the appellant cannot claim the full amount, assuming that the work was completed as per the schedule of quantity. For example, deficiency No.9 in Ex.P-4 is the final coat of paint on the walls, GI, SI and other pipes not done. Deficiency at item No.7, is to weld the grills of the windows, wherever left out. Deficiency 2, is final grinding of the mosaic flooring not done. The appellant has not led any evidence that said 27 deficiencies noted in Ex.P-4 were rectified.

16. As has been noted above, Ex.P-2 would show that if complete work as per bill of quantity was completed, the appellant would be entitled to receive from Delhi Development Authority a sum of ₹2,34,29,340.42 out of which the appellant had already received ₹2,25,20,008.41, and hence claim for sum of ₹9,09,332.01.

17. Much was sought to be urged from the admission made by the witness of the Delhi Development Authority that Delhi Development Authority did not get the work completed from any other agency and that possession of the flats was handed over by the Delhi Development Authority to the allottees. Therefrom learned counsel sought to infer that the appellant has proved completing the works.

18. The argument overlooks the fact that the total number of flats to be constructed were $193+101 = 294$. Some shops had to be constructed as well. The sum of ₹9,09,332/- would thus translate to ₹3,092.96 per flat.

19. The shrill cries of allottees that the Delhi Development Authority has given possession of not fully constructed flats can be read in the press whenever Delhi Development Authority allots and hand over possession of

flats to the allottees. Thus, this negative inferential evidence on which the appellant seeks to build its case is noted and rejected.

20. In our opinion the 27 deficient and defective works listed in Ex.P-4 give sufficient guidance to a judicial mind that the appellant is not entitled to the sum of ₹9,09,332.01, the amount as per sub-head (i) of the claim and therefore the amount payable under sub-head (ii) would also fail.

21. This would be the reason to deny appellant sub-head (iii) of the claim in sum of ₹1,50,951/- because the appellant has failed to lead evidence that said amount withheld from the 9th running bill became payable. This would also be the reason to deny sub-head (iv) of the claim.

22. Much was sought to be made out from an admission by the witness of the Delhi Development Authority that a sum of ₹2,14,378/- was payable. It relates to the cross-examination of the witness of the Delhi Development Authority recorded on March 24, 2007. The admission is that the Assistant Engineer II had prepared the final bill as per which appellant was entitled to ₹2,14,378/-. The argument overlooks that the witness has said that the Executive Engineer had not accepted the bill prepared by the Assistant Engineer. The argument further overlooks that the witness said that the sum of ₹2,14,378/- was subject to deductions. Unfortunately the final bill which was being commented upon by the witness and as per the witness had been brought by him was never taken on the judicial record, either as a proved or a marked document and thus we cannot make any comments thereon with reference to its contents. The argument that a decree in sum of ₹2,14,378/- ought to have been passed is therefore rejected because the witness of the Delhi Development Authority has simply said that the Assistant Engineer of the Delhi Development Authority had prepared the final bill as per which

₹2,14,378/- was payable but subject to deductions. What these deductions were? Nobody knows. We repeat. The appellant was obliged to lead best evidence to prove its case.

23. Regarding sub-head (v) of the claim we note that the appellant has not produced its books of account, what to talk of payments received or vouchers received to any money paid for watch and ward. Ex.DW-1/P-2 is of no help to the appellant because it is a circular issued by Delhi Development Authority requiring contractors to engage watch and ward till possession of flats is handed over to Delhi Development Authority. Thus, best evidence regarding this sub-head of the claim has not been led.

24. Lest same grievance, which was made against the impugned judgment and decree passed by the learned Single Judge is made against our decision, we would briefly comment upon the documents proved by the appellant. The grievance was that the learned Single Judge has not discussed the 15 exhibits proved.

25. In paragraph 5 above we have noted the 15 exhibits proved by the appellant, and would highlight that Ex.P-2 and Ex.P-15 are the same. Ex.P-1 is a letter dated December 16, 1996 written by the Executive Engineer of the Delhi Development Authority to the appellant giving reasons to withhold certain payments while certifying running bills. It would relate to sub-head (iii) of the claim. We wonder what weightage can be given by the appellant to the same to prove sub-head (iii) of the claim. Ex.P-2 and Ex.P-15 are legal notices, which were replied vide Ex.DW-1/2. Nothing turns thereon. Ex.P-3 is a letter written by Delhi Development Authority to the appellant regarding rectification of defects. What weightage it has on the claims? None in our opinion. Ex.P-4, the stated completion certificate has already

been discussed by us hereinabove. Ex.P-5 is a letter written by Delhi Development Authority to the appellant informing of theft of fittings coupled with the request to provide round the clock security. The letter is no evidence of watch and ward staff being provided as was sought to be urged. Ex.P-6 to Ex.P-14 are receipts issued by officers of Delhi Development Authority accepting receipt of fittings and fixtures to be provided. The said exhibits only show that fittings to be provided in the flats were received by an officer of the Delhi Development Authority, and we see no weightage therein regarding the proof of the claims. The relevancy of the said documents is that officer of Delhi Development Authority received some fittings and fixtures from the appellant. Its weightage could be relevant if the issue was whether the appellant has supplied all the fittings and fixtures.

26. The appeal is dismissed with cost against the appellant and in favour of the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 30, 2015
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