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

+ **RSA 79/2016**

Date of Decision: 21.03.2016

THE SRIJAN SCHOOL Appellant

Through: Mr.Praveen Mahajan, Advocate.

versus

HARVINDER SINGH Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J. (ORAL)

CM Appln. 10473/2016

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RSA 79/2016

1. The appellant is aggrieved by the judgment dated 22.12.2015 passed by the learned Additional District Judge-01 (West), Delhi in RAC No.57/2011 whereby the judgment of the Trial Court dated 27.08.2011 passed in suit No.627/2006, dismissing the suit, was upheld and affirmed.
2. The respondent/plaintiff brought the suit seeking recovery of Rs.2,46,230/- along with interest as the balance payment for the work of construction done by him and his father Kartar Singh, were not made.
3. The appellant had entrusted the work of construction of the

school premises to the respondent/plaintiff and an agreement to that effect was signed and executed on 10.08.2012. The work was carried out as per the specifications and to the satisfaction of the appellant/defendant. The bills were paid but the balance amount of Rs.1,81,051/- remained pending and was not paid.

4. Hence the suit by the respondent.

5. The contention of the appellant before both the Courts below had been that the contract had been entered with Kartar Singh and not with the respondent who, though, is the son of Kartar Singh. The work also was carried out by Kartar Singh, which fact was also admitted by the respondent/plaintiff in his cross examination. Thus what was argued by the appellant was that in the absence of any privity of contract between the appellant school and the respondent/plaintiff, respondent did not have the locus to file the suit. The further ground taken by the appellant before both the Courts was that the entire payment had been made to Kartar Singh and that the respondent/plaintiff could not prove even one instance of any payment having been made to him. Learned counsel for the appellant drew the attention of this Court to the evidence of the respondent/plaintiff who had examined himself as PW-1 before the Trial Court wherein he has admitted that TDS was deducted on the payments made to Kartar Singh and him but the same was not filed before the Court. The respondent/plaintiff was directed to bring the TDS certificate on the next date. The TDS certificate, referred to above, was never produced and the respondent took the lame plea that it was in possession of his father who had expired on 15.07.2007. Learned counsel for the

appellant submits that the suit was filed much before the death of the father of the respondent/plaintiff on 06.07.2005 whereas Kartar Singh died on 15.07.2007. In that view of the matter, an adverse inference ought to have been drawn against the respondent/plaintiff in terms of Section 114(g) of the Indian Evidence Act, 1872.

6. The appellants had also challenged the final bill (Exh.PW-1/4) as being forged and fabricated document. But one of the witness appearing on behalf of the appellant namely Sh.Ashish Jain, DW-1 admitted that the school had engaged Mr.S.P.Garg, as an architect and that the final bill bears the signature of aforesaid Sh.S.P.Garg. Thus the ground of the final bill against which part payments were made, being forged and fabricated was not accepted by both the Courts.

7. The Trial Court, taking into account the evidence of respondent/plaintiff (PW-1) and documents namely Exh.PW-1/1 to PW-1/8 which was the agreement dated 10.08.2002, carbon copy of the bill dated 15.05.2003, bills sent to the school, legal notice dated 29.03.2005 and the postal proofs of the same, came to the conclusion that the suit was maintainable at the instance of the respondent/plaintiff and as against the appellant/defendant.

8. The Trial Court as well as the Appellate Court took note of the fact that Exh.PW-1/1 which is an agreement between the school and the respondent/plaintiff dated 10.08.2002 bears the signature of two of the trustees of the school. In that event, it was an admission on the part of the defendant that the agreement in question was entered into with the respondent/plaintiff. The agreement also does not mention the name of Kartar Singh as a contractor but has been signed by the two of

the trustees of the appellant school and the respondent/plaintiff.

9. The issue regarding the agreement not being properly stamped for any implicit reliance on the same was also discarded by the Trial Court as Article 5 of Schedule 1 of the Stamp Act, 1989 mandates stamp duty on an agreement relating to sale of bill of exchange or sale of Government security of shares. Any agreement or memorandum of agreement for or relating to the sale of goods or merchandise is exempted from the stamp duty. Ex.PW-1/1 was, justifiably, found to be an agreement relating to labour rate for contract of building works, which fall under the exemptions. Thus there was no requirement of paying any stamp duty. In the absence of anything contrary shown by the appellant/defendant, the aforesaid issue whether the unstamped agreement between the parties could have been relied upon, was also answered in the affirmative.

10. There is no denial of the appellant/defendant that the building was not constructed or that complete work was not executed. As has been noted earlier, the only bone of contention between the parties is that the work was executed by Kartar Singh and for the same, he was paid the entire dues.

11. From the evidence adduced on behalf of the parties, both the Courts below were of the opinion that the respondent/plaintiff and his father used to work together. It is always not necessary for a father and son to enter into a partnership agreement for carrying out the work. Certain contradictions in the deposition of the respondent/plaintiff (PW-1) with regard to payments is not of any vital importance for a decision in the aforesaid matter.

12. The First Appellate Court has also taken note of the fact that if the respondent/defendant did not furnish the TDS certificate despite directions of the Trial Court, it was upon the appellant/defendant to have placed it on record. It further took note of the fact that the appellant sought to place on record copy of Form 16A under Order 41 Rule 27 of the CPC to show payment, against construction work, to Kartar Singh. The TDS certificate which was placed on record on behalf of the appellant referred to payment of Rs.26,34,665/- in favour of Kartar Singh. This obviously was no evidence for the entire payment of Rs.28,15,716/-. If at all, the claim of the respondent/defendant had to be rebutted, it was for the appellant to have brought on record evidence with regard to payment of the entire amount i.e. Rs.28,15,716/- to either the respondent /plaintiff or to his father, Sh.Kartar Singh. Thus this Court does not find any anomaly with the findings returned by the Trial Court as well as by the First Appellate Court.

13. The proposed substantial question of law by the appellant namely (i) whether the onus probandi of bringing on record the TDS certificate was on the respondent/plaintiff; (ii) whether adverse inference ought to have been taken against the respondent/plaintiff for not bringing the TDS, in terms of the provisions of Section 114(g) of the Indian Evidence Act and (iii) whether the respondent/plaintiff had no locus to file the suit are definitely not the questions of law which would arise in the present second appeal. The reasons for the same have already been discussed in this order.

14. Thus in the absence of any substantial question of law, the present second appeal is dismissed.

CM Appln. No.10472/2016

1. In view of the appeal having been dismissed, this application has become infructuous.
2. This application is disposed of accordingly.

MARCH 21, 2016
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ASHUTOSH KUMAR, J