

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

+ **RFA No. 329/2018**

% **20th April, 2018**

M/S VIRGOTRA PROMOTORS & DEVELOPERS PVT. LTD.

..... Appellant

Through: Mr. Rajender Kumar, Advocate.

versus

KAMAL PAHWA

..... Respondent

Through: Mr. Manish Mohan, Advocate
with Ms. Rohini, Advocate and
Ms. Manisha Saroha, Advocate.

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. 15406/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 15405/2018 (for delay)

2. For the reasons stated in this application, delay of 7 days
in re-filing the appeal is condoned, subject to just exceptions.

C.M. stands disposed of.

RFA 329/2018

3. This RFA under Section 96 of the Code of Civil Procedure (CPC) is filed by the appellant/defendant/counter-claimant impugning the judgment of the Trial Court dated 30.10.2017 by which the trial court has dismissed the suit filed by the respondent/plaintiff for recovery of Rs.10,10,330/- and it has also dismissed the counter-claim filed by the appellant/defendant for a sum of Rs.7,44,900/-. Appellant/defendant had filed a counter-claim pleading that it was entitled to an amount of Rs.7,44,900/- for extra work done and an amount of Rs.2,30,000/- on account of material lying at the site when the subject premises were handed over by the appellant/defendant to the respondent/plaintiff. Disputes between the parties pertain to an agreement of construction whereby the appellant/defendant was to make construction upon the property of the respondent/plaintiff

4. The facts of the case are that parties admittedly entered into a contract dated 5.12.2005 whereby the appellant/defendant agreed to construct residential property of the respondent/plaintiff situated at D-5/180 Safdarjung Enclave, New Delhi. Cost of

construction was agreed at Rs.48,00,000/-. Respondent/plaintiff claimed that he had already paid Rs.36,96,000/- to the appellant/defendant but work done was less than the said amount and appellant/defendant failed to carry out further construction by pleading lack of funds. Respondent/plaintiff claims to have appointed a Government approved valuer who reported that the appellant/defendant had only done 50% of the work while already taking payment upto 80% of the project cost. The valuer S.L. Dhir valued the work done by the appellant/defendant to be Rs.27,00,000/-. Accordingly, respondent/plaintiff pleaded to have decided to get the remaining work done from other person and consequently the agreement dated 5.12.2005 was repudiated and the amount of Rs.10,10,300/- claimed by the respondent/plaintiff from the appellant/defendant. Respondent/plaintiff additionally claimed amount towards rent which the respondent/plaintiff paid for the premises in which respondent/plaintiff was staying till completion of work on the subject premises, and further claimed damages on account of delay in completion and which if completed would have entitled the respondent/plaintiff to let out the subject premises and earn rent.

5. Appellant/defendant contested the suit and pleaded that in fact the appellant/defendant had completed about 82.5% of the work, but had only received Rs.36,24,080/- till 29.9.2006. Appellant/defendant also pleaded to have done extra work of an amount of Rs.7,44,900. Appellant/defendant also pleaded that it is further entitled to recover Rs.2,30,000/- on account of raw material which was lying at the site when the site was handed over to the respondent/plaintiff.

6. After pleadings were complete, the trial court framed issues and parties led evidence and which aspects are recorded in paragraphs 5 and 6 of the impugned judgment and which paragraphs read as under:-

“5. The parties went to trial and the following issues framed vide order dated 20.07.2010:-

1. Does the plaintiff in CS(OS) 2186/2006 prove that the defendant did not perform the work as agreed upon in terms of the contract dated 05.12.2005? OPP
2. Does the plaintiff in CS (OS) 2186/2006 prove that the area constructed upon was less in the contracted area, as is alleged in the suit? OPP
3. If the findings on Issue Nos. 1 & 2 are in the affirmative, does the plaintiff in CS (OS) 2186/2006 prove the quantum of damages suffered and /or that a fresh contract, as alleged, was entered into with a third party for the alleged rectification? OPP

4. Does the defendant in CS(OS) 2186/2006 prove that the area agreed upon by the parties in the contract dated 05.12.2005 was constructed to the satisfaction of the plaintiff in accordance with its terms and conditions? OPD

5. Does the plaintiff in CS (OS) 1540/2009 prove entitlement to a decree for Rs.7,44,900/-? OPP in CS (OS) 1540/2009

6. If the answer to the above issue is in the affirmative, is the plaintiff in the said suit entitled to any interest- if so, at what rate, for what period and on what amount? OPP in CS (OS) 1540/2009

7. Is the plaintiff in CS (OS) 1540/2009 entitled to damages as claimed? OPP in CS (OS) 1540/2009

6. Parties led their evidence. PW1 Sh. Kamal Pahwa tendered his evidence by way of affidavit Ex. PW1/A and relied upon documents Ex. P-1, Ex. P-2A and Ex. P-3 to Ex. P-5. DW1 Sh. Surinder Virgotra tendered his affidavit of evidence Ex. DW1/A and relied upon documents Ex. DW1/1 to Ex. DW1/5 and also placed his reliance on documents filed by the plaintiff Ex. P-1 to Ex. P-5 and also on documents Ex. PW1/D1 and Ex. PW1/D2.”

7. Trial court has held that both the parties except making self-serving averments have led no documentary evidence to prove their respective cases, and therefore the trial court dismissed both the suit and the counter claim of the appellant/defendant by making the following observations:-

“8.2. In his affidavit, he re-asserted the pleas as raised by him in the plaint and written statement about the agreement dated 05.12.2005 Ex. P.1 inter se him and defendant for construction estimated as Rs.48,00,000/- and giving the amount of Rs.36,96,000/- towards the construction being done. According to him only 50% construction has been done as per report of Government approved valuer marked as Ex. P.2 and also placed on record

letter dated 10.10.2006 written by him to carry out the work against the payment made to defendant as Ex. P.3 and letter of defendant in reply dated 12.10.2006 as marked Ex. P.4 and also placed on record the letter dated 25.10.2006 for refund of Rs.10,10,330/- paid in excess of the construction work done as marked Ex. P.5 and deposition pertaining to amount of Rs.20,95,740/- in record to recovery of payment in excess and tentative amount of rent which could have been fetched in case the building stood constructed and tentative amount to be paid to new contractor.

8.3. He, in his cross-examination, admitted that two copies of agreement were prepared, one was retained by him while other was retained by the defendant. According to him, as per sanction plan Ex. PW1/D1, the measurement of plot is 70 feet X 30 feet and total area is 2100 sq. feet. Out of same 1317.5 sq. feet is the covered area and rest is open area and the covered area is same on all the floors. He admitted to be correct that kitchen on the ground floor at the rear portion of the plot and also admitted to be correct photographs Ex. P.5 (colly- 10 photographs) filed in suit no. 8746/2016 (1540/2009) are of this property. He also stated that officials of MCD had come for inspection when the building was at the plinth level and the department issued B-2 Certificate. After that officials of MCD came regularly to check as to whether construction was as per the B-2 Certificate. According to him, he got the plan sanctioned much before the demolition of old building and admitted that said fact was not mentioned in the plaint. He admitted Ex. PW1/D2 is the site plan prepared by the defendant and admitted that as per this plan, the open area is 6 ½ feet X 30 feet at the back and 14 feet 11 inches X 30 feet in the front and also admitted that there are two shafts, one measuring 5 feet 9 inches X 4 feet 5 inches and second measuring 5 feet X 5 feet. He admitted to be correct that in Ex. PW1/D2, the position of kitchen and bed room is not exactly as per sanction plan. He also admitted to be correct that he had written a letter dated 10.10.2006 Ex. P.3 and also admitted that as per that letter the plot was handed over to the defendant in the month of March, 2006 and construction was to be made complete on or before ten months.

8.4. He further denied the suggestion that he received the letter dated 29.09.2006 written by the defendant towards the final payment. He admitted that ventilators of the basement are of wood. He further denied the suggestion that defendant initially built the front and rear wall as per sanction plan and they were demolished and denied the suggestion that the

same was got done after the inspection of the Municipal officials and again directed to re-construct as per plan Ex. PW1/D2. He also denied the suggestion that slabs were constructed on the first, second and third floor too were removed and got constructed as per sanction plan Ex. PW1/D2 and also denied the suggestion that the wall of 480 sq. feet of 9 inch thickness too was got reconstructed. According to him, water pump was installed by defendant at his instance against payment but showed his inability to produce the receipt about the said payment. He admitted that he used to inspect the construction before releasing the payment but showed his inability to show if he maintained the record regarding extent of construction so carried out by defendant having so inspected by him. According to him, he also used to make part payment from his saving and part from loan from Indian Overseas Bank and admitted the receipts (in number 23) Ex. PW1/D4 (colly). He admitted that no notice was given to the defendant before Sh. S.L. Dhir inspected the site. He denied suggestion that locked store broke open where defendant has put his goods but expressed his inability to tell if any police complaint was made to this effect by defendant on 17.11.2006. He admitted that he did not mention the name of new contractor from whom he got completed the remaining work and denied the suggestion that he did not engage the new contractor. He admitted to be correct that all material seen in 10 photographs Ex. P.5 (colly) filed in suit no. 8746/2016 (1540/2009) was purchased by the defendant and denied his liability to pay Rs.7,44,907/- to the defendant for the extra work done by him as per bill dated 29.09.2006. In support of his evidence, the plaintiff did not lead any other evidence except his solitary statement as referred to and discussed above.

8.5. In rebuttal to the evidence, the defendant Surender Virgotra appeared as DW1 and tendered his evidence Ex. DW1/A. He averred the pleas as taken by him in written statement as well as in the plaint o the suit filed by him bearing CS no. 8746/2016 (1540/2009) and relied upon documents referred by him in the affidavit Ex. DW1/1 to Ex. DW1/5 and relied upon documents Ex. P.1 to Ex. P.5 and also relied upon the documents admitted by the plaintiff in his cross-examination as Ex. PW1/D1 and Ex. PW1/D2.

8.6. According to him, the plaintiff got done additional work more than the working site plan and beyond written agreement Ex. P.1 and got the floor extended in the rear side of the building after demolishing earlier construction done by him as per sanction plan ans also got constructed an

additional wall on the left side of the building beyond working site plan. He admitted that he did not sanction any site plan of the said house in order to get any status report of the said property prepared from any authority including government. He admitted to have received the payment of approx. Rs.36,00,000/- and also stated to have received in advance. He admitted to be correct that he did not complete the work as per agreement Ex. P.1 alleging that the plaintiff stopped making the payments and have got the dues outstanding against the plaintiff approx of Rs.7-8 Lacs plus material worth Rs.2.5-3 Lacs. According to him, when he handed over the site to the plaintiff, material was lying and had taken the photographs but he denied that he was in possession of receipt of the value of the material lying there. He next stated that he completed 82.5% of work but the same was not certified by anyone. The dues of Rs.7-8 Lacs, which he claims to be due, against the plaintiff includes the marble flooring, door-window fixing, plaster and some extra work got done by him by the plaintiff. The extra work included the extra area of backyard got covered. He admitted that he has got no documents on record that MCD got demolished extra work and it was built by him again and also showed his inability to tell the date when it was done so. He admitted that he did not give any notice regarding re-construction after demolition. He admitted that no notice was given for demolition by MCD.

8.7. According to him, no notice was received by him about the visit and survey of site by the Engineer appointed by the plaintiff. He admitted that he was carrying out construction in the month of October, 2006 though the dispute arose in the month of September-October 2006 regarding payment which the plaintiff refused to make. According to him, he regularly issued the bills of the work done but showed his inability to prove the same. He showed the ignorance if he carried out the work worth Rs.39,60,000/- and admitted that he raised the bill of Rs.43,68,900/- and also admitted that he did not prepare any status report that record 82.5% completed work.

8.8. Thus, on perusal of entire evidence on record, it is evident that there are only self-serving statements of parties in support of their respective contentions. The defendant (plaintiff of suit no. 8746/2016 (1540/2009)) did not place on record in his evidence supportive of his contentions that he carried out extra work at the instance of plaintiff. He admitted that no notice was ever received from MCD about the demolish of any wall alleged to have constructed contrary to the sanctioned plan and was re- constructed

as per site plan or thereafter again demolished and constructed as per working site plan and demolish of 480 sq. feet wall of 9 inches thick or other extra work as claimed by him. No photographs of any demolition so carried and reconstruction so done has been placed on record supportive of said contention. No letter of request made to him by the plaintiff was placed on record. So simplicitor solitary statement cannot be relied upon for arriving at conclusion that defendant carried out extra work. He also did not file any status report about his alleged construction carried upto 82.5%. Thus, in these set of circumstances, he cannot be said to be entitled to Rs.7/8 Lacs for the alleged extra work so claimed by him.

8.9. Similarly, the plaintiff too did not lead any supportive evidence supportive of his claim. He did not examine Sh. S.L. Dhir, the alleged Government approved valuer from whom he got valued the construction work. Mere filing the report Ex. P.2 does not give authentication to his report for the purpose of colouring it as cogent proof for the reason that said valuer visited the site without notice to the defendant and he carried out the inspection in the absence of defendant and he too has not been produced as witness to authenticate his report and giving an opportunity to rebut the same by cross-examining him testing his veracity. Further, the plaintiff did not examine the contractor from whom he got done the remaining construction work. No bill has been placed on record as to what amount had been paid to the said contractor. So, all these lapses on the part of the plaintiff does speak volumes to nullify his claim against the defendant." (underlining added)

8. I have asked the counsel for the appellant/defendant/counter-claimant to show any documentary proof whatsoever that appellant/defendant had done extra work and submitted bill for this extra work, but counsel for the appellant/defendant could not point out to any documentary evidence filed and proved showing extra work done or for that matter even having submitted the bill for the extra work to the respondent/plaintiff.

I may note that trial court has been more than fair because trial court has also dismissed the suit of the respondent/plaintiff for recovery by observing that the Government approved valuer Sh. S.L. Dhir appointed by the respondent/plaintiff made his report without any notice to the appellant/defendant, with the fact that the valuer did not even appear in the witness box to prove his report.

9. In view of the aforesaid facts, I completely agree with the conclusion of the trial court that self-serving averments do not amount to discharge of onus of proof for decreeing the counter-claimant for recovery of money.

Dismissed.

APRIL 20, 2018/AK.

VALMIKI J. MEHTA, J