*   IN THE HIGH COURT OF DELHI AT NEW DELHI

\+   RFA No. 836/2016

%   *29th October, 2018*

M/S SRS CONSTRUCTION & EARTH MOVERS

..... Appellant

Through: Mr. R.K. Trakru, Advocate.

versus

SENBO ENGINEERING LTD. & ANOTHER

..... Respondents

Through: Mr. Ashok Anand, Advocate with Mr. Rajesh Sharma, Advocate (M. No.9810580541).

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 31.03.2016 by which trial court has dismissed the suit for recovery of Rs. 5,91,616/- filed by the appellant/plaintiff against the respondent/defendant. The amount prayed in the suit was the claim for the balance due for the work done

by the appellant/plaintiff for the respondent no.1/defendant no.1 for the Delhi Metro Rail Project at Delhi.

2. The facts of the case are that the appellant/plaintiff filed the subject suit pleading that the respondent no.1/defendant no.1 was given construction work by the Delhi Metro Rail Corporation Limited at IGI Airport, Delhi and a part of this work was sub-contracted by the respondent no. 1/defendant no. 1 to the appellant/plaintiff in the year 2008. The appellant/plaintiff after having done the work, raised invoices totaling to Rs. 63,96,379/- against which an amount of Rs. 59,53,767/- was paid by the respondent no.1/defendant no.1 leaving a balance due amount of Rs. 3,19,026/-. In addition to this amount, a further amount of Rs. 51,295/- was payable to the appellant/plaintiff, and therefore, the total due to the appellant/plaintiff was a sum of Rs. 3,70,321/-, and since this amount was not paid despite serving a Legal Notice dated 04.01.2012, therefore the subject suit for recovery was filed.

3. Respondent no. 1/Defendant no. 1 contested the suit by filing the written statement-cum-counter claim, however the indubitable position on record is that the respondent no.1/defendant

no.1 led no evidence as its General Manager, Sh. Somnath Mukherjee, who filed affidavit by way of evidence did not appear for cross-examination, and therefore, the respondents'/defendants' evidence was closed vide order dated 10.04.2015, and this order has become final.

4. The trial court framed the following issues:-

> "(i) Whether the suit filed by the plaintiff is barred by limitation? OPD.
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> (ii) Whether defendant No.1 has made excess payment to the plaintiff over and above the agreed amount. If so, its effect?
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> (iii) Whether the plaintiff is entitled to the decree of amount, as prayed for? OPP
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> (iv) If answer to the aforesaid issue is in affirmative, then whether plaintiff is entitled to interest. If so, at what rate and for what period? OPP
>
> (v) Whether the plaintiff is entitled to the decree of mandatory injunction, as prayed for? OPP
>
> (vi) Whether the defendant is entitled to the amount of counter claim, as prayed for? OPD.
>
> (vii) Whether the counter claim has not been verified, instituted and filed by a duly authorized person? OPP
>
> (viii) Whether the defendant has not paid proper court fees on the amount of counter claim, as prayed for. If so, its effect? OPP.
>
> (ix) Relief."

5. The appellant/plaintiff led evidence and proved its case and documents as noted in para 8 of the impugned judgment, and this para 8 reads as under:-

> "8. Shri Ram Solanki has appeared as PW1 to prove his case. He has proved the original work order dated 02.10.2008 as Ex.PW1/1, carbon copy of running account bill dated 02.12.2008 as Ex.PW1/2, copy of running signed account bill dated 01.05.2009 alongwith its covering letter as Ex.POW1/3, print out of income tax statement under Section 203AA of the Income Tax Act for the years 2008-09 and 2009-10 as mark A and mark B respectively, demand letters dated 21.12.2010, 20.04.2011 and 18.06.2011 as Ex.PW1/6, Ex.PW1/7 and Ex.PW1/8 respectively and copy of legal notice dated 04.01.2012 alongwith 9 original postal receipts and 6 AD cards as Ex.PW1/9 (colly). He also examined his brother Mahender Singh Solanki as PW2."

6. The trial court has dismissed the suit by holding that appellant/plaintiff though claimed to have raised various invoices upon the respondent no. 1/defendant no. 1 for the work done, however, only two invoices were filed and proved as Ex.PW1/2 and Ex.PW1/3. The trial court has also discarded the copy filed by the appellant/plaintiff of the statement of account of the respondent no. 1/defendant no. 1 as uploaded by respondent no. 1/defendant no. 1 on its income tax site, as being violative of Section 65B of the Evidence Act, 1872 as it was an electronic record and not duly certified as required by this section.

7. In my opinion, the trial court has committed a grave error in dismissing the suit inasmuch as not only the appellant/plaintiff proved its case by filing the affidavit by way of evidence of the sole proprietor of the appellant/plaintiff, Sh. Ram Solanki, as also another

witness, Mr. Mahavir Singh Solanki, the brother of Sh. Ram Solanki, no evidence to the contrary has been led on behalf of the respondents/defendants. It is also required to be noted that there is no cross-examination by the respondents/defendants of the witnesses of the appellant/plaintiff PW1 and PW2 that the total bills for the amount of Rs. 63,96,379/- have not been raised upon respondent no.1/defendant no. 1. In any case, the dues of the appellant/plaintiff are duly shown in the Annual Tax Statements uploaded by the respondent no.1/defendant no.1 for the years 2008-09 and 2009-10 which were proved as Ex.PW1/4 and Ex.PW1/5 and the trial court wrongly discarded the same as not complying with Section 65B of the Evidence Act inasmuch as before commencement of cross-examination of PW1, no such objection was raised to exhibiting of such documents by the respondent no.1/defendant no.1's and these documents were the own accounts of respondent no. 1/defendant no. 1 uploaded in its annual statement on the income tax website. Once no objection is raised, at the commencement of cross-examination, the right to object to the exhibition of the document has been waived in view of the judgment of the Supreme Court in the case of ***R.V.E.***

Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anr., (2003) 8 SCC 752. Also, the counsel for the appellant/plaintiff is justified in arguing that the trial court has wrongly held that the appellant/plaintiff failed to prove all the invoices inasmuch as in para 5 of the counter-claim filed by the respondent no.1/defendant no.1, it is clearly admitted that the appellant/plaintiff had in fact raised the total bills for Rs. 63,96,379/-.

8. Since the appellant/plaintiff led the requisite evidence and proved the balance due for Rs.3,70,321/-, therefore appellant/plaintiff was entitled to this amount from the respondent no. 1/defendant no. 1. This Court may note that there cannot be any decree against the respondent no. 2/defendant no. 2, who is only the Managing Director of the respondent no. 1/defendant no.1 company, because there is no pleading or case set up by the appellant/plaintiff that the liability of a company being the respondent no. 1/ defendant no. 1 was also the liability of respondent no.2/defendant no.2 who was the Managing Director, and since the Managing Director is not pleaded to have stood as a guarantor and nor had he agreed to pay the liability of respondent no.1/defendant no.1 towards the appellant/plaintiff. The

appellant/plaintiff is also entitled to interest inasmuch as the appellant/plaintiff has served upon the respondent no.1/defendant no.1 the Legal Notice dated 04.01.2012 which is duly proved alongwith postal receipts and AD cards as Ex.PW1/9(colly).

9. In view of the aforesaid discussion, this appeal is allowed. Impugned judgment of the Trial Court dated 31.03.2016 is set aside. The suit of the appellant/plaintiff is decreed for a sum of Rs. 3,70,321/- alongwith interest @ 12% per annum simple from the date of Legal Notice dated 04.01.2012 and till the filing of the suit on 03.05.2012, and thereafter, *pendente lite* and future interest till realization of the decretal amount at the same rate of 12% per annum simple. The appellant/plaintiff is also entitled to costs of the suit as also the appeal. Decree sheet be prepared. Trial court record be sent back.

OCTOBER 29, 2018 **VALMIKI J. MEHTA, J**

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