

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

+ **RFA No.119/2019**

% **21st February, 2019**

S.M. BAGLEY & ASSOCIATES PVT. LTD. & ORS

..... Appellants

Through: Mr. Hem C. Vashisht, Advocate
with Mr. Rahul Malik,
Advocate (M. No.9811039867).

versus

M/S IITL NIMBUS, THE EXPRESS PARK VIEW

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 6258/2019(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**RFA No. 119/2019 and C.M. Nos. 6256/2019 (under Order XLI
Rule 27 CPC) & 6257/2019 (stay)**

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the Judgment of the trial court dated 26.11.2018 by which the trial court has decreed the suit for recovery of money filed by the respondent/plaintiff on account of the respondent/plaintiff having paid the amount of Rs. 5,00,000/- to the appellants/defendants as advance towards providing architectural services but that ultimately no contract was entered into between the parties for providing of architectural services by the appellants/defendants to the respondent/plaintiff.

3. Before proceeding to the facts of the case, it is noted that the appellants/defendants led no evidence. Once it is found that the appellants/defendants led no evidence, and the respondent/plaintiff has led evidence and proved its case, hence there was no reason why the suit could not have been decreed by the trial court. This is all the more so because it is informed to this Court by the counsel for the appellants/defendants that when the right of the appellants/defendants to lead evidence was closed vide Order dated 19.01.2018, an application was filed to set aside that order but that application has been dismissed and no challenge was/is preferred, including in this

appeal, by the appellants/defendants to the order dismissing the application and confirming the closing of the evidence by the appellants/defendants.

4. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that it is a partnership firm engaged in the business of construction and development of land. The appellant no.1/defendant no.1-company is engaged in the business of providing Architectural Consultancy Services. The appellant nos. 2 and 3/defendant nos. 2 and 3 are the Directors of the appellant no. 1/defendant no. 1. The appellants/defendants are said to have offered Architectural Consultancy for Group Housing Project at CHI-V, Greater Noida, Uttar Pradesh to be launched by the respondent/plaintiff. For this purpose, an advance token amount of Rs. 5,00,000/- was paid to the appellants/defendants. Out of the total amount, Rs. 4,50,000/- was paid by Cheque no. 000693 dated 09.05.2011 drawn on Axis Bank and the balance amount of Rs. 50,000/- was deducted towards TDS. The respondent/plaintiff pleads that since it was not satisfied with the drawings/drafts/designs submitted by the appellants/defendants, and which were found to be defective and non-

practical, therefore, the respondent/plaintiff found the appellants/defendants not competent to handle the project and hence respondent/plaintiff did not enter into the contract with the appellants/defendants for providing the Architectural Services. Since no contract was entered into, the respondent/plaintiff requested the appellants/defendants to refund the amount of Rs. 5,00,000/-, but the same was not done. Ultimately after serving a Legal Notice dated 23.04.2012, the subject Suit for recovery of Rs. 8,20,000/- was filed.

5. The appellants/defendants filed the written statement and contended that the respondent/plaintiff was satisfied with regard to the work and quality of designs/drawings supplied. Receipt of the amount of Rs. 5,00,000/- as advance was not denied. It was in fact contended by the appellants/defendants that not only they were not liable to repay the advance amount of Rs. 5,00,000/- but they were entitled to a sum of Rs. 14,85,400/- for the work done by the appellants/defendants for the respondent/plaintiff. This Court notes that though the appellants/defendants claimed that they were entitled to a sum of Rs. 14,85,400/-, yet no Counter-Claim in this regard was filed (and by paying court fee) by the appellants/defendants seeking this amount

from the respondent/plaintiff. It was denied that the work done by the appellants/defendants was found defective or was not appreciated.

6. After the pleadings were complete trial court framed the only issue with respect to the entitlement of the respondent/plaintiff to receive the suit amount.

7. The evidence which was led by the respondent/plaintiff is as recorded in paras 4 to 4.2 of the impugned judgment, and these paras read as under:-

“4. In support of his evidence, the plaintiff examined two witnesses in all.

4.1 PW-1 Sh. Lalit Agarwal tendered his evidence by way of affidavit Ex.PW1/A and reiterated and reaffirmed the contents of the plaint in his affidavit. He has relied upon following documents:

1. Ex.PW1/1 is the copy of Authority Letter.
2. Ex.PW1/2(Colly) is the copy of E-mails.
3. Ex.PW1/3 is the Legal Notice dated 23.04.2012.
4. Ex.PW1/4 to Ex.PW1/6 are the Postal Receipts.
5. Ex.PW1/7 to Ex.PW1/9 are Courier Receipts.

4.2 PW-2 Sh. D.P. Goyal tendered his evidence by way of affidavit Ex.PW2/A and reiterated and reaffirmed the contents of the plaint in his affidavit. He has relied upon following document:

1. Ex.PW2/1 is the Authority Letter dated 21.10.2013.”

8. The trial court has decreed the suit by observing that the appellants/defendants vide Email dated 08.07.2011 (part of Ex.

PW1/2(Colly)) were asked to refund the advance payment on the ground that the project was not assigned to the appellants/defendants and the respondent/plaintiff by its Legal Notice dated 23.04.2012 Ex.PW1/3 had maintained that the work done by the appellants/defendants was not satisfactory and was full of deficiencies and hence the project was not awarded to the appellants/defendants. PW-2/Sh. D.P. Goyal also accordingly deposed in this regard. These aspects are noted by the trial court while deciding issue no.1 in para 10 of the impugned judgment, and which para 10 of the impugned judgment reads as under:-

“10. The e-mail dated 07.05.2011 Ex. PW1/2 (Colly) addressed by the plaintiff to the defendants records the payment of Rs. 5 lacs by the plaintiff to the defendants. The same is reproduced here in for ready reference:

“Bipin Agarwal <nimbusindia@gmail.com> Sat, May 7, 2011 at 4:39 PM
Reply -To: nimbusindia@gmail.com
To: saurabh.bagley@gmail.com
Cc: rscorporate@gmail.com

Dear Mr. Santosh Bagley,

We appreciate the presentation plan made to us by your good Concern and we appreciate your pace and quality of design presented. We also look forward to persons understanding the essence of time.

We are happy to appoint you as our Consultant Architect for our project “The Express park view II” located at Plot No. GH-03, Sector Chi V, Greater Nodia on the following main terms:

Rs. 10/Sqfit of Super-Structure Built Up area and
Rs.4/Sqft of Basement Built Up area.

We look forward to our association and wish to make an immediate advance token payment of Rs. 5 lacs. The Final terms of agreement will be drafted and placed soon.

You are requested to revert to us as a token of acceptance. We like to launch our project asap.

Thanks & Regards

Bipin Agarwal

Director

IITL NIMBUS THE EXRPRESS PARK VIEW ”

The same reflects that the defendants made some presentation to the plaintiff whereafter on being satisfied with the presentation made by the defendants to the plaintiff, the plaintiff paid advance token amount of Rs.5 lacs to the defendants pending the settlement of final terms of the Agreement by the parties. Vide e-mail dated 08.07.2011 addressed by the plaintiff to the defendants, the plaintiff asked the defendants to return the advance payment on the ground of project being ultimately not assigned by the plaintiff to the defendants. It is correct that the plaintiff has not filed any written communication on record by which the defendants had communicated regarding the deficiencies/discrepancies in the services rendered by the defendant to plaintiff. However, the plaintiff consistently took a stand in legal notice Ex. PW1/3 as well as in pleadings and evidence of the plaintiff that such defects/deficiencies were pointed out to the defendants in several meetings and discussions held during the negotiations between the parties. The said fact has not been specifically denied by the defendants in the Written Statement. PW-2 also stated during his cross-examination that defects and discrepancies were pointed out to the defendants during the telephonic conversation and during personal discussions and meetings with the defendants. Not even a single suggestion was given by defendants to the PW-2 that no such personal discussions and meetings took place or no such deficiencies were ever pointed out to defendants. In absence of specific denial in pleadings and specific suggestion by the defendants, it is deemed to be admitted by the defendants that plaintiff pointed out to the defendants discrepancies and defects in their work during discussions and meetings. Thus, the plaintiff has been able to prove through oral evidence that defendants were communicated about the deficiencies in the draft submitted by the defendants and the plaintiff was not satisfied with the draft submitted by the defendants. It is borne out from evidence of plaintiff that the final terms of the settlement were not agreed between the parties and before the settlement of the final terms of the agreement, the plaintiff decided not to assign the project to the defendants. So, the project was still at the stage of negotiations between the parties and only draft plans were submitted by the defendants. The defendants controverted the claim of plaintiff and claimed to have done the work for the plaintiff till Stage I and even further. So, the onus was on the defendants to prove that the defendants completed work till Stage I

beyond Retainer Stage without entering into final agreement with the plaintiff. The defendants have placed on record the Invoice dated 12.05.2011 amounting to Rs. 14,85,400/- raised by defendants. However, the defendants failed to lead evidence despite sufficient opportunities and none appeared on behalf of the defendants in the witness box to prove Invoice dated 12.05.2011 by which the defendants claimed an amount of Rs. 14,85,400/- from the plaintiff. Further more, the defendants were served the summons of present suit on the same address on which the legal notice dated 23.04.2012 Ex. PW1/3 was sent by the plaintiff to the defendants. Section 27 of General Clauses Act raises rebuttal presumption of due delivery of notice /post sent to the addressee at the correct address of the addressee by means of Registered AD by pre-paying. So, the defendants were presumed to be served with legal notice Ex. PW1/3 as no evidence has been lead by defendants to rebut the presumption. However, the defendants never replied to the said legal notice and, therefore, adverse inference is to be drawn against the defendants. So, the plaintiff has been able to prove on the preponderance and scale of probabilities that the defendants have wrongly withheld the amount of Rs. 4,50,000/- paid by plaintiff to defendants and defendants have failed to prove their entitlement to retain Rs. 4.5 lacs paid as token money to the defendants. I award pendente lite and future interest @ 9% per annum which in my opinion is just and proper. **So, suit is decreed for a sum of Rs. 4,50,000/- in favour of the plaintiff and against the defendant alongwith pendente lite and future interest @ 9% per annum”**

9. In my opinion, once the respondent/plaintiff proved its case by leading evidence, and the appellants/defendants had failed to lead evidence, trial court has committed no illegality in decreeing the suit. In law when advance amount is paid, which is to be adjusted from the total consideration payable under a contract which is to be eventually arrived at, then in the scenario when no contract is infact entered into between the parties, then the advance amount received has to be refunded.

10. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed. All pending applications are also disposed of.

FEBRUARY 21, 2019
Ne

VALMIKI J. MEHTA, J

