

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

+ **RFA No. 181/2007**

% **9th January, 2019**

KAMAL CONSTRUCTION CO. Appellant

Through: Mr. Dhiraj Sachdeva, Advocate.
(9818114050)

versus

D.D.A Respondent

Through: Mr. Dhanesh Relan, Standing
counsel for DDA and Ms. Gauri
Chaturvedi, Advocate
(9810272270)

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 04.12.2006 to the extent whereby the trial court has denied the watch and ward charges as claimed by the appellant/plaintiff, and which was the subject matter of Issue No.11 in the suit.

2. The facts of the case are that the appellant/plaintiff had filed the subject suit seeking recovery of the principal amount of Rs. 11,78,532/- alongwith interest of Rs. 5,35,649/- totaling to Rs. 17,14,181/- by pleading that various dues were payable to the appellant/plaintiff by the respondent/defendant on account of the contract entered into between them in 1992-1993 with respect to the construction of 180 MIG Houses at Kondli, Gharoli Group VIII, Delhi. I need not go into any other issue except the claim of watch and ward for a sum of Rs. 5,10,000/- for the period from 01.03.1996 to 31.01.1999 inasmuch as during the pendency of the suit all other claims of the appellant/plaintiff were paid by the respondent/defendant, and the appellant/plaintiff is only pressing this appeal with respect to the claim of watch and ward charges.

3. The relevant issue in this regard being Issue No.11 reads as under:-

“(xi) Whether the plaintiff is entitled to amounts towards watch and ward as claimed? OPP”

4. Issue No. 11 has been dealt with by the trial court exhaustively in para 12 of the impugned judgment wherein the trial

court has held that before the appellant/plaintiff can succeed in the claim of watch and ward charges, the appellant/plaintiff must actually show payments/expenses made by the appellant/plaintiff towards watch and ward charges, and in this regard, the appellant/plaintiff has failed. The trial court has also held that merely because in one Letter Ex.DW1/2 dated 30.03.1998, the respondent/defendant has stated that one supervisor was found at the spot, but that would not mean that the claim of watch and ward has to be decreed because a claim towards watch and ward can only be claimed if watch and ward charges were actually incurred for the complete period from 01.03.1996 to 31.01.1999. Existence of a supervisor on one day at the site would not mean that it stands proved by the appellant/plaintiff that watch and ward was actually employed for the complete period from 01.03.1996 to 31.01.1999 and further substantiate the claim that the appellant/plaintiff had in fact incurred watch and ward charges of Rs. 5,10,000/-. The trial court has further observed that although the appellant/plaintiff had claimed that his documents were destroyed in the fire in Uphar Cinema Building, however, this plea was found by the trial court to be an afterthought because this was not the case

which was pleaded by the appellant/plaintiff in the plaint along with the fact that no such deposition was made by PW-1. The trial court also notes that no agreement was entered into for providing watch and ward by the appellant/plaintiff with the respondent/defendant. The exhaustive discussion of the trial court with regard to Issue no. 11 of watch and ward charges has been made in para 12 of the impugned judgment, with which I completely agree, and the same reads as under:-

“12. ISSUE NO.11.

The onus to prove the said issue was on the plaintiff.

Ld. Counsel for plaintiff contended that the plaintiff firm had employed supervisors and chowkidars for the security of the site during the period August, 96 to March, 2000 and even defendants in its letter, which is Ex.DW1/2 admitted that one supervisor was found at the site on inspection, hence defendants are liable to pay the amount spent by the plaintiff on account of watch and ward of the site. Ld. Counsel for plaintiff has strongly replied upon the document Ex.P-10 and P-16.

Ld. Counsel for the defendants refuted the said contentions by arguing that plaintiff had not employed any supervisor and chowkidars. It is further contended that the circular Ex.P-10 is not applicable in this case as no supplementary agreement was executed with the plaintiff in this regard. It is further urged that during the trial, plaintiff failed to produce any evidence on record to prove that plaintiff firm had spent Rs. 5,10,000/- on watch and ward as alleged by the plaintiff in the plaint.

In the instant case, plaintiff had prayed for the payment of Rs. 5,10,000/- on account of watch and ward allegedly spent during the period 01.03.96 to 31.01.99. To prove its claim, plaintiff was supposed to prove that plaintiff firm had employed supervisors and chowkidars for the security of site and he had actually spent said amount by paying salary to them. In this regard the testimony of PW1 is relevant. In his cross-examination, he deposed that he did not remember how may

chowkidars and supervisors were kept at the site for watch and ward. He deposed that he could not tell about their detail without seeing the record. He further admitted that he had not brought any such record. He also deposed that no written instruction was given by the defendant for watch and ward of the flats. Admittedly, plaintiff firm has not filed any document on record whatsoever to prove that plaintiff firm had employed any supervisor or chowkidar for watch and ward of the site and paid any amount to them. As plaintiff firm has claimed Rs. 5.10,000/- towards watch and ward, hence onus was on the plaintiff to prove the same by producing all the documentary evidence during the trial but plaintiff failed to produce any such document during the trial. In absence of any documentary evidence, the oral testimony of PW1 does not inspire any confidence that plaintiff firm had spent the said amount on the watch and ward of the site.

I have perused the circular, which is Ex.P-16 wherein directions were issued by defendant no.1 that payment on account of watch and ward should be made to the contractor on engaging watch and ward staff by the contractor. On perusal of circular which is Ex.P-10, it is clear the directions were issued by defendant no.1 that supplementary agreement should be executed with the contractor for providing watch and ward and rate was also specified in the said circular. On perusal of both the circulars, it becomes clear that contractor can claim payment on account of watch and ward provided there must be an agreement with DDA and contractor had actually provided watch and ward facility by engaging supervisors and chowkidars at site. In fact from the said circulars it emerges that contractor can claim reimbursement on account of watch and ward subject to the upper limit fixed by DDA in circular Ex.P-10. Thus, to claim the payment on account of watch and ward, contractor is bound to prove that he had engaged the supervisors and chowkidars and made payment to them for the security of the site.

But, in the present case plaintiff not only failed to prove that plaintiff firm had engaged supervisors and chowkidars but also failed to prove that plaintiff had made any payment on said account to the supervisors and chowkidars.

Admittedly in Ex.DW1/2, defendant admitted that one supervisor was found at the site for watch and ward but plaintiff failed to prove how much salary was paid to the said supervisor and for how long period, he was employed. In absence of the said information, in my opinion the plaintiff is not entitled for any payment on the said account.

Ld. Counsel for plaintiff contended that plaintiff could not produce the relevant record of the amount spent on watch and ward because the said record was lying in the office of plaintiff situated in the Uphar Cinema

Building, which had been sealed after the incident of fire. The said contention is opposed by the ld. Counsel for the defendant. Admittedly, in its pleadings plaintiff had nowhere averred this fact. Even in his testimony, PW1 has not uttered even a single word about the same. As the said contention is beyond pleading and even not supported by PW1, hence in my opinion the said contention does not appear trustworthy.

In view of above discussion, I am of the considered opinion that plaintiff has failed to prove that plaintiff firm had spent Rs. 5,10,000/- on watch and ward, thus I decide this issue against the plaintiff and in favour of defendants.”

(Underlining Added)

5. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

JANUARY 09, 2019/ib

VALMIKI J. MEHTA, J